FILE NO.: SCT-7005-11
CITATION: 2014 SCTC 6
DATE: 20140627

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
POPKUM FIRST NATION Claimant	Allan Donovan and John Burns, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Rosemarie Schipizky and Sean Stynes, for the Respondent
	HEARD: June 18, 2013

REASONS FOR DECISION

Honourable Patrick Smith

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; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48, [1999] 2 CNLR 60 (FCTD); *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA); *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261; *Norberg v Wynrib* (1991), [1992] 2 SCR 226, 92 DLR (4th) 449; *Medeiros v Ginoogaming First Nation*, [2001] FCT 1318, 213 FTR 221; *Squamish Indian Band v Findlay* (1981), 122 DLR (3d) 377, [1981] 3 CNLR 58 (BCCA); *Nowegijik v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193; *Opetchesaht Indian Band v Canada* (1996), [1997] 2 SCR 119, 147 DLR (4th) 1; *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191, [2014] CNLR 306.

Statutes and Regulations Cited:

Act relating to the Island Railway, the Graving Dock, and Railway Lands of the province, SBC 1883, c 14.

Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion, SC 1884, c 6.

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

Indian Act, RSC 1906, c 81.

Indian Act, SC 1951, c 29.

Indian Act, SC 1956, c 40.

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I. INTRODUCTION AND OVERVIEW OF THE CLAIM

[1] This Claim raises the issue of whether the Minister responsible for Indian Affairs in 1959 (the "Minister") breached a fiduciary duty owed to the Claimant, Popkum First Nation ("Popkum"), in the application of section 17 of the *Indian Act* when:

a. she reallocated Popkum's interest in the Seabird Island Reserve ("SI Reserve"), situated on fertile agricultural land located in the Fraser Valley in British Columbia, to the Seabird Island Band; and,

b. she distributed funds held in trust for the beneficiaries of the Seabird Island Reserve on a *per capita* basis to Popkum.

[2] Popkum seeks compensation for the loss of its one-seventh interest in the SI Reserve at the time it was reallocated brought forward to the current value of the loss; and, the difference between a one-seventh share of the trust funds and the amount that it received calculated on a *per capita* basis, brought forward to the current value of the loss.

[3] The Minister created the Seabird Island Band ("SI Band"), made the reserve reallocation and distributed the trust funds in 1959 in an exercise of her discretion pursuant to section 17 of the *Indian Act*. Section 17(2) provides for the reallocation of band assets when a band subdivides or amalgamates with another band.

[4] When the Minister made her decision to transfer the SI Reserve and distribute the trust funds, the SI Reserve had previously been confirmed in favour of seven bands in common: the Claimant, Skawtits, Ohamil, Hope, Union Bar, Yale and Ska-wah-look (the "Seven Bands"). The SI Band was not one of these bands. The Parties agree that the SI Band was formally created pursuant to the *Indian Act* in 1959.

[5] Beginning in approximately 1918, and for many years following, many residents of Seabird Island (the "SI Residents") appear to have been under the misapprehension that they were a "Band" as defined by the *Indian Act*. The record before the Tribunal indicates that the Minister created the SI Band in 1959 from the SI Residents; however, the record regarding the formal band affiliations of the SI Residents when the Minister made her decision is unclear,

particularly regarding whether any of the SI Residents were members of the Claimant's Band.

[6] The Claimant submits that the Minister improperly applied section 17 of the *Indian Act*. In the Claimant's view, the SI Band did not have a valid claim to Popkum's share of the SI Reserve and trust funds, and the Minister transferred the Claimant's share of the SI Reserve to a non-interested and unrelated band. The Claimant submits that the Minister distributed the trust funds held for it in a manner that failed to recognize the existing legal entitlements of the beneficiaries in law. The Claimant further submits that it did not give valid consent to these transactions, while the Crown submits that such consent was effective and binding.

[7] The Crown admits that it acknowledged the legal interest of the Seven Bands, including the Claimant, in the 1940s but submits that the SI Band was also an interested party to whom the Crown also owed duties. In the Crown's view, the Minister acted in accordance with and pursuant to discretion inherent in her statutory powers and fiduciary duties to all affected parties.

A. Claim Background

[8] On August 21, 2007, Popkum filed the Seabird Island Specific Claim with the Specific Claims Branch of the Department of Indian Affairs. The Department informed Popkum on October 30, 2009, that the Minister had decided not to accept the Claim for negotiation.

[9] The Claimant filed the Declaration of Claim with the Tribunal on October 27, 2011. The Tribunal heard the Claim on June 18, 2013.

II. FACTS

[10] Article 13 of the *British Columbia Terms of Union,* RSC 1985, App II, No 10 [*Terms of Union*] required that British Columbia convey land "…from time to time… to the Dominion Government in trust for the use and benefit of the Indians…."

[11] In 1876, British Columbia and Canada established the Joint Indian Reserve Commission to address the Indian Reserve question in the Province of British Columbia. The Commission had three members, including Commissioner Gilbert Sproat. In 1877, both governments dissolved that Commission (PC 1877-7564 and OIC 1877/279) and then reappointed Commissioner Sproat as the sole commissioner charged with allotting Indian reserves in British

Columbia.

[12] In Canada's order in council of reappointment, PC 1878-170 issued on March 8, 1878, Canada stipulated that Commissioner Sproat's allotments for Indian reserves would be subject to the approval of British Columbia's Commissioner of Lands and Works, and if the latter disagreed, the matter would be referred to a Superior Court Judge.

[13] Prior to British Columbia issuing its order in council appointing Mr. Sproat as the sole Commissioner, Mr. Sproat expressed to the Superintendent General of Indian Affairs (SGIA) and to the Province, his views regarding why the success of the Commission depended upon him being vested with final authority.

[14] British Columbia then appointed Mr. Sproat the sole Reserve Commissioner by OIC 1878/615 (April 26, 1878). The Order in Council stated that: "decisions regarding Indian Land Questions in the Electoral District of Yale be regarded as final excepting those of which he shall have received notice from either Mr. Teague or Mr. Usher, Government Agents, to lay over." The Electoral District of Yale included Seabird Island.

[15] The evidence before the Tribunal indicates that Commissioner Sproat believed that OIC 1878/615 gave him full authority to create reserves in law.

[16] In a letter to the SGIA dated April 29, 1878, Commissioner Sproat reported that he had told British Columbia that he would not do the job without full authority and that for "credit and safety" the government must deal "frankly" with First Nations because otherwise they may "refuse to treat at all about their lands."

[17] In a further letter dated July 29, 1879, to the Deputy SGIA, Commissioner Sproat again indicated that he believed that he possessed complete authority to make final and binding decisions. No evidence is before the Tribunal that indicates that the SGIA attempted to disabuse Commissioner Sproat of his beliefs.

[18] In 1879, pursuant to the authority set out in PC 1878-170 and in OIC 1878/615, Commissioner Sproat allotted the SI Reserve, consisting of 4,500 acres, to the Seven Bands in common, including the Claimant. The purpose of this allotment was to provide the Seven Bands

with sufficient cultivable lands to sustain themselves.

[19] Commissioner Sproat's Minutes of Decisions stipulated that: "[i]f the Indians have not in 6 years from 13 June 1879 sufficiently used this land in the opinion of the Government of Canada the unused portion is to cease to be Indian land."

[20] In 1881, the SI Reserve was formally surveyed.

[21] In 1883, British Columbia and Canada reached a settlement regarding railway lands in the province, including the Canadian Pacific Railway (CPR) corridor through the Fraser Valley. British Columbia then adopted this agreement by statute and in the Claimant's submission transferred to Canada administration and control of the land 20 miles to each side of the CPR line (the "Railway Belt") such that Canada had full jurisdiction over Seabird Island: *Act relating to the Island Railway, the Graving Dock, and Railway Lands of the province*, SBC 1883, c 14.

[22] In 1884, Canada also adopted the 1883 agreement with British Columbia by statute and included provisions related to the sale of the Railway Belt land to fund the construction of the CPR: *Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion*, SC 1884, c 6.

[23] Order in council PC 3362, dated October 30, 1897, further affirmed the 1883 agreement. Nevertheless, British Columbia and Canada disagreed on various aspects of railway and reserve land administration well into the mid-20th century: *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*].

[24] The Parties disagree as to whether Canada exercised the discretion afforded by Commissioner Sproat's use-related allotment condition and decided to keep the SI Reserve as a reserve. There is evidence indicating that when Commissioner Sproat's condition expired in 1885, Canada considered the land to be a fully established reserve. The 1885 Schedule of Indian Reserves showed the SI Reserve as allotted to the Seven Bands in common, as do subsequent Schedules of Indian reserves through 1902, 1913 and 1943.

[25] As well, Canada refused several applications to squat on the SI Reserve by settlers in and around 1887 on the basis that it was a reserve.

[26] In 1887, the Dominion Lands Agent sent a surveyor to the reserve. He concluded the SI Reserve would be first class settlement land if "taken away from the Indians" which prompted a dispute between the Dominion Lands Agent, Superintendent of Indian Affairs (Superintendent Powell) and the SGIA.

