FILE NO.: SCT-7007-11
CITATION: 2015 SCTC 6
DATE: 20151105

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
DOIG RIVER FIRST NATION Claimant	Allisun Rana and Emily Grier, for the Claimant
– and –	
BLUEBERRY RIVER FIRST NATIONS Claimant	James Tate, Ava G. Murphy and Michelle L. Bradley, for the Respondent
-and-	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Jonathan Sarin, Michael Mladen and Darlene Prosser, for the Respondent
	HEARD: May 20-22 2015

REASONS FOR DECISION

Honourable W.L. Whalen

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

Cases Cited:

Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), (1987) 14 FTR 161, [1988] 1 CNLR 73; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1993] 3 FCR 28, [1993] 2 CNLR 20; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2012 SCTC 7; *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2; Pro Swing Inc v Elta Golf Inc, 2006 SCC 52, [2006] 2 SCR 612; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *Fairford First Nation v Canada (AG)* (1998), [1999] 2 FCR 48, [1999] 2 CNLR 60 (FCTD); *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73, [2004] 3 SCR 511; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247.

Statutes and Regulations Cited:

Indian Act, RSC 1927, c 98.

Veterans' Land Act, SC 1942, c 33.

Land Act, RSBC 1948, c 175, ss 45, 47, 66, 120, 121.

Indian Act, RSC 1985, c I-5, s 2.

Specific Claims Tribunal Act, SC 2008, c 22, ss 2, 14, 16, 20, 22, 24.

The Railway Belt and Peace River Block Act, SC 1930, c 37.

An Act to Amend the "Land Act", SBC 1931, c 33, s 5.

Authors Cited:

John McGhee, *Snell's Equity*, 33rd ed (London: Sweet & Maxwell, 2015).

Headnote:

Aboriginal Law – Specific Claims – Specific Claims Tribunal Act – Fiduciary Duty– Provincial Land Grants for Reserve Creation – B.C. Land Act – Reservation of Subsurface Rights – Cognizable Interest – Discretionary Control – Subsurface Rights – Duty to Inform – Duty to Consult – Intentions of the Band – Law of Equity in Crown-Aboriginal Fiduciary Relationship – Duty to Correct

This specific claim arises out of the Crown's acquisition of Replacement Reserves that were established as a condition of the Band's surrender of its original, larger reserve. The Replacement Reserves did not include the subsurface rights, which were reserved by the Province of British Columbia, from which Canada purchased these Reserves. Canada did not investigate title and it mistakenly presumed that the Replacement Reserves included the subsurface rights. The Claimants contend that the Crown had a fiduciary duty to act in their best interests in the acquisition of the Replacement Reserves, which it breached by failing to acquire the subsurface rights. They seek compensation based on sub-sections 14(1)(*a*), (*b*) and (*c*) of the *Specific Claims Tribunal Act ("SCTA").*

The Respondent does not dispute that the Crown owed the Claimants a fiduciary duty to obtain the Replacement Reserves, but takes the position that its duty did not include an obligation to obtain subsurface rights. The lands for the Replacement Reserves were owned by the Province of B.C. Its prevailing legislation reserved all subsurface rights in provincial Crown Lands conveyed to anyone, including to Canada for reserve purposes. The Provincial Crown was therefore following its existing statutory regime and policy when it only transferred surface rights in the Replacement Reserves to Canada. Further, the Respondent submits that there had been no understanding by any of the Parties that Canada would obtain subsurface rights in the Replacement Reserves. Therefore, Canada cannot be held responsible for something that had never been promised and over which it had no control or ability to acquire. Canada submitted further that the purpose behind acquiring the Replacement Reserves was to permit the Band to

pursue its traditional life of trapping, hunting, growing hay for horses, which was achieved by acquiring the surface rights in the Replacement Reserves. Finally, the Respondent argues that Claimants had been made whole by the award of damages in an earlier case relating to the original surrendered lands, decided by the Supreme Court of Canada in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 ["*Blueberry*"].

The Crown's undertaking with respect to the Replacement Reserves was made as a condition of the surrender of the original Montney Reserve. Once the Crown accepted discretionary control over the Band's cognizable interest, namely the Montney Reserve, together with the underlying conditions, it had the obligation or mandate to fulfill those conditions as a fiduciary. The Crown had undertaken to act on the Band's behalf, and no one else's. The Crown could not dispose of the Montney Reserve without addressing the underlying conditions, including the intended purpose for the acquisition of replacement lands.

The Band wanted replacement lands suited to its traditional hunting and trapping culture. However, it remained vulnerable to serious disruption of its intended use of the Replacement Reserves by virtue of B.C.'s extensive reserved right of use of and access to the subsurface rights. In these circumstances, the Band did not achieve its intended purpose in acquiring the Replacement Reserves. This result was both exploitative and improvident.

Canada had believed it had acquired the subsurface rights in the Replacement Reserves, and discovered its error only after issuing mineral exploration permits to a third party. Canada's failure to investigate the nature and quality of the title it was acquiring on behalf of the Band was a breach of fiduciary duty. Canada's failure to inform the Band of the nature and quality of that title, to explain the practical consequences of the reservation of subsurface rights and to consult the Band on its wishes under those circumstances constitutes a further breach of fiduciary duty. Upon discovering its error and admitting it to the Province, Canada did nothing to try to rectify the situation. This also constituted a breach of Canada's fiduciary obligation to the Band. Finally, the Claimants were made whole by the *Blueberry* decision only with respect to the breaches found in that decision. It did not deal with the question of whether Canada's acquisition of the Replacement Reserves may also have involved breaches of fiduciary duty to the Band.

Held: The Crown breached its fiduciary obligation to the Claimants.

TABLE OF CONTENTS

I. INTRODUCTION

[1] This Claim addresses the final link in a chain of events that happened nearly 75 years ago, inspired decades of litigation, and established important legal precedent in the legal domain of Crown-Aboriginal relations. These events and relations are at issue again here.

[2] The facts of the case are among the more considered in Canadian jurisprudence, although until now in respect of the first part of the "story". The issues before the Tribunal focus on the final chapters of that story.

[3] The Claimants are Dunne-za Cree people, who historically led a nomadic lifestyle of hunting, fishing, gathering, and trapping in northeastern British Columbia, north of the present-day city of Fort St. John.

[4] They eventually formed the Fort St. John Beaver Band. The Band adhered to Treaty Number 8 in 1900, which entitled it to reserve lands in northern British Columbia. In April 1916, Canada set aside Indian Reserve 172 ("the Montney Reserve") for the Band. The Reserve consisted of 18,168 acres of prime agricultural land located not far from developing non-aboriginal settlements. Like their forebears, the members of the Band were hunters and trappers, with little interest in agriculture. As a result, they spent little time on the Montney Reserve, preferring to pursue their traditional ways in the more isolated wilderness to the north of the Reserve.

[5] In September 1945, through the usual process under the Indian Act, RSC 1927, c 98 ["the *Indian Act"*], the Band surrendered the Montney Reserve to the Crown for lease or sale for the benefit of the Band. The Crown then sold both the surface and subsurface rights in the Montney Reserve, for distribution under the *Veterans' Land Act*, SC 1942, c 33.

[6] In 1950, after the sale of the Montney Reserve, the federal Crown acquired lands from the Province of British Columbia that became Indian Reserves 204, 205 and 206 and were set-aside for the Band in August 1950 ("the Replacement Reserves"). B.C. reserved the subsurface rights in the Replacement Reserves pursuant to the provisions of the *Land Act*, RSBC, 1948 c 175 ["1948 *Land Act*"]. The federal Crown did not put its mind to the question of subsurface rights, either in respect of the Montney Reserve or the Replacement Reserves. In consequence, it

disposed of both the surface and subsurface rights in the Montney Reserve and only acquired surface rights in the Replacement Reserves.

[7] In 1976, petroleum was discovered on the former Montney Reserve lands, to the great benefit of some veterans and a petroleum exploration company.

[8] In 1977, the Fort St. John Beaver Band was divided into the present successor Claimant Bands. In the same year, the Bands discovered that the Montney Reserve's subsurface rights had been disposed of, and that the Replacement Reserves did not include subsurface rights. Accordingly, the Bands commenced an action against Canada in the Federal Court of Canada: *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, (1987) 14 FTR 161, [1988] 1 CNLR 73 ["*Apsassin*"]. The Apsassin case focused on the legitimacy of the surrender of the Montney Reserve and the related loss of mineral rights therein. Initially there was also a claim for declaratory relief in respect of the Replacement Reserves, although this claim was withdrawn before trial. The Apsassin claim was dismissed after a lengthy trial. The Federal Court of Appeal dismissed the Bands' appeal: Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development), [1993] 3 FCR 28, [1993] 2 CNLR 20 (FCA). On further appeal, the Supreme Court of Canada reversed the trial judgment and remitted it back to the Federal Court (Trial Division) for assessment of damages that were eventually settled for $147 million and a release: *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 ["*Blueberry*"].

[9] The current proceeding focuses on the Replacement Reserves. The Claimants contend that the Crown's failure to obtain the subsurface rights constitutes a breach of fiduciary duty; and, that the failure to correct the breach when the Crown discovered it two years later was a further breach. Acknowledging that it had a fiduciary duty in acquiring the Replacement Reserves, the Crown takes the position that its duty did not include an obligation to obtain subsurface rights.

[10] British Columbia's prevailing legislation reserved all subsurface rights in provincial Crown Lands conveyed to anyone, including to Canada for reserve purposes, although through failure to investigate, Canada did not appreciate this at the time. The Provincial Crown was

therefore following its existing statutory regime when it only transferred surface rights in the Replacement Reserves to Canada.

[11] The Respondent takes the position that there had been no understanding by any of the Parties that Canada would obtain subsurface rights in the Replacement Reserves. Therefore, Canada cannot be held responsible for something that had never been promised; and in any event, the Claimants had been made whole by the award of damages in *Apsassin*.

[12] The Parties agreed to bifurcate the current Claim into two phases. The first phase, which is the focus of these Reasons, will determine the validity of the alleged breaches of fiduciary duty. If validity is found, the Tribunal will then conduct a second phase to determine the amount of compensation due, if any.

II. ELIGIBILITY AND PROCEDURAL HISTORY

[13] Division of the Fort St. John Beaver Band into the Doig River First Nation ("Doig") and Blueberry River First Nation ("Blueberry") received Ministerial approval on August 8, 1977. Each is a "band" within the meaning of section 2(1) of the *Indian Act*, RSC 1985, c I-5 as amended, and as such, both are "First Nations" within the meaning of sub-section 2(*a*) of the *Specific Claims Tribunal Act*, SC 2008, c 22 ["*SCTA*"]. They are also successors in possession and benefit of the Replacement Reserves. Doig obtained roughly 2,890 acres of the Replacement Reserves, including half of IR 204 and all of IR 206. Blueberry obtained roughly 3,240 acres, including the other half of IR 204 and all of IR 205.

[14] As First Nations under the *SCTA*, both Claimants are entitled to make a claim to the Tribunal, provided all other preconditions have been met. On April 12, 1999, Doig filed a specific claim with the Minister of Indian Affairs and Northern Development concerning the mineral rights in IRs 204, 205 and 206. On May 24, 2009, it filed a supplemental submission updating the original claim. By letter dated December 21, 2009, the Minister rejected the specific claim for negotiation.

[15] Section 16(1) of the *SCTA* provides:

> **16.** (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

> (*a*) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;
>
> (*b*) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;
>
> (*c*) in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or
>
> (*d*) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

[16] As the Minister has notified Doig in writing of his decision not to negotiate the Claim, Doig's Declaration of Claim filed on December 15, 2011 meets the requirements of section 16 and is properly before the Tribunal.

[17] On May 17, 2012, the Tribunal gave Blueberry notice pursuant to section 22 of the *SCTA*, which together with section 24 provides:

> **22**. (1) If the Tribunal's decision of an issue in relation to a specific claim might, in its opinion, significantly affect the interests of a province, First Nation or person, the Tribunal shall so notify them. The parties may make submissions to the Tribunal as to whose interests might be affected.
>
> …
>
> **24.** The Tribunal may, on application by a First Nation to whom notice under subsection 22(1) is provided, grant the First Nation party status if the Tribunal considers it a necessary or proper party.

[18] As a result of receiving the section 22 notice, Blueberry applied to be added as a Party Claimant. Doig consented but the Respondent opposed. By Reasons dated November 30, 2012, Patrick Smith J. ordered that Blueberry be added as a Party Claimant (see *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2012 SCTC 7). Blueberry filed its Declaration of Claim on December 20, 2012.

[19] The Claimants based their Claims on the grounds specified in sub-sections 14(1)(*a*), (*b*) and (*c*) of the *SCTA*, namely that there was:

> (*a*) a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

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

[20] In their respective Declarations of Claim, the Claimants confirmed that they are not seeking in excess of the $150 million limit under sub-section 20(1)(*b*) of the *SCTA*.

[21] I am satisfied that the Claimants have met the requirements of the *SCTA* and that their Claims are properly before the Tribunal.

III. THE ISSUES

[22] The Parties do not dispute that the Crown owed the Claimants a fiduciary duty to obtain the Replacement Reserves, including surface rights. However, they do not agree on whether the fiduciary duty extended beyond that to subsurface rights, and whether the Crown breached its obligation in that regard. While the Parties did not file an Agreed Statement of Issues, from their submissions it would appear that the issues to be resolved by the Tribunal are as follows:

a. What was the Crown's fiduciary duty to the Claimants with respect to the Replacement Reserves?

b. Did the Crown breach its fiduciary duty to the Claimants?

IV. THE FACTS

[23] The Parties were helpful in filing an Agreed Statement of Facts. Most of the agreed facts were derived from the many documents generated over the years through the federal Crown's relationship with the original and successor Bands, including with respect to the subject transaction. The most salient documents (approximately 136 documents) were assembled in a Common Book of Documents ("CBD") filed and referred to extensively during the hearing. In addition, a number of courts (including the Tribunal) have considered the underlying transaction and made findings of fact. The Parties asked the Tribunal to accept some of these findings, and to discount or reject others. I agree that because of the factual nexus between this case and the

Apsassin/Blueberry line of cases, the findings of these earlier courts require close attention.

[24] I therefore propose to summarize the agreed facts in an abbreviated fashion sufficient to serve the positions of the Parties and the resolution of the issues before the Tribunal. I will then review the jurisprudence, including findings of fact arising from the disposition of the Montney Reserve. In the Analysis section of these Reasons, I will then explore the facts, whether agreed or arising from documents and judicial opinions.

[25] I have assumed that all requisite Orders-in-Council or other procedural steps necessary for the implementation of an agreement or approval by any of the Bands or levels of government were properly obtained. There was no issue in the validity phase that any surrender, Order-in-Council, or other procedural matter was improper or illegal.

[26] Treaty Number 8, completed in 1899 at Lesser Slave Lake Alberta, was adhered to by 46 Beaver Indians from Fort St. John on May 30, 1900. The Treaty provided that Canada would set aside a specified amount of reserve lands for the use and benefit of the signatory First Nations.

[27] As part of a land agreement, British Columbia transferred three and a half million acres of land ("the Peace River Block"), including surface and subsurface rights, to Canada in May 1907. It was from these Dominion lands that the 18,168-acre Montney Reserve was set-aside in April 1916 for the use and benefit of the Fort St. John Beaver Band. In 1930, pursuant to The *Railway Belt and Peace River Block Act*, SC 1930, c 37, Canada transferred what was left of the Peace River Block back to the Province after the creation of Indian Reserves and whatever other purposes had been achieved.

[28] The Montney Reserve was regarded as prime agricultural land. However, the Fort St. John Beaver Band followed a traditional nomadic lifestyle based on hunting, trapping, gathering and fishing. Thus the Band rarely used the Montney Reserve, preferring to live and work in a more isolated area north of the Montney Reserve. As World War II drew to a close, there was a growing need for land for agricultural and settlement purposes. Canada received enquiries about the availability of the Montney Reserve. Area petroleum exploration spurred further enquiries and led to the 1940 surrender of the Montney Reserve's mineral rights for sale or lease for the Band's benefit.

[29] With the end of the war, there was a need to provide land and housing for the settlement of returning veterans. The Director of the Veterans' Land Act ("DVLA") approached the Department of Indian Affairs ("DIA") about the availability of the Montney Reserve, which eventually led to its surrender. The surrender took place on September 22, 1945 and was confirmed by Canada on October 16, 1945. The usual term of the surrender was that the Reserve would be sold or leased for the benefit of the Band. Although not specified in the surrender documents, the Crown also promised that it would provide the Band with replacement lands. Three locations were identified in consultation with Band members. It was also understood that the proceeds from the Montney Reserve would be used to acquire the replacement lands.

[30] In 1946, IR 204, IR 205 and IR 206 (the Replacement Reserves) were surveyed, and after a period of negotiation, British Columbia agreed to sell the land to Canada for $4,932.50 plus a $30.00 Crown grant fee. In determining the purchase price, a letter from the B.C. Minister of Lands and Forests dated November 6, 1947 to the federal Minister of Mines and Resources (who was also responsible for Indian affairs) stated:

> ...The necessary surveys of the lands required by your Department for the transfer of the Indians from the St. John Indian Reserve No. 172, Peace River District, have been received and plotted, and are known as Lot 1486, containing 883 acres, which have been classified as 159 acres, first class, 144 acres, second class and 580 acres, third class. Lot 1487 contains 2838 acres: 255 acres first class, 557 acres second class and 2026 acres third class; parts of Townships 87 and 88, Range 16, W.6.M., containing 2473 acres, 164 acres 1st class, 205 acres 2nd class and 2104 acres third class.
>
> As you are undoubtedly aware, the minimum prices of Crown lands in the Province are $5.00 per acre for first, $2.50 for second and $1.00 for third. I am, however, prepared to make the sale of the aforementioned lands in accordance with Section 47 of the Land Act at one half of the aforementioned price, and upon receipt of the sum of $4932.50, plus $30.00 for Crown grant fees, Crown grants will be issued in favour of your Department.