[27] Superintendent Powell and the SGIA resisted any attempt to take back the reserve. The record indicates that Superintendent Powell was of the opinion that the Seven Bands needed the land at the SI Reserve because: they could not "make a fourth of their living on their reserves;" the reason they had not cultivated it more extensively was that they had been temporarily employed in railroad construction; and, the "Indians interested in the Island … never understood that they were to live permanently upon the Island, and feel exceedingly annoyed when they heard it reported that they are to lose the Island."

[28] In 1888, the SGIA informed the Deputy Minister of the Interior that "the Dept. cannot relinquish the claim of the Indians to Seabird Island" and that the SGIA did "not consider that it would be expedient to interfere with the Indians in their occupation of this Island as an Indian Reserve."

[29] The evidence indicates that throughout the period 1888-1891, the Department of Indian Affairs (DIA) defended the SI Reserve against jurisdictional challenges, upheld its status as an Indian reserve, and denied any requirement that the Seven Bands occupy as opposed to merely farm the land.

[30] In 1890, Canada approved the taking of 96.4 acres from the SI Reserve for railway purposes and compensated each of the Seven Bands in one-seventh shares for their loss. In 1896, the DIA unsuccessfully sought surrenders from the Seven Bands for half of the SI Reserve.

[31] Between 1879 and 1918, band members belonging to each of the Seven Bands, established residency on the SI Reserve along with individuals from other bands, including the Cheam and Spuzzum Indian Bands. The Cheam Indian Band members began arriving in 1891.

[32] In 1917-1918, the DIA encouraged and eventually permitted logging on the SI Reserve. When the Department sought the consent of the Seven Bands, the Seven Bands refused to give it. The issue of how the timber sale funds were distributed is a separate claim and is not before the

Tribunal.

[33] In 1918, Indian Agent Graham replied to an inquiry from Popkum Chief Billy Gladis to the effect that the SI Residents had petitioned the DIA to become a separate band and the Seven Bands had sent a petition "praying that their rights be still recognized as the owners" of the SI Reserve.

[34] In 1918, Deputy Superintendent Scott approved an internal recommendation that a separate Seabird Island trust account be set up.

[35] Accounts referred to as the "Seabird Island" capital and revenue accounts continued to belong formally to the Seven Bands and their release to the "SI Band" was the subject of continued debate through the years leading up to 1959.

[36] As of 1918, the DIA began keeping an unofficial Seabird Island "Band List." From this time onward, the SI Residents began to consider themselves as a distinct "Band."

[37] Initially the unofficial Seabird Island list showed the official band affiliations of the residents. The 1918 Seabird Island "Band List" includes the names of two members of Popkum.

[38] Canada submits that in 1919 "at least one family of the Claimant" resided on Seabird Island.

[39] The record before the Tribunal includes no further band lists that show the formal affiliations of the SI Residents. The record does not reveal how many members of the Seven Bands or members of Popkum continued to live among the SI Residents as of 1958. Instead, the available data shows the "Seabird Island Band" as a separate band in 1958 despite the fact that the SI Band was not created in law until 1959.

[40] Of the two Popkum members appearing on the 1918 list, Henry Ewan and Fred Ewan, the record shows no further references to Henry Ewan among the SI Residents. The evidence indicates that Fred Ewan remained in residence on the SI Reserve at least until the time of the Commission of Inquiry in 1958. However, when giving testimony at the Commission of Inquiry Mr. Ewan confirmed that he was "not a registered Indian." The record also indicates that Fred Ewan and his family were struck from the DIA's Seabird Island "Band List" with this

handwritten annotation: “Membership investigation shows he is Chinese extraction.”

[41] The Parties agree that in 1946, the DIA investigated the ownership of the SI Reserve and that the DIA recognized that the beneficial ownership of the Reserve was still vested in the Seven Bands. The Indian Commissioner instructed the Indian Agent to investigate the origins of the SI Residents. The Indian Agent reported on May 6, 1946, that the first residents came from the Seven Bands but did not give specifics as to the residents in 1946 beyond stating, “… of the Indians still living of the older generation the great majority are descendants of the Squawtits ….”

[42] The Claimant submits that after the conclusion of the 1918 sale of timber the administration and ownership of the SI Reserve lay dormant until British Columbia desired a road right-of-way in 1949.

[43] The Crown disagrees and argues that considerable evidence suggests that the administration of the Seven Bands was problematic over a long period, especially between 1946 and 1959, and that all attempts to obtain the consent of all the Seven Bands consistently prevented the development of the reserve. The Parties agree that in the 1940s and 1950s, numerous activities, transactions and proposals did not proceed due to the requirement of consent from the Seven Bands.

[44] In 1949, British Columbia was interested in obtaining a road right-of-way on the SI Reserve. Indian Commissioner Arneil reported to Ottawa that the matter would have to be taken up with the Seven Bands and consents obtained. Several attempts were made to obtain releases without success.

[45] The Parties agree that the DIA then began considering alternatives including breaking up the “SI Band” and distributing the trust funds in one-seventh shares to the Seven Bands. The Parties also agree that the Indian Agent reported that the “understanding” at the time between the “SI Band” and the Seven Bands was that the SI trust funds were available to the “SI Band” only and that any member of the Seven Bands could take up residence on the SI Reserve and share in the “SI Band” whenever they wished.

[46] In 1951 and 1952, officials with Indian Affairs approached the Seven Bands to determine

their willingness to relinquish their interests in the SI Reserve and trust funds. Three bands made resolutions including the Claimant. At this time, the Cheam Indian Band also claimed 50% of the SI Reserve based on its involvement in the reserve's settlement and development.

[47] Popkum Chief Fred Cheer made a Band Council Resolution (BCR) in 1951 as sole member of Popkum's Band Council. On its face the BCR appears to release Popkum's interest in the SI Reserve to the unofficial "Seabird Island Band:"

> We, the undersigned, Chief and Councillors of the Popkum Band of Indians… Do hereby for ourselves, and on behalf of the Indian owners of the said Reserve, Relinquish any and all claims the Popkum Band may have to the Seabird Island Indian Reserve in favour of the Seabird Island Band.

[48] The Parties dispute the effect of this BCR.

[49] Also, in 1951, Parliament amended the *Indian Act*, SC 1951, c 29 [*Indian Act, 1951*] to include the band subdivision and reallocation provisions that are now found in section 17.

[50] In October 1951, Superintendent Letcher wrote to the Chief of the "SI Band," Chief Harry Joseph, indicating that the 1918 decision to establish the residents of the reserve as the new band had been inconsistent with, or overlooked, the original allotment of the reserve to the Seven Bands.

[51] The Indian Agent and Superintendent Letcher then pursued meetings with the Seven Bands. Superintendent Letcher reported to Ottawa in 1952 that Yale and Union Bar Bands had issued resolutions relinquishing their interests on the condition that the capital funds be distributed *per capita*. Superintendent Letcher did not mention Chief Cheer's 1951 BCR. The Superintendent of Reserves and Trusts replied that surrenders would be required from the Seven Bands and that the consideration would be *per capita* shares of the Seabird Island capital account.

[52] Further meetings involving members of the Seven Bands through 1952-1956 yielded three proposals, each of which included ongoing involvement by the Seven Bands in the SI Reserve. Indian Affairs did not pursue the first two and determined the third to be infeasible in law.

[53] In 1957, the Indian Agent wrote to the Seven Bands indicating that the matter had reached an impasse and urging the Seven Bands agree to the reallocation of the SI Reserve to the SI Residents.

[54] In June 1957, a meeting was held of the Seven Bands. Superintendent Letcher reported that the purpose was to discuss the "problem of ownership in common by the Seven Bands" and to try to reach an agreement to "relinquish" ownership of the SI Reserve to the "SI Band." Superintendent Letcher reported that the Seven Bands refused and the Chairman of the meeting advised the SI Residents to petition the Minister to constitute them formally as a separate band within the meaning of the *Indian Act*, which they did. Andrew Paull, on behalf of the SI Residents in support of their petition, sent a document summarizing the SI Reserve's history to the SGIA, Superintendent Letcher and Commissioner Arneil. The Claimant alleges that this summary provided unclear or inaccurate information regarding the entitlement of the Seven Bands to the SI Reserve.

[55] In 1957, the Superintendent of Reserves and Trusts, Mr. Bethune, wrote a letter to the Indian Commissioner, Mr. Arneil, which was also forwarded to Superintendent Letcher, proposing the use of section 17 of the *Indian Act* to reorganize the SI Residents into an official band. In that letter, the Superintendent of Reserves and Trusts wrote that the SI Residents came from the Seven Bands but neglected to mention that individuals from the Cheam and Spuzzum Indian Bands also lived on the SI Reserve.

[56] In 1958, the Governor in Council established a Commission of Inquiry with the mandate of inquiring into and reporting on: the desirability of establishing a new band of Indians composed of those residing on Seabird Island; and, the reserve lands and funds which should be held for the new band if established.