[31] On March 30, 1948, the DIA transferred the Montney Reserve to the DVLA for $70,000, the net proceeds of which was deposited into the Band's trust account. After appropriate approvals by the Band and the federal Department, Canada paid B.C. the agreed amounts from the Band's account. B.C. approved the sale by Order-in-Council 1655 dated July 25, 1950, which specified that B.C. would transfer administration and control over the Replacement Reserves "subject to the provisions and reservations contained in Form No. 11 of the schedule to Chapter

175 of the Revised Statutes of British Columbia, 1948". The effect of OIC 1655 and the reservations expressed in Form 11 was to reserve subsurface rights in the Replacement Reserves to the Province. A certified copy of OIC 1655 was forwarded to Canada on July 26, 1950. Surface rights in the Replacement Reserves (but not subsurface rights) were thus transferred to Canada, which set them apart on August 25, 1950 for the use and benefit of the Fort St. John Beaver Band under the provisions of the *Indian Act*.

[32] As the process of selling the Montney Reserve and acquiring the Replacement Reserves was ongoing, Canada received expressions of interest from petroleum exploration companies regarding the proposed Replacement Reserves. Canada therefore approached the Band, obtaining a surrender to lease the subsurface rights in the Replacement Reserves for the Band's benefit. Canada accepted the surrender on October 11, 1950 and on October 26, 1950 (only two months after the setting-aside of the Replacement Reserves), Canada issued mineral exploration permits to Halfway River Development Co. Ltd ("Halfway").

[33] On January 19, 1952, Halfway advised Canada of B.C.'s notification that Canada's exploration permits were not valid, and on January 21, 1952, B.C. formally advised Halfway that gas and petroleum rights in the Replacement Reserves had been reserved to the Province at the time of transfer. B.C. also notified Canada on January 26, 1952.

[34] On January 26, 1952, the federal Deputy Minister of Citizenship and Immigration wrote B.C.'s Deputy Minister of Mines:

> The areas of these three Reserves in the Peace River District were transferred to the Crown in right of Canada by British Columbia Order-in-Council No. 1655 of the 25th of July, 1950. A certified copy of the Order-in-Council was forwarded to this Department with the Deputy Provincial Secretary's letter of the 26th of July, 1950.
>
> *At the time, it was not appreciated that Form 11 of the schedule to the Land Act provided a reservation of minerals.*
>
> ...
>
> *On examination of our title, we must agree that minerals, including petroleum and natural gas, were reserved to the Crown in the right of British Columbia.*
>
> ...

> *I regret the error which led us to attempt to deal with petroleum and natural gas rights,* which remain provincial property, and I hope that our issuing the permits, which have terminated, is not a serious inconvenience to your Department. [emphasis added]

[35] By letter of January 26, 1952, Canada confirmed to Halfway that the exploration permits had expired on October 25, 1951 and that subsurface rights in the Replacement Reserves remained vested with the Provincial Crown. Canada refunded Halfway's permit fees on February 14, 1952.

[36] Canada wrote to B.C. on March 17, 1952 asking whether the petroleum and natural gas rights in the Replacement Reserves had been disposed of, and if so to whom. B.C. replied that the Texaco Exploration Company held them under provincial permits dated March 3 and 23, 1950.

V. LEGAL HISTORY: THE *APSASSIN/BLUEBERRY* FAMILY OF CASES

1. Introduction

[37] The judicial treatment of the surrender that resulted in the present claim is central to the analysis that follows. It is therefore important to highlight the important aspects of that jurisprudence.

2. Contextual Judicial Background

[38] The legal context of the *Apsassin/Blueberry* decisions is to be found in prior Supreme Court of Canada cases. In *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145 the court recognized that Indian interests in ancestral lands constituted a legal interest predating European settlement, and thereby raising rights that could not be treated merely as an act of grace and favour by the Crown (see also *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 75, [2002] 4 SCR 245) ["*Wewaykum*"].

[39] In *Guerin v R*, [1984] 2 SCR 335 at para 86, 13 DLR (4th) 321 ["*Guerin*"] the Supreme Court of Canada reaffirmed this finding, stating that it "recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". The court then went on to discuss constitutional developments under which First Nations ultimately had a legal right to occupy and possess reserve lands in circumstances that cast the federal Crown in a

trustee-like ("*sui generis*") position with the First Nations as beneficiaries. Dickson J. stated:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. [*Guerin*, at para 97]

[40] In *Guerin*, the Band had surrendered valuable surplus reserve lands to the Crown for lease to a golf club. The surrender followed the process mandated by the *Indian Act*. However, the terms ultimately obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. Indian Affairs Branch officials did not return to the Band to inform it of the revised terms and to seek approval. Indeed, they withheld pertinent information.

[41] The court made landmark findings on the purpose of the surrender provisions of the *Indian Act*:

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. [*Guerin*, at para 100]

[42] The court then went on to characterize the fiduciary obligation of the federal Crown in managing Indian lands it controlled for the benefit of a Band:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> …

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.
>
> Section 18(1) of the Indian Act confers upon the Crown a broad discretion in dealing with surrendered land. In the present case, the document of surrender, set out in part earlier in these reasons, by which the Musqueam Band surrendered the land at issue, confirms this discretion in the clause conveying the land to the Crown "in trust to lease ... upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf. [*Guerin*, at paras 83, 104-105]

[43] In *Blueberry*, the Supreme Court of Canada confirmed this equitable approach and further described the nature of the Crown's protective fiduciary obligations.

3. Federal Court of Canada, Trial Division: *Apsassin*

[44] As already observed, the trial focused on the validity of Canada's dealings with the Montney Reserve, including surface and subsurface rights. Although the Bands originally claimed declaratory relief in respect of the Replacement Reserves, that claim was withdrawn before the commencement of trial.

[45] It was a complicated trial, taking 10 weeks and involving the presentation of hundreds of documents, lengthy opening statements, the introduction of extensive amounts of evidence, lengthy videotaped commission evidence, time-consuming procedural questions and five days of oral submissions. Because the Supreme Court of Canada over-ruled the trial court's conclusions, I will only provide a contextual overview of the questions considered and decided. More important to the current proceeding are certain portions of the trial judge's findings of fact, some of which were adopted by the Supreme Court of Canada. The Respondent in the present

proceeding submitted that the trial judge's findings were "still persuasive and, therefore, should not be ignored" (Respondent's Written Submissions, at para 30), irrespective of the conclusions of other courts and the Tribunal.

[46] The trial judge summarized the Plaintiffs' claims and the nature of their allegations as follows:

1. That between 1916 and 1945 the defendant was guilty of several acts and omissions which constituted negligence and breaches of its fiduciary obligations towards them, in allowing unauthorized use of lands in which the plaintiffs had an interest and improper regulation of land use by the Province of B.C.

2. That the 1945 surrender of I.R. 172 was void or, in the alternative, voidable.

3. That by various acts and omissions, the defendant acted both in breach of a fiduciary relationship and also fraudulently in securing the consent of the Band to the 1945 surrender and in accepting the surrender.

4. That the defendant's acceptance of the 1945 surrender was void because it did not conform to s. 51 of the **Indian Act**.

5. That the defendant's transfer in 1948 to the Director, the **Veterans Land Act** was void as it did not conform to s. 54 of the **Indian Act.**

6. That, if the 1948 transfer was valid, it had no force and effect or was void regarding the mineral rights under I.R. 172, on the grounds that those rights were never surrendered by the Band for sale nor did the surrender meet the requirements of s. 54 of the **Indian Act** and s. 41 of the **Dominion Lands Act**, 1908, Ch. 20, s. 1.

7. That in transferring the land in 1948 to the Director, the **Veterans Land Act** the defendant was guilty of numerous breaches of its fiduciary duties towards the Band and, in addition, acted fraudulently.

8. That since 1948 the defendant and the Director, the **Veterans Land Act** as such, acted both in breach of their fiduciary duties to the plaintiff and fraudulently in

respect of the mineral rights under I.R. 172.

9. That all transfers of mineral rights to the Director, the **Veterans Land Act** since 1952 were void as they did not meet the requirements of the **Indian Act**. [emphasis in original; *Apsassin*, at para 5]

[47] Addy J. took a chronological approach to analyzing these claims, addressing the nature of the Crown's fiduciary obligations first, then turning to allegations related to Treaty 8, the 1940 surrender of subsurface rights in the Montney Reserve, the 1916-1945 period, the 1945 surrender of the Montney Reserve, the 1948 transfer of the Montney Reserve to the DVLA, and the post-transfer period.

[48] In examining the nature of the Aboriginal-Crown relationship and the duties of the Crown, Addy J. found the majority opinion in *Guerin* to be binding.