[57] All members of the Seven Bands and SI Residents were invited to speak at the Commission hearing on Seabird Island. Chief Cheer gave evidence that he supported the idea that the SI Residents be "set up as a Band," saying "I already signed for that in 1951." During cross-examination the Commission Chairman asked Chief Cheer: "Was the idea of that resolution that you were letting go your interest in Seabird Island and everything they owned." Chief Cheer replied: "Yes." Earlier in his testimony, however, Chief Cheer gave contradictory

evidence. Chief Cheer was asked: "Did your Band ever pass any resolution like the one Albert Douglas's Band passed?" Albert Douglas had testified immediately before Chief Cheer to the effect that the Cheam Indian Band passed a resolution in favour of the SI Residents being constituted as a band and releasing the Cheam Indian Band's claim to the SI Reserve if the Seven Bands also released their interests. Chief Cheer replied: "Not that I know of." When asked if Popkum was ever asked to make such as resolution, Chief Cheer replied: "No." The Parties disagree on the effect of Chief Cheer's testimony.

[58] The Commission of Inquiry's majority report recommended:

a. that the establishment of the residents of Seabird Island as a Band in accordance with section 17(1)(*a*) of the *Indian Act*;

b. that the entire SI Reserve be held for the use and benefit of the newly established Band;

c. that the funds in the Seabird Island capital and revenue accounts be distributed on a *per capita* basis among the continuing members of the Seven Bands and the new Band; and,

d. that any member of the Seven Bands may, within two years from the date of the establishment of the new Band, transfer to and enjoy full membership in the newly established Band.

[59] The minority report agreed with the recommendation of the majority report that the SI Residents be constituted as a new band, but recommended:

a. that the Seven Bands retain their common interest in the SI Reserve and the Seabird Island capital account;

b. that the revenue account be provided to the new Seabird Island Band for the development of their welfare, habitation and farm implements;

c. that any members of the Seven Bands who desire to take up land on the SI Reserve be admissible at all times; and,

d. that the evidence from the inquiry hearings be disregarded.

[60] In 1958, the Minister substantially adopted the Commission's majority recommendations with an adjustment requiring that any members of the Seven Bands who wanted to join the newly forming SI Band must apply prior to January 1, 1959, after which the consent of the new Band would be necessary.

[61] On October 1, 1958, officials with Indian Affairs posted a notice on the SI Reserve and on the reserves of the Seven Bands informing them of the Minister's decision. The notice provided a list of who would be included in the new SI Band (that is, the SI Residents) and indicated that any other members of the Seven Bands must apply to transfer to the SI Band if they wished to be included there as of January 1, 1959. The Parties agree that no members of the Seven Bands applied to transfer to the SI Band under this procedure.

[62] Given the fact that no non-residents applied to join the SI Band in 1959, the evidence above regarding Henry Ewan and Fred Ewan, and the lack of other evidence to support the view that Popkum members were among the SI Residents in 1958, the only conclusion that can be fairly drawn on the basis of the record is that, when the Minister exercised her discretion pursuant to section 17 of the *Indian Act*, she had no evidence that any members of Popkum resided on the SI Reserve.

[63] Effective January 1, 1959, the Minister created the SI Band within the meaning of the *Indian Act* and transferred the Claimant's beneficial interest in the SI Reserve to the new SI Band.

[64] On January 31, 1959, the Minister divided the funds in the Seabird Island trust accounts on a *per capita* basis amongst the SI Band and the Seven Bands.

III. THE ISSUE

[65] The issue before the Tribunal is whether the Minister breached any fiduciary duty owed to the Claimant when, in 1959, she transferred the SI Reserve to the new SI Band and distributed the related trust funds on a *per capita* basis among the entitled bands, specifically Popkum, and the new SI Band.

IV. LEGISLATION

[66] In 1951, Parliament amended the *Indian Act*,1951, to add the following:

> 17. (1) The Minister may, whenever he considers it desirable,
>
> (*a*) constitute new bands and establish Band Lists with respect thereto from existing Band Lists or General Lists, or both, and
>
> (*b*) amalgamate bands that, by a vote of a majority of their electors, request to be amalgamated.
>
> (2) Where pursuant to subsection one a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Governor in Council determines shall be held for the use and benefit of the new band.

[67] Section 17 of the *Indian Act* was further amended in 1956 to add subsection 17(1)(*c*) (regarding enfranchisement), to amend subsection 17(2) and to add subsection 17(3) as follows (*Indian Act*, SC 1956, c 40 [*Indian Act*, 1956]):

> (2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.
>
> (3) No protest may be made under section 9 in respect of the deletion from or addition to a list consequent upon the exercise by the Minister of any of his powers under subsection (1). [Changes underlined]

[68] Regarding trust funds, in 1959 the *Indian Act*, 1956, provided:

> 61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.
>
> 64. With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
>
> (…)
>
> (*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

[69] Regarding statutory prohibitions on the acquisition of interests in reserve land by

occupation or various forms of acquiescence, the *Indian Act, 1951* provided:

> 20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.
>
> …
>
> 28. (1) Subject to subsection two, a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> …
>
> 50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

V. THE POSITION OF THE CLAIMANT (POPKUM)

[70] The Claimant asserts that the SI Reserve was fully confirmed to it in 1879 or at the latest in 1883 and, given that the reserve was fully established, that the SI Residents as a group or as individuals could not have had or acquired an equitable, or other, interest in the reserve. The Claimant acknowledges that any member of one of the Seven Bands shared the in-common reserve interests of that band.

[71] The Claimant's position is that the Minister owed fiduciary duties with respect to the SI Reserve and trust funds exclusively to it and the other six of the Seven Bands.

[72] The Claimant submits that the Crown is in a fiduciary relationship with Aboriginal peoples with respect to their interests in land and that this special relationship governed the Crown's dealings with the Claimant's interest in the SI Reserve: *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*]; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; Articles 10 and 13 of the *Terms of Union*.

[73] In the Claimant's view the confirmed nature of the SI Reserve and the broad discretion to affect reserve interests without the consent of the band that is afforded to the Minister pursuant to section 17 of the *Indian Act* together imply a very high level of fiduciary obligation. That obligation included the duty to act in the best interests of legal beneficiaries and the duty to preserve and protect the beneficiary's assets from invasion, destruction or exploitation by the

Crown or third parties. The Claimant further submits that this duty to preserve and protect a beneficiary band's reserve interests from exploitation persists in the presence of competing interests: *Wewaykum*, *supra* at para 104.

[74] The Claimant alleges that when the Minister divested Popkum of its reserve interest without a surrender, informed consent, compensation, or minimal impairment she breached the following fiduciary duties:

a. the duty to preserve and protect the Claimant's interest from invasion, destruction or exploitation by the Crown;

b. the duty to put the beneficiary band's interests first, ahead of the Crown's administrative interests;

c. the duty to respect the decisions of beneficiary bands, whom the Claimant submits opposed the Minister's decision;

d. the duty to follow the Crown's own policies, which the Claimant submits included only acting pursuant to section 17 of the *Indian Act* with the consent of affected bands;

e. the duty to act as "a man of ordinary prudence in managing his own affairs," which will not be met when a valuable asset is given away for no consideration: *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344 at para 104, [1996] 2 CNLR 25 [*Blueberry River*]; and,

f. the duties to evaluate any proposed transactions, inform and seek directions from the beneficiary band regarding the terms, reject improvident transactions and ensure fair compensation for any disposition of reserve interests: *Guerin, supra; Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48, [1999] 2 CNLR 60 (FCTD) ; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA) [*Semiahmoo*]; *Blueberry River, supra*.

[75] The Claimant denies that it gave a valid consent to the release and transfer of any interest that it had in the SI Reserve and/or to the distribution of trust funds. The Claimant denies that a

reserve interest can be relinquished by a BCR and alleges that the 1951 BCR by Chief Cheer and his testimony at the 1958 Commission of Inquiry, that the Crown submits released Popkum's interest, resulted from inappropriate and improvident pressure on the Claimant. The Claimant further alleges that the Crown failed to inform the Claimant of the economic values and options involved. The Claimant also alleges that it was denied the requisite time after the Commission of Inquiry issued its decision to reallocate Popkum's interest in the SI Reserve to obtain a legal opinion.

[76] The Claimant also denies that a valid public purpose existed for taking and redistributing its assets, but alternatively, if a valid public purpose did exist and an expropriation-like action was necessary, then the Crown breached its resulting duty to minimally impair the Claimant's interests and reasonably compensate it for any losses that occurred: *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 [*Osoyoos*]; *Semiahmoo*, *supra*.

[77] Regarding the trust funds, the Claimant asserts that the Crown was obliged to hold and administer them for the benefit of the beneficiary bands: *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 [*Ermineskin*]; *Indian Act*, 1956, s 61(1). Additionally, the Crown had a statutory duty only to distribute capital funds with the consent of the beneficiary band councils: *Indian Act*, s 64. The Claimant submits that the Seven Bands held the trust funds on the same basis as they shared the SI Reserve, implying one-seventh shares for each beneficiary band. The Claimant alleges that the Minister breached the Crown's fiduciary duties to the Claimant when she:

a. distributed Popkum's share of the trust funds without Popkum's consent;

b. distributed some of Popkum's share of the funds to non-beneficiaries of Popkum's share; and,

c. distributed the funds *per capita* when the Claimant, as a member of the Seven Bands, held a one-seventh share.