> The Chief Justice, whose reasons were concurred in by three of the judges namely, Beetz, Chouinard and Lamer, JJ., took a somewhat different view of the relationship.
>
> The nature of the Indians' interest is that it is inalienable except upon surrender and places upon the Crown the equitable obligation, enforceable at law, to deal with the land for the benefit of the Indians. They agreed with Le Dain, J., who had delivered the judgment in that case on behalf of the Federal Court of Appeal, that the Crown does not hold land in trust for the Indians after surrender. They did not agree that, at the time of surrender, the Crown's obligation crystalized into a trust either express or implied. They felt that upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the res of the trust nor is there a constructive trust created by the surrender. The Crown must however hold the surrendered land for the use and benefit of the surrendering Band and that obligation is "subject to principles very similar to those which govern the law of trusts concerning for example, the measure of damages for breach". They also stated that, although the relationship does bear some similarity to an agency, it does not constitute an agency at law, as the Crown's authority to act is not based on contract and the band is not a party to the ultimate disposal of the land, which would be the case if there were an agency relationship.
>
> …
>
> I feel that the views expressed by the Chief Justice and the three Justices who concurred, are binding upon me and also appear to be the most plausible. This approach has since been followed by Urie, J., in the appeal of **Kruger et al. v. The Queen**, reported in [1976] 1 F.C. 3; 58 N.R. 241 (F.C.A.), at 257 paras. 52 and 53 N.R.. With the exception of any special obligations which might be

> created by treaty, there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender nor, a fortiori, is there any remaining after the surrendered lands have been transferred and disposed of subsequently. The duty from that moment attaches to the proceeds of disposition. There might indeed exist a moral, social or political obligation to take special care of the Indians and to protect them (especially those Bands who are not advanced educationally, socially or politically) from the selfishness, cupidity, cunning, stratagems and trickery of the white man. That type of political obligation, unenforceable at law, which the Federal Court of Appeal in the **Guerin** case (supra) felt should apply to the Crown following surrender (which concept was, of course, rejected by the Supreme Court), would be applicable previous to surrender. This legal issue is of some importance in the present case since counsel for the plaintiffs argued that, previous to the surrender and also following final disposition of the lands the Crown was in breach of certain alleged fiduciary duties such as the duty to take action to prevent some white farmers from grazing cattle on certain parts of the reserve. [emphasis in original; *Apsassin*, at paras 46, 47 and 51]

[49] Addy J. therefore concluded that the Crown had a fiduciary duty to the Bands over the Montney Reserve once it was surrendered and until it was transferred to the DVLA in 1948. While in retrospect, his reading of the majority opinion in *Guerin* was narrow, it was appropriate to the development of the law at the time. In the end, after reviewing the evidence, Addy J. found that there had been no breach of fiduciary duty because the Crown could not "reasonably be expected to have anticipated at any time during 1948 or previously that there would be any real value" in the mineral rights or "any reasonably foreseeable advantage in retaining them" (*Apsassin*, at para 81).

[50] Then, turning to an analysis of Treaty 8, the trial judge addressed the Bands' claim that because it was entitled to the full acreage of land allotted to it under the Treaty, the Replacement Reserves ought to have been the same acreage as the Montney Reserve. He dismissed this on the face of the Treaty and on the basis of the contemporaneous reports of Treaty Commissioners, finding that "once the Crown had laid aside as a reserve the required amount of land, the obligation of the Crown pursuant to the **Treaty** had been fulfilled insofar as reserve land is concerned" (emphasis in original; *Apsassin*, at para 86).

[51] On the matter of the 1940 and 1945 surrenders, Addy J. addressed the Bands' argument that the 1945 surrender could not have included mineral rights because they had already been surrendered in 1940 by a valid surrender process. He reasoned that the mineral rights surrendered in 1940 were still capable of surrender in 1945 because they constituted a "right in a part of the

whole reserve" and were not severed from the Reserve upon the earlier surrender (at para 102). The 1945 surrender had been validly sought and obtained in accordance with the provisions of the *Indian Act*, and without explicit exclusion of subsurface rights (at para 120). In the ensuing appeal, the Supreme Court of Canada split on its characterization of the legal nature and effect of the 1945 surrender. The court also dealt with certain portions of the trial judge's findings of fact.

[52] Addy J. then dismissed allegations relating to Canada's alleged failure to regulate and prevent unauthorized uses of the land between 1916-1945, finding they were without foundation because the Crown had no duty to police the lands (at para 106).

[53] He then turned his attention to the DIA's 1948 transfer of the surrendered lands to the DVLA. He ruled that the Crown had acted within its rights under the *Indian Act* and found that there had not been a breach of fiduciary duty because the Crown could not foresee the future value of the mineral rights. Furthermore, the Crown's fiduciary duty to the Band ended once the purchase price was paid and the lands conveyed. The DVLA did not owe the Band a fiduciary obligation because of the nature and effect of its underlying legislation (at paras 175-194).

[54] Addy J. then considered "Alleged Breaches Since 1948". Before the commencement of the trial, Blueberry had dropped its claim for declaratory relief with respect to subsurface rights in the Replacement Reserves. However, it did raise the question of the Replacement Reserves tangentially, arguing that the Crown had promised to acquire the new reserves at a location outside the area of future agricultural settlement, and that they were to be set apart *before* the Montney Reserve was sold. Addy J. found no evidence of the former and no damage flowing from any breach of the latter. Although the question was not before the court, he then went on to consider the issue of entitlement to mineral rights in the Replacement Reserves:

> The plaintiffs also complained that they did not obtain mineral rights to the replacement reserves. Treaty lands normally carried mineral rights, since those rights had been held by the Crown in Right of Canada in the first place. This did not apply to the replacement reserves after the mineral rights had been transferred to the province. Unlike I.R. 172, the replacement reserves were merely reserves obtained for the benefit of the plaintiffs under the provisions of the **Indian Act** and in pursuance of the conditions of the 1945 surrender of I.R. 172, and were not treaty reserves. It turned out that the Department could not, in view of the general policy of the Provincial Government regarding reservation of all mineral rights, obtain title to those rights for the benefit of the Indians. The Department was apparently not aware of this policy nor of the reservation of

> rights until some time later when, in error, some of its officials indicated a readiness to grant an exploration licence on the replacement reserves to an oil company. Furthermore, although the defendant, had it obtained mineral rights in the replacement reserves, would undoubtedly have considered them as forming an integral part of the reserve, there is a lack of evidence that the defendant, as a condition of the 1945 surrender, undertook in any way to obtain mineral rights in the replacement reserves. There is also evidence which might tend to indicate the contrary. Before being chosen the areas were considered by both parties merely from the standpoint of their suitability for habitation, their proximity to the hunting, fishing and trapping grounds of the Indians, their distance from white settlements in the vicinity and the possible future development of the lands for agricultural or cattle farming by the Indians. There is no evidence of any thought whatsoever having been given to mineral rights under the new reserves. [emphasis in original; *Apsassin*, at para 199]

[55] In an interlocutory application in the present case, Smith J. of this Tribunal found that Addy J.'s observations were o*biter*. Nonetheless, the Respondent seeks to rely on this passage in three ways.

[56] Firstly, it submits that, as Addy J. observed, the Replacement Reserves are not treaty reserves. The Montney Reserve had been set-aside in fulfillment of Canada's obligation under Treaty 8 from lands owned by the federal Crown, and in which the federal Crown had also owned the mineral rights. When the Montney Reserve was sold (with its subsurface rights) and new reserves were to be created from provincial lands, B.C. had no obligation to transfer subsurface rights in the Replacement Reserves to Canada, and Canada could not require it to do so. Therefore, Canada could not be duty bound to do what it could not control or obtain.

[57] Secondly, the Respondent relies on the passage to demonstrate that the purpose of acquiring the Replacement Reserves was not related to mineral rights, but rather to enabling the Band to hunt and trap. That purpose having been achieved, there was no breach of fiduciary duty. Finally, the Respondent seeks to show that neither party anticipated or expected that the Replacement Reserves would include subsurface rights, and cites the absence of evidence of an undertaking to do so (itself an uncontested fact) as probative of those expectations. I will deal with these arguments later.

[58] Finally, Addy J. found that the Crown had breached its fiduciary duty in one respect, namely: it had failed to obtain a full and fair price from the DVLA for the lands sold. He concluded that the DIA and the DVLA had conflicting interests with respect to the price to be

paid for the Reserve and "there rested an onerous fiduciary duty upon the Department of Indian Affairs to ensure that all reasonable efforts were made to obtain the best price possible for the land at the time of sale" (at para 184). The Crown had failed to demonstrate that the $70,000.00 paid was fair, and had thus breached one of its fiduciary obligations. However, because more than 30 years had passed between the time of the breach and initiation of the Bands' action, the limitation period had expired under the prevailing *B.C. Limitations Act*, with the result that the cause of action was "extinguished" (at para 216).

[59] The Bands appealed unsuccessfully to the Federal Court of Appeal. However, they were successful in their appeal to the Supreme Court of Canada.

4. The Supreme Court of Canada: *Blueberry*

a) Overview

[60] The Supreme Court of Canada was unanimous in its conclusion. However, that conclusion was developed in two opinions following very different paths of analysis. Gonthier J. (La Forest, L'Heureux-Dubé, and Sopinka JJ. concurring) wrote for the majority, while McLachlin J. (as she then was) (Cory and Major JJ. concurring) delivered the opinion of the minority. Both opinions are important because they agree on most of the facts, as well as the nature and application of the equitable principles that rendered the unanimous overall result. The contrasting analytical frameworks of the opinions are instructive of the path to be followed in the current case.

b) Minority Opinion

[61] McLachlin J. started with the usual review of the facts. She then dealt with issues concerning the surrender of surface rights in the Montney Reserve. In the present case, there is no issue with respect to surface rights, so this part of the decision does not have great bearing on the questions before the Tribunal and will only be reviewed in a summary fashion, to provide context, including in respect of the trial judge's findings.

[62] Firstly, McLachlin J. reviewed what had taken place up to the end of the surrender meeting, and concluded that the Crown had not breached a fiduciary duty in respect of surface rights prior to the surrender (at paras 32-40). In particular, she reaffirmed the purpose of the

surrender provisions of the *Indian Act*, as established in *Guerin:*

> The first issue is whether the Indian Act imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this question is found in Guerin v The Queen, [1984] 2 SCR 335, where the majority of this Court, per Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains. [*Blueberry*, at para 33]

[63] After citing Dickson J.'s statement (see paragraph 39 above), she stated:

> In short, the Crown's obligation was limited to preventing exploitative bargains. [*Blueberry*, at para 35]

[64] She then cited Addy J.'s following factual findings with approval:

> The evidence supports the view that the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. It does not support the contention that the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown, as attested by the following findings of Addy J. (at pp. 66-67 F.C.):
>
> 1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
>
> 2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;
>
> 3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
>
> 4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
>
> 5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;
>
> 6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender;
>
> 7. That, although they would not have understood and probably would have been incapable for understanding the precise nature of the legal interest

> they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their tapping lines to be purchased from the proceeds;
>
> 8. That the said alternate sites had already been chosen by them, after mature consideration. [*Blueberry*, at para 39]

[65] It is clear that McLachlin J.'s approval of these facts was limited to her discussion of fiduciary obligation in the context of surface rights, because she concluded that "…the Bands have not established breach of fiduciary duty with respect to the sale of the *surface rights*" (emphasis added; *id.*, at para 60). Later in her Reasons, she considered subsurface rights and held that these findings were *legal* conclusions not based on the evidence.

[66] Continuing in the context of surface rights, McLachlin J. next reviewed the Bands' complaints that the surrender process mandated under the *Indian Act* had not been complied with (at paras 41-44). She concluded that while there had been a technical breach in respect of the certification of the surrender, it had not invalidated the surrender because the sale of the Reserve was in compliance with the Band's wishes. She then considered whether there had been a post-surrender breach of fiduciary duty with regard to the surface rights because the DIA had sold the Reserve, rather than lease it according to established Departmental policy so that future generations might enjoy the land. She concluded that in all of the circumstances the DIA had properly considered all of the options, in particular the Band's need for funds to purchase alternate lands that would support its traditional lifestyle, as well as a source of revenue-generating capital. The Band had made an informed choice in approving a final disposition of surface rights because it appreciated it would never again have use of the Reserve and that it would receive more appropriate alternative lands. Its interests and wishes had been given "utmost consideration throughout" (at para 51).

[67] McLachlin J. then determined that while Canada was in a potential conflict of interest position (because the DIA had sold the Montney Reserve to another federal agency), it had provided acceptable evidence at trial that negotiations had been conducted at arm's length and that the ultimate sale price had been within the range of appraisals obtained. This was enough to resolve the issue when the Bands failed to rebut the evidence (at paras 52-56). Also, Canada was not in breach of a fiduciary duty with respect to surface rights by failing to cancel the sale

because the members of the Band lived in great poverty and ill-health between 1945 and 1961. The Band's impoverished circumstances were not related to the possession of the Montney Reserve, which the Band did not use in any event (at paras 57-59). Therefore, McLachlin J. concluded "…that the Bands have not established breach of fiduciary duty with respect to the sale of the *surface rights*" (emphasis added; at para 60).

[68] McLachlin J. then turned her attention to the question of subsurface rights. She summarized the details of the 1940 surrender of mineral rights "for lease" and their actual leasing for $1,800 (at para 61). She then observed that in 1948 "by means which to this day remain the subject of debate" the same mineral rights were transferred to the DVLA with the result that veterans benefited from the discovery of oil and gas. She then made the following finding of fact:

> To this résumé must be added two additional uncontested facts. First, at the time the mineral rights passed to the DVLA, and hence to the veterans, the Indians were unsophisticated and may not have fully understood the concept of different interests in land and how they might be lost. Second, they were never advised of the transfer of the mineral rights to the DVLA. They discovered it only in 1977, when an employee of the DIA brought to their attention that oil and gas had been discovered on their former lands and queried how the mineral rights had come to be transferred from the Band to the veterans. [*Blueberry*, at para 62]

[69] With these facts in mind, McLachlin J. embarked on an analysis based on common law principles of property and on an interpretation of certain provisions of the *Indian Act* (at paras 65-79). She observed that under sections 50-54 of the *Indian Act*, only a reserve or a portion of a reserve could be surrendered. Section 2(j) of the *Indian Act* defined a "reserve" as follows:

> (j) "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

[70] Section 2(*e*) of the *Indian Act* provided that "any reserve or portion of a reserve" surrendered to the Crown became "Indian lands". Thus the subsurface rights surrendered by the Band in 1940 and held by the Crown in trust were "Indian lands". Those subsurface rights were no longer a "reserve" and were not available for surrender again.

[71] She also held that based on "plain English", the wording of the *Indian Act*, the policy of

common conveyancing law and Departmental practice, surface and subsurface rights were divisible, and could be surrendered (or otherwise dealt with) separately. The general wording of the 1945 surrender did not have the effect of revoking the earlier surrender of subsurface rights because the *Indian Act* did not provide for "re-surrender". By the Department's established practice, it was necessary for a surrender to be revoked by federal order-in-council before the interest could be surrendered again. That had not been done with regard to the 1940 surrender of the subsurface rights in the Montney Reserve.

[72] In the course of this part of her Reasons, McLachlin J. expressed her disagreement with Gonthier J.'s intention-based analysis, which she criticized for ignoring the presence and effect of the *Indian Act* and for being unsupported by the evidence (at para 81). She also disagreed with Addy J.'s conclusion that by approving the 1945 surrender the Band intended to give up *all* its rights in the Montney Reserve (at para 85). She characterized Addy J.'s finding as based on his reading of the 1945 surrender document rather than on the evidence presented at trial (at para 86). In reaching her conclusion, however, she accepted the trial judge's finding that there was no mention or any consideration of subsurface rights at the 1945 surrender meeting. She also accepted as fact (Gonthier J. did not disagree) that the Band was promised replacement lands at that meeting, but that the Replacement Reserves ultimately purchased did not include subsurface rights:

> It follows that the finding of the trial judge that the Band intended to give up all rights in I.R. 172 forever is a legal finding based on his reading of the wording of the 1945 surrender rather than a finding of fact based on the evidence presented at trial. In fact the only witness whose oral testimony with respect to the 1945 surrender was accepted by the trial judge testified: "No mention of mineral rights were made at the meeting" (p. 201 F.T.R.). Likewise, the notes of the Indian agent in Fort St. John, Galibois, indicate that no mention was made of mineral rights. At page 184 F.T.R., the trial judge states that "from and including the surrender in 1945 ... mineral rights were never mentioned or considered either one way or the other". What the evidence does establish is that the Band was promised replacement reserves at the 1945 surrender meeting. It also establishes that the replacement reserves purchased for the Band did not include mineral rights.
>
> While the reasons of my colleague Gonthier J. claim to reflect the intention of the Band, the only evidence on the record of an intention to vary the terms under which the Crown held the mineral rights is that they were not mentioned either at the meeting at which assent was given to the 1945 surrender nor in the 1945 surrender document. With respect, this constitutes a weak

> evidentiary basis on which to establish an intention which would have the effect of revoking or varying an explicit surrender on different terms to which full and informed consent was given. In fact, later in his reasons, my colleague accepts that in 1945 the Crown did not receive a clear mandate from the Band to sell the mineral rights. [*Blueberry*, at paras 86-87]

[73] It was also clear to McLachlin J. that Canada had transferred the Montney Reserve's subsurface rights to the DVLA even though it was the DIA's established practice and policy at the time to reserve them. Moreover, the evidence supported a finding that Canada appreciated the separate potential value of subsurface rights in Dominion and reserve lands, and that it had considerable experience in dealing with subsurface rights, including through established regulations under the *Indian Act*. Under these circumstances, McLachlin J. concluded that the Crown had breached its fiduciary duty:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. [*Blueberry*, at para 104]

[74] McLachlin J. next considered whether Canada had a fiduciary obligation to take corrective measures once it discovered that it had "inadvertently" transferred the Reserve's subsurface rights to the Province. She observed that section 64 of the Indian Act provided that Canada could cancel a sale of Indian lands made in error:

> 64. If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made. [*Blueberry*, at para 112]