[78] The Claimant seeks compensation for: the market value of its asserted one-seventh interest in the SI Reserve at the time of its loss brought forward to the current value of the loss; and, the difference between the funds distributed to the Claimant in 1959 and a one-seventh

share of the Seabird Island capital and revenue funds, also brought forward to the current value of the loss.

VI. THE POSITION OF THE RESPONDENT (CROWN)

[79] The Crown agrees that prior to 1959, the SI Reserve was a reserve within the meaning of the *Indian Act* and that the Seven Bands held legal and equitable interests in the SI Reserve in common. The Crown submits that the precise date and means of reserve confirmation is unnecessary to decide in this Claim and additionally, the record is not sufficiently complete to do justice to this issue. The Crown describes the legal interest as the allotment shown on Departmental records.

[80] The Crown asserts that before the Minister made her decision, the SI Residents also had an equitable interest in the SI Reserve alongside the Seven Bands' interests by virtue of various social connections (such as familial and original band affiliations), their occupation of the island and the acquiescence of the Seven Bands. The Crown notes that legal and equitable interests do not always coincide. The Crown submits that the situation was analogous to *Wewaykum*, in which two bands each claimed the reserve occupied by the other and the occupying bands were found by the Supreme Court of Canada (SCC) to have the equitable interest in each instance. An important distinguishing fact in *Wewaykum*, was the finding by the SCC that the Schedule of Reserves contained administrative errors.

[81] The Crown admits that it owed a fiduciary duty to Popkum when the Minister exercised her discretion pursuant to section 17 of the *Indian Act*. The Crown submits that fiduciary obligations vary with the nature of the relationship between the parties, the demands of the situation and statutory guidance: *Wewaykum, supra* at paras 90-92 (discussing provisional reserves); *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 at paras 45-46 (discussing when fiduciary duties do and do not exist in the context of statutory discretion).

[82] The Crown denies that, in the circumstances, its fiduciary duties involved preserving and protecting the Claimant's reserve interest at the expense of other affected interests. The Crown submits that the duty to preserve and protect a beneficiary's interest from exploitation cannot mean, in the context of section 17, protecting the "existing" band's interest above the "new"

band's needs, because that interpretation would render the discretion granted by section 17(2) impossible to exercise. Instead, the Crown submits that its duty was to avoid unconscionable acts when reallocating assets pursuant to section 17(2).

[83] The Crown asserts that when exercising her discretion, the Minister owed competing duties to the SI Residents and the Seven Bands, including the Claimant. The Crown emphasizes that all the affected entities in the Claim were related, Aboriginal beneficiaries.

[84] The Crown asks the Tribunal to distinguish *Guerin* and *Blueberry River*, as cases that involved non-Aboriginal, non-beneficiary third parties. The Crown submits that unlike *Guerin* and *Blueberry River*, no disposition of land to a third party occurred nor was the Crown interposed between an Aboriginal entity and a non-Aboriginal third party who would acquire reserve lands for a sum of money. Instead, the Crown emphasizes that the Minister was concerned with "… the reallocation of reserve land and funds among related aboriginal groups."

[85] The Crown submits that its duty was to consider all relevant factors and ensure no unconscionable action in reallocating the SI Reserve and trust funds. The Crown also includes the duties of loyalty and good faith, appropriate disclosure, ordinary prudence with a view to the best interests of the beneficiaries, and "preserving and protecting from exploitation the discharge of the Crown's subsection 17(2) mandate."

[86] The Crown submits that the Minister acted with ordinary prudence and reasonable diligence and that her decision was fair and equitable in view of all the circumstances.

[87] In the Crown's view, the Minister properly considered all competing interests including those of the Claimant and the SI Residents thereby properly discharging the Crown's fiduciary duty to all beneficiaries. The Crown submits that it was appropriate in the circumstances to consider the population sizes, *per capita* acreages and *per capita* funds of the affected bands and SI Residents. The Crown states that fiduciary law is concerned with the equitable allocation of resources having regard to all the circumstances, the law of equity protects possessory interests in land, and the SI Residents had been living on and developing the SI Reserve for decades.

[88] Additionally, the Crown submits that, although section 17(2) of the *Indian Act* involves no requirement for consent, the Claimant consented to the release of its interest prior to the

Minister's decision with a BCR in 1951 that was confirmed by Chief Cheer in 1958. The Crown says compensation is not appropriate when a First Nation voluntarily relinquishes its interest in favour of a related band, citing *Wewaykum, supra* at para 102.

[89] The Crown denies any duty of minimal impairment or compensation, asserting that the Claim does not involve an expropriation. In the Crown's view, the principles of minimal impairment and fair compensation for a disposition are ill-suited to this Claim and section 17 reallocations generally because the Claim involves balancing competing interests and section 17 specifically directs the Minister to consider the "existing band" and the "new band."

[90] Furthermore, the Crown submits that the Claimant did receive compensation in two ways: (a) the trust fund distribution; and, (b) any Popkum members who joined the SI Band on January 1, 1959, gave up any beneficial claim to the reserve land and trust accounts of the Claimant on that date.

[91] Finally, the Crown submits that the Minister was entitled, pursuant to section 17(2) of the *Indian Act*, to distribute the Seabird Island trust funds to the newly created SI Band and the Seven Bands because all eight bands had an interest in those funds. The *per capita* formula was reasonable and fair, particularly in light of the disparity in population among those eight bands and satisfied the Crown's fiduciary duties of reasonable diligence, ordinary prudence, loyalty and good faith.

VII. DISCUSSION

[92] Popkum's Claim is for damages for breach of a fiduciary duty owed to it by the Crown.

[93] Fiduciary duties exist with respect to specific interests: "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests" (*Wewaykum, supra* at para 81).

[94] It is the combination of vulnerability with an important interest, recognized in law and over which the trustee undertakes discretion, which establishes a fiduciary duty. As explained in *Norberg v Wynrib* (1991), [1992] 2 SCR 226 at para 97, 92 DLR (4th) 449 :

> ... an imbalance of power is not enough to establish a fiduciary relationship. It is a necessary but not sufficient condition. There must also be the potential for interference with a legal interest or a non-legal interest of "vital and substantial 'practical' interest."

[95] In *Wewaykum, supra* at para 85, Binnie J. stated that the fiduciary relationship "depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility 'in the nature of a private law duty.'" Fiduciary obligations vary with the nature and importance of the interest sought to be protected: *Wewaykum, supra* at para 86.

A. The Nature of the Interests at Stake

[96] The Parties have divergent views of the interests at stake in this Claim. The "vital and substantial practical interest" in issue is the Claimant's interest in the SI Reserve and trust funds up until 1959. The Crown has submitted that the SI Residents had a competing interest that affected the Claimant's interest and the duties of the Crown with respect to it.

[97] The Claimant submits that it held a confirmed, one-seventh interest in the SI Reserve when the Minister exercised her discretion pursuant to section 17 of the *Indian Act*. The Claimant asserts that it held this interest beginning in 1879 or at the latest 1883.

[98] The Crown admits that "by 1958 the Seabird Island Reserve was a reserve within the meaning of the *Indian Act* and the beneficial ownership of the Reserve was vested in the Seven Bands in common." The Crown further admits that "the 1943 schedule of Indian reserves in the Dominion of Canada indicated that Seabird Island had been allotted to the Seven Bands" and "that Indian Affairs in 1949 acknowledged that the Seven Bands owned the Reserve in common." The Crown considers that the exact date of reserve confirmation is unnecessary to decide given its admissions.

[99] The Crown also asserts, however, that the SI Residents had a competing interest in the SI Reserve when the Minister made her decision. The Crown submits that "… in the 1940s it [Canada] acknowledged that the Seven Bands held the legal interest to the Reserve but states that the Crown also acknowledged the interest of the residents of Seabird Island in the Reserve throughout the period in question."

[100] The key issue for this Claim is who held an interest in the SI Reserve, and what type of interests were held, when the Minister made her decision. If the record before this Tribunal indicates that when the Minister made her decision the SI Reserve was confirmed to the Seven Bands only, then the precise date of reserve confirmation is not necessary to decide. The Crown's argument regarding a competing interest in favour of the SI Residents does not, however, cede this point. Furthermore, the Crown's argument draws heavily from a precedent relating to provisional reserves and appears to rely implicitly on the supposition that the SI Reserve was provisional during the early part of the twentieth century.

[101] For the reasons given below, I find that the record before this Tribunal indicates that the Crown confirmed the SI Reserve in favour of the Seven Bands only, in one-seventh shares, sometime prior to 1959.

[102] Given the state of the record before the Tribunal, the exact date of reserve confirmation is unnecessary to decide in order to resolve this Claim and, given the incompleteness of the record as to how this confirmation first occurred, I make no finding regarding that exact date.

[103] I also find that the evidence before the Tribunal is sufficient to find that the SI Residents had no competing interest as a group and that a full hearing of the reserve creation issue is not required.