[75] She held that "inadvertence" amounted to error or mistake within the meaning of section 64 of the *Indian Act* (at para 113). Where the fiduciary had a corrective power, it was under a duty to use its power to correct the erroneous transfer of subsurface rights in the Montney Reserve. The transfer could have been revoked, especially as it had been from one federal entity to another. Canada had thus committed a second breach of fiduciary duty by failing to use its

corrective powers (at para 118). McLachlin J. explained the duty as follows:

> In my view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians. The fiduciary duty associated with the administration of Indian lands may have terminated with the sale of the lands in 1948. However, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64. That section gave the DIA the power to revoke erroneous grants of land, even as against bona fide purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: Frame v. Smith, supra, per Wilson J.; and Hodgkinson v. Simms, supra. Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band's minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.
>
> The DIA's duty was the usual duty of a fiduciary to act with reasonable diligence with respect to the Indians' interest. Reasonable diligence required that the DIA move to correct the erroneous transfer when it came into possession of facts suggesting error and the potential value of the minerals that it had erroneously transferred. [*Blueberry*, at paras 115-116]

[76] Finally, McLachlin J. considered whether the Bands' claim was barred by British Columbia's 30-year statutory limitation. She concluded that the clock had started running on August 9, 1949, the date on which the DIA "incontrovertibly" knew of the potential value of the mineral rights in the Montney Reserve and confirmed their transfer to the DVLA (at para 117). At that time, 6.75 sections of the 31 sections transferred remained in the DVLA's possession. The rest had been sold to veterans or oil companies. Upon analysis of the prevailing legislation and applying the principle of discoverability, McLachlin J. determined that the claim was not limited with regard to the 6.75 sections remaining with the DVLA after August 9, 1949.

c) Majority Opinion

[77] Gonthier J. agreed with virtually all of McLachlin J.'s analysis and conclusions, except in respect of the transfer of subsurface rights in the Montney Reserve. He disagreed that the 1940 surrender of the subsurface rights operated to prevent their surrender in 1945. After describing the competing positions on whether the 1945 surrender had been effective in transferring both

surface and subsurface rights (at paras 2-5), he concluded that an analysis framed in technical common law principles of property law were not appropriate in a trust-based situation and that evaluation of intention was the best approach:

> In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is sui generis, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members' intention should be given legal effect.
>
> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the sui generis nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings. [*Blueberry*, at paras 6-7]

[78] Gonthier J. found that the Band had intended to transfer all its rights in the Reserve to the Crown in trust:

> In applying this approach in the circumstances of this case, one must have regard to the factual findings of the trial judge, Addy J. Three are particularly relevant in determining the Band members' intention when they agreed to the surrender of I.R. 172 in 1945:
>
> > 1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
> >
> > . . .
> >
> > 6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender;

> 7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds; [Emphasis added.] ([1988] 3 F.C. 20, at pp. 66-67.)

> The Band understood that by agreeing to the 1945 surrender, they would be ransferring all their rights in I.R. 172 to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. The sale or lease of I.R. 172 by the Crown would provide the funds necessary for the Band to purchase alternate reserve sites better suited to their traditional hunting and gathering activities. The Band neither expected nor intended to hold rights over I.R. 172 once the 1945 surrender was completed. This was entirely appropriate, as my colleague McLachlin J. points out, because I.R. 172 was virtually useless to the Band at the time. [emphasis added; *Blueberry*, at para 9]

[79] The factual findings referred to in this quote were from the same group of findings cited and approved by McLachlin J. in respect of the surface rights in the Montney Reserve (at para 39; and as discussed at paragraphs 64 and 65 above). Like McLachlin J., Gonthier J.'s recognition of these factual findings was also limited, and in his case, accepted only in respect of assessing the Band's intention.

[80] Gonthier J. sidestepped the common law legal debate of the effect of the *Indian Act* on the 1940 and 1945 surrenders by explaining the transaction in terms of equity law. He found (at para 12) that the 1945 dealings were a variation of a pre-existing trust in Indian lands, whereby the 1945 surrender (also trust-like) subsumed the earlier 1940 surrender of subsurface rights. He observed that this analysis was not inconsistent with *Guerin*, where it was held that the relationship between Crown and Indians was *sui generis* trust-like.

[81] Having accepted the surrender of the surface and sub-surface rights in the Montney Reserve, the Crown was under a fiduciary obligation to exercise its discretion to sell or lease in the Band's best interest, as the words of the surrender had expressed. Gonthier J. observed that the Crown's "long-standing policy, pre-dating the 1945 surrender" was to reserve out mineral rights "for the benefit of aboriginal peoples…precisely because reserving mineral rights was thought to be "conducive to the welfare" of aboriginal peoples in all cases" (at para 18). The 1945 surrender authorized the Crown to "sell or lease" the Reserve, so that the Crown had carte

blanche to do either. However, during negotiations between Canada and the Band leading up to the 1945 surrender, there had been no specific discussion of selling the mineral rights. Therefore, there was no clear authorization from the Band justifying Canada's departure from its long-standing policy of reserving subsurface rights for the benefit of the Band when surface rights were sold. Under these circumstances, Gonthier J. concluded that Canada was under a fiduciary duty to continue the leasing arrangement established by the 1940 surrender. The 1945 sale of the mineral rights was a breach of this fiduciary duty (at para 19).

[82] He agreed with McLachlin J.'s conclusions on the question of time limitations. He also agreed with her assessment of the duty to correct the error once discovered:

> As a fiduciary, the DIA was required to act with reasonable diligence. In my view, a reasonable person in the DIA's position would have realized by August 9, 1949 that an error had occurred, and would have exercised the s. 64 power to correct the error, reacquire the mineral rights, and effect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA's fiduciary duty to deal with I.R. 172 according to the best interests of the Band. [*Blueberry*, at para 22]

[83] Accordingly, Gonthier J. allowed the appeal in the terms stated by McLachlin J. (at para 24). He remitted the action back to the Federal Court, Trial Division for assessment of damages, where it was eventually settled by payment to the Bands of $147 million.

5. Interlocutory Application: Was the Present Claim Barred by *Res Judicata* and an Executed Release?

[84] In the early stages of the current proceeding, the Respondent applied to strike the Claims on the basis that they were *res judicata* by virtue of the findings in *Apsassin* and *Blueberry* and as a result of a release signed when that case was finally settled. Smith J. dismissed the application in its entirety by written Reasons issued February 20, 2014 *(Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2).

[85] Smith J. observed that the *Apsassin* claim focused on the loss of subsurface rights in the Montney Reserve. While the original statement of claim had included a claim for declaratory relief in the Replacement Reserves, it had been amended to withdraw that claim before the commencement of trial. The amended statement of claim did not allege a breach of fiduciary duty for failure to obtain subsurface rights in the Replacement Reserves, or to claim damages for

loss of subsurface rights in those Reserves. The legal effect was that there had been no ruling on these questions, which were therefore not barred from being the subject of future proceedings (at paras 69, 70-71).

[86] Smith J. also found that the purchase of the Replacement Reserves had involved a number of further separate and distinct steps subsequent to the 1945 surrender of the Montney Reserve, none of which were material to whether the surrender had been valid or the question of possible breaches of fiduciary duty considered in *Apsassin*. Therefore, he concluded that the alleged breaches in the purchase transaction were separate and distinct from the causes of action adjudicated upon in *Apsassin* (at paras 76-80). He also noted that the material facts relating to any calculation of damages would also be separate and distinct from those in the *Apsassin/Blueberry* litigation. Damages here, if any, would relate to the Replacement Reserves only, whereas the Supreme Court of Canada had only directed the Parties to address compensation in relation to the Montney Reserve (at para 81). While there might be a considerable overlapping of facts, that did not result in the material facts in each piece of litigation being the same. Overlapping facts were contextual background to the separate and distinct claims made in each case.

[87] Smith J. further concluded that the present Claim was not asking the Tribunal to do something inconsistent with an earlier decision. Nor was the current claim a collateral attack upon the *Apsassin/Blueberry* decisions. Allowing or disallowing the current Claims would not be an affront to the integrity of the administration of justice (at paras 89-92). He agreed with the Claimants that the *Apsassin* litigation was at the time already long, complex and expensive. It was not evident or reasonable at the time that the present claims ought to have been advanced with the *Apsassin* claim, or that it would have been practical or efficient to do so. Furthermore, on the basis of the available evidence, the Crown was not exposed to possible double jeopardy. In short, Smith J. concluded that the Crown had not satisfied the onus of proof upon it to establish that it was plain and evident that *res judicata* should bar the present Claim (at paras 89-98). Nor was the present Claim an abuse of process (at paras 99-106).

[88] In dealing with the question of *res judicata*, Smith J. also considered the Crown's arguments in respect of Addy J.'s earlier quoted comments with respect to the Replacement

Reserves (see paragraph 54 above). He concluded (at para 73) that the trial judge's observations were *obiter dicta* in all but one respect:

> The material issue in the *Apsassin* litigation was whether the validity of the I.R. 172 surrender was affected by any promises made by Canada. At the Federal Court, Addy J addressed the Replacement Reserves to discuss the validity of the surrender, and whether the promises made at the surrender had in fact been fulfilled (*Apsassin* FCTD, *supra* at paras 141-149). Addy J found insufficient evidence to confirm an undertaking regarding future reserves and mineral rights in them, thus rejecting the argument that such promises tended to invalidate the surrender of I.R. 172. Beyond that point, in my view the comments on mineral rights in Replacement Reserves at the Federal Court were *obiter dicta*. [emphasis in original]

[89] Finally, Smith J. dealt with the effect of the release executed by the Parties in final resolution of *Apsassin*. After a detailed review of the wording and applicable principles of interpretation, he determined that the release was intended to provide finality to the *Apsassin* litigation, but no more than that (at paras 107-152).

6. Later Supreme Court of Canada of the *Blueberry* Principles

[90] The Supreme Court of Canada's division of opinion in the *Apsassin* appeal may appear to have complicated its subsequent application. It does not seem, however, that the Court was divided on the equitable principles articulated, or even on the facts. The decisions differed mainly in their analytical approach, which bears upon how the Tribunal should deal with the present Claim. The task is made easier by later pronouncements of the Supreme Court of Canada.

[91] Writing for a unanimous court in *Wewaykum*, Binnie J. reaffirmed essential elements in *Blueberry*.

[92] He reaffirmed that the fundamental purpose of the Crown's fiduciary duty to First Nations was to protect them from exploitative bargains. It was also a means of supervising the Crown as it administered the *Indian Act* and thereby impacted the lives of First Nations:

> The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.
>
> …

> This sui generis relationship had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in Royal Proclamation, 1763, R.S.C. 1985, App. II, No. 1, to the "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians"), but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in Guerin, supra, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." See also: Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, per Sopinka J., at pp. 599-600; Hodgkinson v. Simms, [1994] 3 S.C.R. 377, per La Forest J., at p. 406; Frame v. Smith, [1987] 2 S.C.R. 99, per Wilson J., dissenting, at pp. 135-36. Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown": R. v. Taylor (1981), 34 O.R. (2d) 360 (C.A.), per MacKinnon A.C.J.O., at p. 367, leave to appeal refused, [1981] 2 S.C.R. xi; Van der Peet, supra, per Lamer C.J., at para. 24; Marshall, supra, at paras. 49-51. [emphasis in original; Wewaykum, at paras 79-80]

[93] Binnie J. also recognized McLachlin J.'s standard of fiduciary care as she had expressed it in *Blueberry*:

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

[94] This quotation also speaks to the necessity of the Crown's respecting the wishes and decisions of the Band. The Crown cannot meet that duty or understand the Band's wishes and decisions unless it communicates and consults with the Band.

[95] The *Wewaykum* court reaffirmed the purpose of framing the relationship between Crown and First Nations in terms of equity, much like Gonthier J. had done in *Blueberry* (quoted above at paragraph 77), where he ruled that common law principles and technical legal requirements should not frustrate the Band's intentions, which were of utmost importance. Equity was a means of recognizing these intentions whereas the application of technical common law rules might not do so, or could otherwise achieve an unfair result. At paragraph 43 of *Wewaykum*, Binnie J. stated:

> Our Court has on several occasions emphasized that in dealing with the Indian interest in reserves, "we must ensure that form not trump substance" (*St. Mary's Indian Band v. Cranbrook* (City), [1997] 2 S.C.R. 657, at para. 16) or allow the true intention of the parties to be frustrated by "technical" rules embodied in the common law (*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development*), [1995] 4 S.C.R. 344, at para. 6). [emphasis in original]

[96] Texts on the law of equity describe the general purpose and policy of equity. John McGhee, *Snell's Equity*, 33rd ed (London: Sweet & Maxwell *("Snell's*) observes (at 3-4):

> In its most general sense, equity refers to a conception of justice that transcends the substantive and procedural rules of the positive law. Equity in this sense has been a feature of many legal systems from ancient times. It introduces an ethical element into the positive law by holding the parties to a more sensitive or exacting standard of justice than the rules of positive law would require of them.
>
> …
>
> Although the intervention of equity has often been justified by a special rationale of this kind, a distinctive feature of equity in all legal systems has been its secondary or supplementary nature. Equitable intervention presupposes the existence of primary rules of positive law. The effect of equity is to qualify the enforcement of the positive law to ensure a more complete standard of justice than the law itself would attain.
>
> To recognise the relevance of equity is not to say that the positive law is unjust or lacking in any immanent moral consent. Rather positive law and equity seek to attain complete justice by different means…But occasionally a case may arise where the generality of the rule leads to an unjust result. Here, equity intervenes and ensures that a more complete justice is done that is sensitive to the needs of the case. [footnote omitted]

[97] In the common law tradition, equitable doctrines were developed and practiced in the English Court of Chancery. In spite of the abolishment of that court, equitable principles have continued to exist and evolve in our law (*Snell's* at 4). The Supreme Court of Canada touched upon the general policy of equity in *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 22, [2006] 2 SCR 612 where it referred (with approval) to a passage from *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (6th) ed. 2001), at p. 6):

> As Spry puts it:

> . . . the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise. [p. 6]

[98] The Supreme Court of Canada has framed relations between the Crown and First Nations in terms of equity with a view to transcending the administrative complexities of the *Indian Act* and the application of ordinary common law rules that may render unjust results. This was done in order not to lose sight of the reason why the present legislative and administrative structure governing the relationship was created, namely, to acknowledge the interests of First Nations and to recognize the legitimacy of their wishes, decisions and intentions in the functioning of that structure. The legal equitable framework is an essential characteristic of the *Apsassin/Blueberry* family of cases and their successors.

7. The Fiduciary's Duty to Inform and Consult

[99] While common sense would suggest that a fiduciary must keep its beneficiary informed and consult on how the asset is being managed, the jurisprudence also supports the proposition.

[100] In *Guerin*, the obligation to inform and consult was stated although not explicitly identified as a specific duty. The inference was that the duty to consult flowed from the fiduciary's duty "of utmost loyalty to his principal":

> …When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal. [at para 111]

[101] In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 ["*Delgamuukw*"] Lamer CJ. discussed the duty to consult. Although the case involved a question of aboriginal title to lands not already part of a reserve, the Chief Justice determined that the duty to consult is part of the Crown's fiduciary obligation. At paragraph 168 he observed that the nature and scope of the fiduciary's obligation to consult depended on the circumstances:

> There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[102] In *Fairford First Nation v Canada (AG)* (1998), [1999] 2 FCR 48 at paras 226-227, [1999] 2 CNLR 60 (FCTD) Rothstein J. relied on this statement in *Delgamuukw* to conclude that "There is no doubt that in questions involving surrenders of reserve land, there is a duty of consultation on the Crown." He also concluded that the obligation to consult related not only to the improvidence of the transaction but also to the timeliness of the assessment of improvidence and resulting consultation. In other words, the Crown was required to assess improvidence, advise the Band, and consult with it in a timely fashion:

> Canada may have been liable for breach of a fiduciary duty if it had proceeded to ratify an improvident transaction. However, Canada is not free of fiduciary liability because it delayed in ratifying the transaction. That is because the delay is not related to the improvidence of the transaction. Canada seems to have been willing to go along with the agreement. The delay was attributable to confusion on the part of Canada as to how to proceed.
>
> The duty of a fiduciary relates to the discretion that is to be exercised. That must include assessing the merits of the agreement from the point of view of the Indian band. What Canada was required to do was to determine, in a timely manner, what, if anything, was improvident in the compensation agreement and advise the Fairford Band.

VI. ANALYSIS

1. Relevance of Factual Findings of Trial Court

[103] Before considering other issues, I would like to deal with the question of Addy J.'s finding of facts in *Apsassin*, which the Respondent submitted should be treated with respect. There is no question that Addy J. carefully considered the abundant evidence and complicated

legal issues before him in this evolving area of the law. However, I am only comfortable giving limited weight to his findings, especially his findings of fact.

[104] First of all, the Supreme Court of Canada overruled his conclusions on a number of fronts, while giving only limited approval on a few factual matters, as have been discussed. I am bound to accept the Supreme Court of Canada's findings, as I understand them. Legal conclusions are based on findings of fact. Sorting out what findings of fact are sound in the face of rejected legal conclusions would be a complicated and risky task with uncertain benefit.

[105] Secondly, I see no reason to question Smith J.'s findings on the interlocutory ruling in this proceeding. Addy J.'s focus in *Apsassin* was the surrender and disposition of the Montney Reserve. The Bands withdrew the claim for subsurface rights in the Replacement Reserves before the commencement of the trial, so that questions regarding the Replacement Reserves were not before the trial court. Smith J. concluded that Addy J.'s observations regarding the Replacement Reserves were *obiter dicta*, except in one respect.

[106] Finally, with all of the documentary evidence provided to the Tribunal, the Parties' agreement on the facts, and the conclusions of the Supreme Court of Canada, the Tribunal may safely make its own findings of fact. It is not necessary to rely on the trial judge.

2. Existence of a Fiduciary Duty: Party Positions and Evidence

[107] The Crown admits that it had a fiduciary duty to the Claimants, although on a much more limited basis than they suggest.