1. The Claimant's Interests

[104] As noted, the Crown admits that the Claimant, as a member of the Seven Bands, held a legal and equitable interest in the SI Reserve when the Minister made her decision. The evidence further indicates that the SI Reserve had been confirmed in favour of the Seven Bands only, not subject to another interest on the part of the SI Residents. The evidence is:

a. The Schedule of Reserves of 1943 shows the Seven Bands only.

b. Correspondence from the DIA to the SI Residents in 1951 acknowledged that a mistake had been made in 1918 that misled the SI Residents regarding their entitlement to the SI Reserve.

c. The DIA repeatedly acknowledged that surrenders or consents were required for from the Seven Bands specifically for various transactions and proposals between 1890 and 1959.

d. The Minister's election to make use of section 17 of the *Indian Act* was itself an acknowledgement that the Seven Bands held the interest in the SI Reserve and that a ministerial act of reallocation under statutory authority was needed if a reallocation was to be carried out.

[105] Because reserves are held by bands, and the Seven Bands shared the SI Reserve in common, the presumption is that the Seven Bands held equal shares. No evidence was presented to indicate that anything else was intended in Commissioner Sproat's allotment. The 1890 compensation paid in one-seventh shares to the Seven Bands also supports the conclusion that the Seven Bands held equal, one-seventh shares.

[106] The Claimant presented a detailed argument to demonstrate that the reserve was confirmed in 1879 or at the latest 1883. This argument is based upon the specific details of the provincial Order in Council of 1878 appointing Gilbert Sproat to allot reserves in the Yale District of British Columbia and, in the alternative, British Columbia's statutory transfer to Canada of administration and control over the land 20 miles to either side of the CPR in 1883.

[107] The Crown did not submit evidence or argument on the date of reserve creation.

[108] The record is insufficient and incomplete for the Tribunal to make a finding on the precise method and date of reserve confirmation; however, it is not necessary to do so for the resolution of this Claim.

2. The SI residents

[109] The Parties agree that the SI Band did not exist until 1959. Band membership does not change based on informal, self-identification as a "band": *Medeiros v Ginoogaming First Nation*, [2001] FCT 1318, 213 FTR 221. Therefore, until 1959 each resident of Seabird Island retained any pre-existing, formal band affiliation that he or she had.

[110] The evidence suggests that some of the SI Residents remained members of bands

included in the Seven Bands until 1959, while some of the SI Residents were in substantial likelihood members of other bands, including the Cheam and Spuzzum Indian Bands.

[111] Each SI Resident who was a member of one of the Seven Bands in the period leading up to 1959 shared the in-common reserve interests of that band until 1959. Beyond this, I find that the SI Residents as individuals and as a group had no other interest in the SI Reserve prior to the Minister's decision.

[112] The Crown presented several arguments for why the SI Residents as a group should be considered to have had an interest in the SI Reserve before 1959, none of which are persuasive. These arguments are based on the SI Residents' occupation of the SI Reserve, the acquiescence of the Seven Bands, and various alleged social connections between the SI Residents and the Seven Bands.

[113] The law is clear that the collective nature of a band's reserve interest means that a band member has no right of individual possession based solely on band membership: *Squamish Indian Band v Findlay* (1981), 122 DLR (3d) 377, [1981] 3 CNLR 58 (BCCA) [*Findlay*].

[114] Furthermore, the *Indian Act*, 1951, prohibited the acquisition of any interest in reserve land by individuals or by agreement, except by a specific statutory authorization. Sections 20(1), 28(1) and 50(1) of the *Indian Act*, 1951, contained prohibitions on the acquisition of interests in reserve land by occupation or various forms of acquiescence or agreement. The 1906 *Indian Act*, RSC 1906, c 81, contained similar prohibitions. In short, Parliament had made it clear that a third party could not acquire an interest in reserve lands by use and occupation.

[115] These provisions of the *Indian Act* are part of an overall statutory scheme and philosophy created to protect reserve interests from erosion and to uphold the principle that Aboriginal interests in land are alienable only to the sovereign.

[116] The SI Residents as individuals could not have acquired an interest in the SI Reserve through their informal occupation or use of the land, nor could they have acquired an interest in the SI Reserve by the acquiescence or by the agreement of the Claimant.

[117] The Crown argued that the SI Residents as a collective acquired some form of interest or

entitlement in equity that the Minister was legally required to consider in 1959.

[118] Based upon the argument that an interest in equity existed, the Crown argued that equitable principles were legal authority for a court to uphold a possessory interest over a mere technical legal interest.

[119] I do not agree. The Seven Bands' interests prior to 1959 were not merely technical. In support of its argument, the Crown relied upon *Wewaykum*; however, *Wewaykum* is distinguishable on this point.

[120] Unlike the situation in *Wewaykum*, there is no evidence present in the claim that the Schedule of Reserves indicated the Seven Bands in error. The allotment to the Seven Bands was fully intended when it was made in 1879 and recognized repeatedly by the DIA between 1879 and 1959.

[121] Furthermore, the common law relating to an occupier's acquisition of an equitable interest does not apply to reserve land, which is inalienable except to the sovereign: *Findlay, supra*.

[122] Other than arguing that, by anology the SCC's reasoning in *Wewaykum* applied, the Crown did not provide authority to support its argument that individuals or "informal" collectives are able to acquire an interest in a reserve by virtue of their use or possession.

[123] The facts in *Wewaykum* were completely different from those in the present Claim. In *Wewaykum* both disputants were bands, both were members of the larger Laichkwiltach First Nation to which the reserves had first been allotted, the reserves in issue were provisional when the non-occupying bands gave their acquiescences and in the circumstances the SCC characterized the acquiescences as being in the nature of quit claims.

[124] The facts of the *Wewaykum* claim are very different from those in this Claim. The SI Residents were not a band until 1959 and the evidence does not demonstrate that the SI Residents had any analogous connection to the original allotment of the SI Reserve.

[125] The evidence further indicates that the SI Reserve was confirmed to the Seven Bands specifically by 1943 or earlier. The Crown emphasized general social connections between the SI

Residents and the Seven Bands, referring to a gradual "social transformation" that occurred in where people lived. Confirmed reserve interests cannot be affected in such a manner.

[126] The Crown's theory of gradual social transformation does raise the possibility that the SI Band could have had some entitlement to the SI Reserve, upon the SI Band's formal creation, by descent. The evidentiary record however, does not support this argument.

[127] The SI Band was not a beneficiary of the allotment of the SI Reserve until 1959. To have an entitlement by descent there would have to be evidence that members of Popkum were among the SI Band as created in 1959. As noted in the review of the facts of this Claim, the Parties agree that two members of Popkum were among the SI Residents in 1918. No evidence was presented, however, to demonstrate that any members of Popkum lived on the SI Reserve by the late 1950s. Of the two Popkum names provided in the 1918 Band List, Henry Ewan was never referred to again in the documents on record, while Fred Ewan and all his family were struck from the list of the SI Residents on the basis that he was found, on a membership investigation prior to 1959, to be of "Chinese extraction." At the Commission of Inquiry in 1958, Fred Ewan confirmed in testimony that he was not a registered Indian.

[128] The Crown, during its argument, referred generally to origins, marriage and family connections between the SI Residents and the Seven Bands, but presented no evidence establishing that the Claimant had members among the SI Residents when the Minister made her decision.

[129] The DIA appears to have mismanaged the Band Lists of the Seven Bands and the SI Residents between 1918 and 1959, recording the SI Residents on a "Seabird Island Band List" before the SI Band existed in law. This mismanagement and confusion of band lists does not justify making assumptions about the composition of the SI Band.

[130] The Parties also agreed that no non-residents applied to be included in the SI Band when it was created.

[131] Considering the evidence in the record, I find that there was no evidentiary basis on which to conclude that the SI Band, when created in 1959, included individuals who shared the 'in common' reserve interests of Popkum.

[132] Consequently, I find no competing or descent-derived interest in favour of the SI Residents.

3. The Crown's Interests

[133] The Claimant submits that the Minister pursued the Crown's own administrative interests ahead of Popkum's. These interests included simplifying administrative processes to facilitate the management and development of the SI Reserve. The Claimant also submits that the Minister's decision served the Crown's interests in that no compensation was considered or provided.

[134] The Crown agrees that seeking the approval of the Seven Bands was administratively difficult over many years. In this regard, both Parties highlight the Crown's efforts regarding the 1918 timber sale, a road right-of-way in 1949, an agricultural lease and other activities, transaction and proposals in the 1940s and 1950s that were impeded by the requirement of obtaining seven consents. The Crown emphasizes, however, that the difficulties that arose when seeking the consents of the Seven Bands caused hardship to the SI Residents rather than to the Crown and that the Minister pursued the best interests of the Seven Bands and the SI Residents.

B. Fiduciary Duties Owed to the Claimant

[135] The Parties agree that, when the Minister exercised her discretion pursuant to section 17 of the *Indian Act*, this was an undertaking of discretionary control "that invokes responsibility 'in the nature of a private law duty'": *Wewaykum*, *supra* at para 85.

[136] Given my findings that the SI Reserve was fully confirmed to the Seven Bands before 1959 and that the SI Residents as a group did not have any interest in Popkum's share of the SI Reserve or trust funds until 1959, it follows that, the fiduciary relationship between the Minister and the Claimant with respect to the Claimant's one-seventh interest in the SI Reserve did not include the SI Residents. To put it another way, the SI Band had no interest in and was owed no fiduciary duties with respect to Popkum's interest in the SI Reserve and trust funds.

[137] The duties owed to the Claimant were the duties associated with confirmed reserves. This included the ordinary accountability of a fiduciary as well as the duty to preserve and protect the Band's interest in the reserve from exploitation, as explained in *Wewaykum, supra* at paras 98-

100:

> The content of the fiduciary duty changes somewhat after reserve creation, at which time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands. In *Guerin*, Dickson J. said the fiduciary "interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown" (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85. See also *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.).
>
> At the time of reserve disposition the content of the fiduciary duty may change (e.g. to include the implementation of the wishes of the band members). In *Blueberry River*, McLachlin J. observed at para. 35:
>
> > It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.
>
> To the same effect see *R. v. Lewis*, [1996] 1 S.C.R. 921, *per* Iacobucci J., at para. 52, and, in another context, *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, *per* La Forest J., at pp. 129-30.
>
> It is in the sense of "exploitative bargain", I think, that the approach of Wilson J. in *Guerin* should be understood. Speaking for herself, Ritchie and McIntyre JJ., Wilson J. stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction" (p. 350). The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). This is consistent with *Blueberry River* and *Lewis*. Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself. (Of course, there will also be cases dealing with the ordinary accountability by the Crown, as fiduciary, for its administrative control over the reserve and band assets.) [Emphasis in original]

[138] As explained in *Ermineskin, supra* at paras 75-79, the *Indian Act* may impose additional duties on the Crown or a statute can also lift fiduciary duties with clear language:

> As I have indicated, legislation may limit the discretion and actions of a fiduciary, whether that fiduciary is the Crown or anyone else.

In *Guerin*, Dickson J. stated, at p. 387:

> The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation.
>
> …
>
> *Authorson* dealt with a similar issue to the one in this case, and consisted of a number of proceedings that were in fact part of the same case. In the Ontario Court of Appeal's decision in *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321 (leave to appeal refused, [2008] 1 S.C.R. v), the Court of Appeal said, at para. 102:
>
> > There are clear legislative limitations imposed on the Crown in the administration of the Consolidated Revenue Fund, where the [Department of Veterans' Affairs] - administered funds were required by law to be held. As we explain below, the governing legislative framework prevented the Crown from investing in external markets or from paying anything but interest as an investment return. The Crown, even when acting as a fiduciary, cannot act contrary to the law. Interest was the only form of investment return for which the government could in law have been liable during the relevant time period.
>
> This Court has held in *Guerin* and *Authorson* that when the Crown is a fiduciary, Parliament may legislate in ways that constrain or eliminate the Crown's fiduciary duties. The Crown's obligation is to act in a way that is consistent with its fiduciary duties as constrained by valid legislation. It is therefore necessary to consider whether legislation limits the Crown's fiduciary duties to the bands with respect to their royalties. [Emphasis added]

[139] In order for the Crown to resile from an established fiduciary duty, clear statutory language must be present.

[140] This is consistent with the SCC guidelines for interpreting statutes "relating to Indians." In *Nowegijik v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193 [*Nowegijik*], at page 36, Dickson J. stated "… treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

[141] In *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at paras 119-120, 71 DLR (4th) 193 [*Mitchell*], the court referred to the need to examine the purpose of a statute to determine

whether a narrow or broad interpretation should be given:

> … I think the approach must be to read the Act concerned [the Indian Act] with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown; see *United States v. Powers*, 305 U.S. 527 (1939), at p. 533.
>
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote. [Emphasis added]

[142] In *Osoyoos*, *supra* at paras 49, 52-53, the SCC addressed statutory provisions that empowered the Crown to take reserve land. Iacobucci J. applied the above principles of interpretation to find that the statutory provisions in issue (regarding expropriation) should be interpreted to minimize any inconsistencies between the Crown's public and fiduciary roles and to minimize impairment of the interests at stake:

> That s. 83(1)(a) should be given a broad reading is clear from an application of the principle in *Nowegijick*, *supra*….
>
> … Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.
>
> This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary

> obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.

[143] In *Osoyoos, supra* at para 31, Iacobucci J. also referred to Lambert JA's summary of the principles in the judgment below:

> … Lambert J.A. set out the following principles that govern the interpretation of an Order in Council that affects the interests of Indians who are under the protection of the Crown. First, ambiguities in an enactment affecting Indian lands should be given the interpretation most favourable to the Indian interests if such an interpretation is one which the enactment will reasonably bear: see *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. Second, an enactment should be given an interpretation and application that results in a minimal impairment of the Indian interests if that interpretation and application are in accordance with the enactment, reasonably construed: see *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 (C.A.), at p. 25; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119. [Emphasis added]

[144] Clear statutory language may nullify or modify the Crown's fiduciary obligation, however, in the absence of clear language, fiduciary obligations will continue to the extent the language of the statute, reasonably construed, will bear: *Nowegijik, supra*; *Mitchell*, *supra*; and *Osoyoos*, *supra*.

1. Section 17 of the *Indian Act*

[145] Section 17(1)(*a*) gives the Minister discretion to create new bands from existing bands, the General List or both.

[146] Section 17(1)(*b*) allows for band amalgamations at the request of the affected bands.

[147] Section 17(2) reads:

> 17. (2) Where pursuant to subsection one a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Governor in Council determines shall be held for the use and benefit of the new band. [Emphasis added]

[148] Section 17(2) uses the mandatory word "shall" to instruct the Minister to divide the parent band's assets "as the Minister determines" in order to provide for the resulting bands when, pursuant to section 17(1), a subdivision (or amalgamation) occurs.

[149] My reading of section 17 and its purpose is that it is intended to give the Minister

authority to manage the redistribution of an “existing band’s” assets when a “new band” is being created from that “existing band or part thereof” that is, when descent-derived interests arise.

[150] The mandatory aspect of section 17(2) ensures that descent-derived interests will be addressed by the Minister and that a subdivision that leaves one subsidiary without assets cannot occur.

[151] Section 17(2) is not intended to give the Minister complete discretion to reallocate reserves *de novo*, whether a band subdivides or not, and regardless of any even-handedness among true successors. Such an approach and interpretation would not be consistent with the larger scheme of the *Indian Act* regarding the protection of reserves and the SCC’s articulation of the significance of confirmed reserve interests. The Court has been clear that the Crown’s role in administering reserves differs from its usual public role. Reserves are not public benefits programs:

> 74 The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people. A quasi-proprietary interest (e.g., reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty" (*Guerin*, at p. 385) [*Wewaykum, supra* at para 74]

[152] The rationale of a descent-based interpretation of section 17(2) is further supported when considering the potential for erosion of reserve assets via inappropriate uses of the section.

[153] Concerns regarding the erosion of reserve assets informed the judgments of the SCC in *Blueberry River*, *Osoyoos*, *Opetchesaht Indian Band v Canada* (1996), [1997] 2 SCR 119, 147 DLR (4th) 1 [Opetchesaht], and, regarding band membership matters, in *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191, [2014] CNLR 306 [*Peepeekisis*].

[154] In *Opetchesaht*, *supra* at para 52, the SCC majority and minority opinions addressed the protective scheme of the *Indian Act* and the significance of that policy. In writing for the majority, Major J. stated:

> … This leads to a consideration of the policy behind the rule of general inalienability. Both the common law and the Indian Act guard against the erosion of the native land base through conveyances by individual band members or by any group of members.

[155] McLachlin J. (as she then was), in her dissenting opinion in *Opetchesaht*, *supra* at paras 85-87, also emphasized the protective scheme of the *Indian Act*:

> … The protection of reserve lands for future generations may be seen as one of the fundamental purposes of the Act. Alienation was viewed as a grave matter, to be effected only in accordance with a highly scrutinized and strictly regulated procedure. The *Indian Act* confirms the general inalienability of Indian lands (s. 37) and safeguards the sanctity of reserve lands, by prohibiting their alienation except to the Crown, with the consent of the band membership as a whole.
>
> The only other way Indian interests in reserve land can be permanently disposed of under the *Indian Act* is by expropriation. Where the greater public good so requires, interests in reserve land may be expropriated: s. 35. The procedure is strictly regulated and subject to consent of the Governor in Council, exercised by Cabinet, which owes the Indians a fiduciary duty to act in their best interests. The process is politically sensitive and open to public scrutiny.
>
> Formal surrender and expropriation, however, are not the only way in which the *Indian Act* permits reserve land to be affected. The Act contains provisions allowing less significant dealings with reserve land by consent of the Minister and the band council…

[156] The SCC has repeatedly and very clearly held that the *Indian Act* provides a very high degree of protection to reserves and that some statutory discretions authorized by it impose fiduciary obligations upon the Crown of the highest order. An interpretation of section 17 of the *Indian Act* must bear these established principles in mind.

[157] The Crown argued that the duty to preserve and protect the reserve interest from exploitation could not fit within section 17(2) because it would render the exercise of the discretion accorded by Parliament impossible to exercise.

[158] Reading section 17(1) and (2) together, I find that, in the context of section 17(2), this duty means that the Minister may reallocate the assets of the "existing band" when the "new band" is composed at least in part from the "existing band." In such cases, the Minister's discretion may be properly exercised such that the assets of the parent band continue in the descendent bands without any overall loss. This interpretation is most consistent with the language of section 17, the overall scheme of the *Indian Act* regarding the protection of a band's

reserves, the SCC's interpretive principles for statutes "relating to Indians," and the SCC's jurisprudence regarding the fiduciary duties that attach to confirmed reserves.

[159] I find that section 17 does not provide clear language removing, altering or diminishing established fiduciary obligations. No persuasive reason has been provided to me to justify concluding that section 17(2) provides a general discretion to reallocate confirmed reserves to bands that are not beneficiaries directly or by descent following a subdivision or amalgamation. The discretion afforded by section 17 engages the Crown's fiduciary obligations and the Minister must exercise that discretion consistent with those obligations. Fiduciary obligations include the ordinary accountabilities of a fiduciary as well as the duty to preserve and protect the Claimant's reserve interest from exploitation by the Crown or third parties. The ordinary accountabilities most relevant in this Claim include acting in the best interests of the beneficiary, loyalty, good faith, full disclosure, reasonable diligence, ordinary prudence, prevention of improvident transactions, respect for a band's decisions, and acting in accordance with the *Indian Act*. All of these duties must be fulfilled when section 17(2) is exercised.

[160] The Claimant also raised the duty of minimal impairment and compensation for necessary losses when a public purpose requires that the Crown reduce a band's reserve holdings. The Claimant denied that a valid public purpose existed, but submitted that if providing a land base to the SI Residents was necessary in 1959, then Popkum was entitled to compensation.

[161] The Crown argued that the duty of minimal impairment and compensation derives from expropriation case law and that section 17 reallocations are distinguishable.

[162] In my view, section 17(2) does not authorize the disposition of one band's confirmed reserve to another band with no descent-derived interest. A band with no descent-derived interest is a distinct entity that is a third party to the fiduciary relationship in issue. I agree with the Claimant; however, I find that the disposition of a confirmed reserve interest without consent to a third party to serve a broader policy purpose does bear a resemblance to an expropriation. I note that in expropriations, the Crown's fiduciary obligation does entail a duty of minimal impairment and compensation for necessary losses: *Osoyoos, supra Semiahmoo, supra*;.

2. Breach of Fiduciary Duty

[163] Effective January 1, 1959, the Minister created the SI Band and reallocated the SI Reserve from the Seven Bands including the Claimant to the newly created SI Band. The Claimant retained no further interest in the SI Reserve. On January 31, 1959, the Minister distributed the associated trust funds to all members of the SI Band and to all continuing members of the Seven Bands on a *per capita* basis.

[164] The situation was no doubt complex with many bands having an interest in the SI Reserve and trust funds, and each band having its own relationship with the SI Residents. Complexity does not, however, absolve the Crown of its fiduciary obligations to the Claimant.

VIII. FINDINGS

[165] For the reasons that follow, I find that the Minister did not administer the Claimant's assets with the diligence and prudence that was required, the Minister treated the confirmed reserve as if it was available for reallocation *de novo* as the Minister saw fit, and consequently, the Minister breached the Crown's fiduciary duties to the Claimant. I will address the breaches relating to the SI Reserve and the trust funds separately.

A. The Seabird Island Reserve

[166] The Crown relies on the argument that the SI Residents had familial connections with the Seven Bands. The evidence indicates that in 1957, the Superintendent of Reserves and Trust, Mr. Bethune, perceived section 17 as a viable option specifically because the SI Residents were considered at the time to have come from the Seven Bands.

[167] However, the evidence also indicates that the Minister failed to take adequate steps to ascertain the extent to which the Claimant was in fact represented among the SI Residents when she made her decision. Furthermore, the DIA was aware that substantial numbers of the Cheam and Spuzzum Indian Band members had settled on the SI Reserve.

[168] In the early 1950s, Chief Cheer felt that his band's presence and influence on the SI Reserve justified a claim to 50% of the SI Reserve.

[169] The DIA was aware that the band affiliations of the SI Residents were not clearly

established. In 1946, in light of memoranda to the effect that the SI Residents were not in fact a band, the Indian Commissioner for British Columbia asked the Indian Agent to investigate the origins of the SI Residents. The Indian Agent reported:

> …the first residents of the Seabird Island Band were allmembers of the Hope, Ohamil, Squawtits, Cheam, Yale, Popcum, Union Bar and Shawahlook Reserves and since the formation of the Band a few members of the Spuzzum Band have been admitted to membership. Of the Indians still living of the older generation the great majority are descendants of the Squawtits Band.

[170] The Indian Commissioner for British Columbia replied that "[t]he next step would be a status investigation of the members of the 'Seabird Island Band' to establish the fact that they originated with one of the Bands concerned in the matter." The Indian Commissioner was also of the view surrenders were needed.

[171] On further inquiry, the Lytton Agency reported in 1947 that their records had been destroyed by fire in 1931. The Indian Agent asked the Indian Affairs Branch for more records. The record does not reveal any response or evidence of status investigations being conducted for the SI Residents.

[172] The evidence is also clear that in 1958, when officials at the DIA were preparing for the Minister's action pursuant to section 17, the Superintendent of Reserves and Trusts instructed the Indian Commissioner for British Columbia to take "immediate steps" to "bring up to date the Seabird Island membership list." The Indian Commissioner for British Columbia passed this instruction on to the Superintendent of the New Westminster Agency. The "membership list" did not, however, describe the formal band affiliations of the SI Residents.

[173] There is no evidence that DIA officials pursued the matter any further. The Minister proceeded on the vague basis that an unknown number of the SI Residents had their origins with the Seven Bands. This was an egregious lack of effort by the Crown to ascertain who the beneficiaries of the SI Reserve were, and whether any Popkum members resided there.

[174] As discussed already, the Crown also provided no specific evidence to demonstrate the familial connections alleged between Popkum and the SI Residents. The evidence does not demonstrate, as asserted by the Crown, that any SI Resident shared or had an interest in the in-common reserve holdings of Popkum when the Minister made her decision in 1959. The Parties

agree that no non-residents applied to join the SI Band under the procedure outlined by the Minister when she created the SI Band. Therefore, the SI Band created in 1959 had no descent-based entitlement to Popkum's interest in the SI Reserve.

[175] The Minister's reallocation of Popkum's one-seventh interest in the SI Reserve to the SI Band was a reallocation from a confirmed reserve holder, Popkum, to a non-beneficiary of Popkum's interest. The discretion afforded by section 17(2) does not extend this far.

[176] The fact that the SI Reserve was shared among multiple bands until 1959, increases the complexity of this Claim, but does not change the fact that the Claimant was owed a fiduciary obligation with respect to its one-seventh interest in the SI Reserve.

[177] The Minister breached the ordinary accountability of a fiduciary when she reallocated Popkum's one-seventh interest in the SI Reserve to the SI Band in 1959. The Minister failed to exercise her statutory discretion with ordinary prudence when she failed to identify the true beneficiaries, exceeded her statutory authority pursuant to section 17(2) and divested the Claimant of its reserve interest.

[178] The Minister failed to administer the Claimant's assets for the benefit of the Claimant when she transferred the Claimant's assets to the SI Band, which was not a beneficiary by descent and also included individuals who, until 1959, had been members of bands to whom the SI Reserve was never allotted or confirmed. Upholding a non-beneficiary as having a superior entitlement to a beneficiary does not reflect ordinary prudence regarding the management of the SI Reserve.

[179] The Crown's breach was exacerbated by the facts that the DIA urged the Claimant over many years to release its interest in the SI Reserve without compensation or full information about the economic value of Popkum's interest. In doing so, the Crown cannot be said to have been pursuing the Claimant's best interests. There is no evidence to show that the Crown gave consideration to providing compensation for the deprivation suffered by the Claimant. The Crown admits that compensation was not contemplated at the time.

[180] The Crown submitted that the Claimant nevertheless received compensation in the form of the *per capita* distribution and because members of Popkum, joining the SI Band in 1959, no

longer shared in Popkum's reserve and trust assets. The trust funds could not be and were not compensation for the land nor does the evidence establish that any Popkum members joined the SI Band when it was created.

[181] I find that the transaction was improvident for the Claimant. For this reason, Chief Cheer's 1951 BCR and testimony in 1958 regarding the release of Popkum's interest do not absolve the Crown of responsibility. Additionally, there is no evidence that the Claimant had legal representation at any time, nor does the evidence demonstrate that Chief Cheer fully understood or was fully informed about what he was entitled to and what he was consenting to forgo. I find that the Crown was also in breach of the duties to evaluate, fully inform, seek directions, and reject improvident transactions.

[182] Regarding the issue of consent, the Crown submitted that section 17(2) does not require the Minister to obtain the consent of affected bands, but that the Claimant in any case did consent to the 1959 reallocations. Because there is no evidence before the Tribunal to support the view that Popkum subdivided, I do not need to make a finding regarding the presence or absence of statutory consent requirements pursuant to section 17 for the disposition of this Claim.

[183] The Claimant further argued that a DIA policy existed at the time of only acting pursuant to section 17 with the consent of affected bands and that a fiduciary obligation existed to act in accordance with existing policy, citing *Blueberry River*. I am not persuaded on the evidence that such a policy existed in 1959, but a finding on this point is not necessary for the disposition of this Claim.

[184] Popkum's divestment was a further breach of the Crown's duty to preserve and protect a confirmed reserve from exploitation by the Crown. The evidence is clear that many officials within the DIA considered the administration of the SI Reserve arduous and unworkable, with seven consents being required for many decisions. With the Minister's action pursuant to section 17, the Crown relieved itself of administrative complexity in the exercise of its fiduciary and statutory duties at the expense of Popkum's legal and equitable interest in the SI Reserve. The actions of the Crown were self-serving, relieving itself of an administrative headache at the expense of Popkum.

[185] The Crown submitted that the SI Residents needed the SI Reserve and that the ongoing issues relating to administration of the reserve had to be addressed. If so, addressing such needs was the Crown's responsibility, not Popkum's. The Minister's decision meant that the Crown avoided providing an alternative agricultural land base to the SI Residents or compensation to Popkum for its loss of its one-seventh interest at the Crown's own cost. By avoiding other options, the Crown satisfied the needs of the SI Residents and the Crown's own administrative goals at the expense of the Claimant. This was a breach of the duty to preserve and protect the Claimant's reserve interest from exploitation by the Crown.

[186] The benefits of the Minister's decision also flowed to the SI Band as recipients of the large and valuable reserve to the extent that the evidence suggests that the Cheam and Spuzzum Indian Bands contributed members to the SI Band in 1959, also benefitted at the expense of Popkum, an existing and established beneficiary to whom the highest fiduciary obligations were owed. Each of these bands – Seabird Island, Cheam and Spuzzum – was a third party with respect to the Claimant's interest in the SI Reserve and the fiduciary relationship that the Crown had with the Claimant regarding the SI Reserve.

[187] The Crown emphasized in argument that the DIA was caught in the middle between competing bands. The Crown described the essence of the Claim as: "[w]hat is at issue here is how best to allocate Indian reserve lands among related First Nations people." This argument is tantamount to saying that "all Aboriginals are the same" and can be therefore treated the same. Each band is a separate and distinct entity with different cultural, social and historical roots. Bands have distinct reserve holdings. Aboriginality per se does not give an individual, group or band an entitlement to occupy and acquire another band's reserve.

[188] The existence of a dispute between a band that has a fiduciary relationship with the Crown with respect to a specific interest and an Aboriginal entity that lacks a share in that interest, does not raise both disputants to the status of co-beneficiaries. An Aboriginal entity that does not share in the interest in issue does not have any duty owed to it with regard to that interest, although it may have other distinct relationships with the Crown.

[189] *Peepeekisis* involved an encroachment on a band's confirmed reserve interests by Aboriginal individuals whom the Indian Agent added to the band at his discretion (*Peepeekisis* at

paras 40-44). The Aboriginal individuals whom the Indian Agent added to the band were considered by the Federal Court of Appeal to be outsiders to the fiduciary relationship that the Crown had with the band with respect to its reserve.

[190] The fact that the SI Residents were Aboriginal does not remove, modify or alter the legal obligation of the Crown to the beneficiaries of the SI Reserve nor can it be used to justify the Minister's decision.

[191] The fact that a conflict existed among formal and informal bands does not relieve the Crown of its duty to preserve and protect the rights of the Claimant or downgrade the Crown's obligation to that of a referee between beneficiaries and non-beneficiaries. The SCC further affirmed in *Wewaykum* that when confirmed reserve interests are involved, the role of "honest referee" does not satisfy the Crown's fiduciary obligations: *Wewaykum, supra* at para 104.

[192] The Crown also presented argument regarding the fairness of the Minister's decision based on *per capita* acreages of reserve land among the affected entities. Confirmed reserve interests are held in common by bands, not by individuals, and are not public benefits programs that may be reallocated based on the Minister's view of need: *Wewaykum, supra* at para 74 citing *Guerin, supra*. Confirmed reserves must be administered in a manner that reflects the historical and legal significance of the reserve interest as defined by the SCC and the *Indian Act*.

[193] In sum, I find that the Minister breached the fiduciary duties owed to the Claimant with respect to the Claimant's interest in the SI Reserve, including the ordinary accountability of a fiduciary and the duty to preserve and protect reserve land from exploitation by the Crown when she transferred the Claimant's one-seventh interest in the SI Reserve to the SI Band in 1959.

B. The Seabird Island Trust Funds

[194] In *Ermineskin, supra* at para 131, the SCC described the standard for managing trust funds with reference to ordinary prudence:

> The standard of care required of the Crown in administering the funds of the bands is that of "a man of ordinary prudence in managing his own affairs", *per* Dickson J. in *Fales*, at p. 315. However, because the Crown "can be no ordinary fiduciary", its obligation to act as a person of ordinary prudence in

> managing his or her own affairs is modified by relevant legislation and by the kinds of considerations outlined above.

[195] Subsection 61(1) of the *Indian Act, 1956* in force in 1959 made it mandatory for the Crown to manage funds held under the *Act* in the interests of beneficiaries:

> 61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

[196] This does not mean that a subdividing band's assets are untouchable pursuant to section 17(2). As with reserves, descent-derived interests arising pursuant to section 17(2) and successorship-based division of trust monies uphold the principles articulated in subsection 61(1) and *Ermineskin*, minimize inconsistencies in the Crown's role, and are consistent with section 17(2), reasonably construed.

[197] I see no justification for taking into account, in a section 17(2) distribution, new members in a descendant band who were not, prior to the subdivision, members of the parent band. As per the discussion on reserves, the most coherent approach is to include only beneficiaries in such a distribution. If outsiders are included, the result is an unwarranted erosion of the parent band's assets.

[198] The Claimant further argued that informed consent prior to a disposition was required as a matter of fiduciary duty and, regarding trust funds specifically, that section 64 required the consent of Popkum for any expenditure of capital monies. The Claimant denies that such consent was given.

[199] As noted, sections 17(1)(*a*) and 17(2) make no mention of consent. I find that it is unnecessary to decide the effect of section 17 on section 64. The Crown has not presented adequate evidence to support the submission that Popkum subdivided. The Minister had no authority to divide Popkum's trust funds pursuant to section 17. The Claimant's consent was therefore required before its capital monies could be expended.

[200] Moving beyond issues of relatedness and descent, the *Indian Act* does not specify, beyond the provisions already mentioned, how trust funds shared by multiple bands should be

divided upon breakup, i.e. ‘band by band’ or *per capita*. The Claimant bases its argument for dividing funds using the ‘band by band’ formula on its in-common entitlement with the Seven Bands and the fact that in 1890, money resulting from a taking of land within the SI Reserve was divided in one seventh shares among the Seven Bands

[201] The SI trust funds belonged to the Seven Bands prior to 1959. The assets of a band are held on a band basis and not individually. I find that the in-common nature of the Seven Bands’ ownership implies that each of the Seven Bands was entitled to a one-seventh share.

[202] As with reserves, the administration of trust funds may become complicated where multiple bands are involved, but this does not absolve the Crown of its fiduciary and statutory duties or reduce its role to the honest referee. The SCC said in *Wewaykum*, *supra* at para 104 that:

> … the role of honest referee does not exhaust the Crown's fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty.

[203] I find that the Minister breached the Crown’s fiduciary duty to the Claimant when, in 1959, the Minister distributed the SI trust funds to all members of the Seven Bands and the new official SI Band on a *per capita* basis. A distribution of the band trust funds ought to have been effected on a *per band* basis, perhaps the only method of trust fund distribution which represented the true nature of the interests at stake in the circumstances of this Claim.

[204] For the same reasons given regarding the SI Reserve, the SI Band was not a beneficiary of the Claimant’s share of the SI trust funds. The Minister had no basis for distributing Popkum’s one-seventh share of the SI trust funds to the SI Band pursuant to section 17. I am not persuaded by the Crown’s submissions to the effect that the SI Band was generally related to the Claimant and should be considered to be a beneficiary, effectively, of those funds by descent. The other six of the Seven Bands were also not beneficiaries of Popkum’s one-seventh interest. The *per capita* distribution had the effect of distributing part of the Claimant’s share of the trust funds to non-beneficiaries of the Claimant’s share. This was a breach of the Crown’s fiduciary obligations to the Claimant.

IX. CONCLUSION

[205] The action of the Crown in divesting Popkum of its one-seventh interest in the SI Reserve without compensation and distributing part of its one-seventh share in the Seabird Island trust monies to non-beneficiaries was a breach of the Crown's ordinary accountability as a fiduciary and a breach of the Crown's duty to preserve and protect the Claimant's confirmed reserve interest from exploitation by the Crown.

X. COSTS

[206] In the event that the Parties are unable to resolve the issue of costs themselves, they shall file written submissions within 30 days. Each submission is not to exceed 5 pages in length.

PATRICK SMITH

Honourable Patrick Smith

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140627

File No.: SCT-7005-11

OTTAWA, ONTARIO June 27, 2014

PRESENT: Honourable Patrick Smith

BETWEEN:

POPKUM FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO:	**Counsel for the Claimant POPKUM FIRST NATION** As represented by Allan Donovan and John Burns Donovan & Company
AND TO:	**Counsel for the Respondent** As represented by Rosemarie Schipizky and Sean Stynes Department of Justice