[108] Based on *Guerin and Blueberry*, the Claimants submit that the Crown's fiduciary obligations arose because it had interposed itself between the Band and B.C. with respect to negotiating the terms of acquiring the Replacement Reserves.

[109] The Claimants also submit that the Crown's fiduciary obligation arose by its assumption of discretionary control over a specific Aboriginal (cognizable) interest, namely the Replacement Reserves, and their acquisition.

[110] The Respondent takes a different position on the criteria necessary for the existence of a fiduciary duty between the Crown and Aboriginal peoples, arguing that more recent case law has

established two clear requirements. The position is succinctly stated at paragraph 98 of its Final Written Argument:

> In the Crown-Aboriginal context, a fiduciary duty arises where the Crown administers, in a trust-like way, lands or property in which Aboriginal peoples have a communal interest. The duty arises if two elements are present:
>
> (1) a specific or cognizable Aboriginal interest; and,
>
> (2) a Crown undertaking or assumption of discretionary control over that interest. [footnotes omitted]

[111] While the criterion of interposition remains a valid general characteristic of a fiduciary relationship, it is also now well-established law in the context of the Crown's relationship with First Nations that a fiduciary duty arises if there is: (1) a specific or cognizable Aboriginal interest, and; (2) a Crown undertaking of discretionary control over that interest (*Wewaykum* at paras 79-83; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18, [2004] 3 SCR 511). It also arises from a Crown promise if it meets the following conditions: "(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control" (*Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 50, [2013] 1 SCR 623 ["*Manitoba Métis*"]).

[112] The Respondent submits that for a variety of reasons it did not have control of subsurface rights in the Replacement Reserves and that it could never have had such control, discretionary or otherwise. Therefore, it could not be held responsible as a fiduciary for a legal interest over which it never had control, or any chance of control or acquisition. In these circumstances, the fiduciary duty on the Crown extended only to the surface rights and not to subsurface rights. I will deal with this later in these Reasons.

[113] I agree with the Respondent that the Band had no treaty, ancestral or other inherent right to the replacement lands as reserves. The Respondent distinguished the origins and types of reserve creation at the time. The Replacement Reserves were not reserve lands that Canada was obligated to set-aside under Treaty 8 or any other treaty. These were not lands for which the

Provincial and Federal Crowns had made a sufficiently defined commitment in order to provide the Band with a cognizable interest in the subsurface rights as discussed, for example, in *Canada v Kitselas First Nation*, 2014 FCA 150 at paras 53-54, [2014] 2 CNLR 6. Nor had the Band claimed or demonstrated ancestral community title, as considered in *Manitoba Métis* at paras 51-59. A fiduciary obligation is not founded on these features in this case.

[114] The Respondent went to considerable effort to demonstrate that British Columbia had a long-established policy of reserving minerals in all Provincial Crown lands, including those transferred to Canada for reserve creation or other aboriginal use. As a result, it argued that Canada had no control or opportunity of obtaining control of subsurface rights in the Replacement Reserves. Respondent's counsel outlined the history of reserve creation in British Columbia. Binnie J. outlined the same history briefly in *Wewaykum* (at paras 14-18). As he pointed out, when B.C. joined confederation Crown Lands in the Province were retained as provincial property, while management of First Nations' reserves including their creation and setting-aside, was a federal responsibility. The result was that neither level of government could unilaterally create a reserve. They were required to cooperate: the one to provide the land for reserve creation and the other to administer it. Unfortunately, there was little cooperation for the first 60 years. The result was a series of commissions that finally brought some resolution.

[115] Because the Montney Reserve had been part of the Peace River Block, in which the entire fee simple had been conveyed to Canada, the federal authority had been able to set aside both surface and subsurface rights for some Treaty 8 reserves, including the Montney Reserve. However, when Canada re-conveyed what was left of the Peace River Block back to B.C. in 1930, the Province resumed control of surface and subsurface rights. Both before and after 1930, Canada faced a period of difficulty in acquiring new lands from the Province to satisfy its reserve creation obligations, including under Treaty 8. As the Respondent pointed out, this was eventually resolved by the McKenna-McBride Agreement and the work of the subsequent Royal Commission from 1912-1916, the Ditchburn-Clark Review from 1920-23 and the Scott-Cathcart Agreement in 1929 (Respondent's Written Submissions, at para 35). Under the latter accord, the Province agreed to provide lands for reserve creation at a discounted price. This was given legislative effect in *An Act to Amend the "Land Act",* SBC 1931, c 33, s 5 and was carried forward in successor legislation, including the *Land Acts* of 1936, 1948 and 1960.

[116] All of these statutes provided for the sale of Crown lands according to classes of land with specified minimum prices for each class of land, and all subsurface rights were consistently reserved to the Province. The Minister was given discretion to reduce the price to not less than half of the otherwise mandated amounts, where the lands were sold to Canada "for the use of Indians". The 1948 *Land Act* applied to the Replacement Reserve transfers. The relevant provisions were as follows:

> **45.** Open or easily cleared lands suitable for cultivation and wild-hay meadow lands shall rank and be classified as first-class lands; all other lands that are capable of being brought under cultivation shall rank and be classified as second-class lands; lands that are not first or second class shall rank and be classified as third-class lands. Lands that contain milling-timber to the average extent of eight thousand feet to the acre west of the Cascade Mountains, and five thousand feet to the acre east of the Cascade Mountains, to each one hundred and sixty acres, shall rank and be classified as timber lands.
>
> **47**. The minimum price of first-class lands shall be five dollars per acre, that of second-class lands two dollars and fifty cents per acre; and that of third-class lands one dollar per acre; but the Minister may at his discretion increase the price of any lands above the said prices: Provided that in the case of any area of lands sold to the Crown in the right of the Dominion for the use of the Indians, the Minister may at his discretion reduce the price of those lands to not less than two dollars and fifty cents per acre for first-class lands and not less than one dollar and twenty-five cents per acre for second-class lands, and not less than fifty cents per acre for third-class lands.

[117] Sections 120 and 121 of the 1948 *Land Act* provided for the reservation of coal, petroleum and natural gas on Provincial Crown lands, and section 121 provided that all transfers of such lands would be according to Form 11. In addition to coal, petroleum and natural gas, Form 11 reserved all subsurface rights to the Province. It also reserved minerals situated on the surface of the land and gave broad access to the land in order to take the minerals. The relevant provision in Form 11 was as follows:

> Provided also that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting under Our or their authority, to enter into and upon any part of the said lands, and to raise and get thereout any minerals, precious or base, including coal, petroleum, and natural gas, which may be thereupon or thereunder situate, and to use and enjoy any and every part of the same land, and of the easements and privileges thereto belonging, for the purpose of such raising and getting, and every other purpose connected therewith, paying in respect of such raising, getting, and use reasonable compensation:

[118] Form 11 did not stop there. It also gave the Province the right to use or give a third party

broad water rights reasonably required for mining purposes (reasonable compensation again due) and the right (without compensation) to take gravel, sand, stone, lime, timber or other materials necessary to the construction, maintenance, or repair of road, bridges and other public works:

> Provided also that it shall be lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through, or under any parts of the hereditaments hereby granted as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation to the aforesaid heirs and assigns:
>
> Provided also that it shall be at all times lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take from or upon any part of the hereditaments hereby granted, without compensation, any gravel, sand, stone, lime, timber, or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works:

[119] To drive the point home, the Respondents referred to paragraph 100 of *Blueberry* where McLachlin J. characterized B.C. as one of an unspecified number of provinces that had adopted a policy of reserving mineral rights on all grants of provincial lands. The Respondent then referred to a number of transfers of B.C. Crown land to Canada around the relevant time and later for reserve creation and in which mineral rights were always reserved to the Province, including reserves created so that Canada could fulfill its Treaty 8 obligations (see CBD, Tabs 72.1, 73.1 through 73.5 and 104.1 through 104.8).

[120] The Claimants do not concede that such a policy existed, but submit that it had no impact on the existence or nature of Canada's fiduciary duty given its discretionary control over both the disposition of the Montney Reserve and the acquisition of the Replacement Reserves. The Claimants point out that the Band was powerless to act in its own interest in the acquisition of the Replacement Reserves. Only the federal Crown could act on its behalf. The Crown was the only party with discretionary control over the Band's interests in the Replacement Reserves and was therefore in a fiduciary relationship with the Band. I will deal further with this question in due course.

[121] It should be noted that the *1948 Land Act* gave the Lieutenant-Governor in Council discretion to transfer Crown lands to Canada free of restrictions. In other words, the Minister could have exercised a discretion to transfer both surface and subsurface rights in the Replacement Reserves to Canada in this or any other case:

> **66**(2) It shall be lawful for the Lieutenant-Governor in Council to transfer the administration, control, and benefit of Crown lands to His Majesty the King in the right of Canada, either forever or for a term of years, and either with or without consideration, and with and under such provisions, restrictions, and privileges as to the Lieutenant-Governor in Council may seem most advisable.

[122] However, there is no evidence that the discretion was ever exercised, and in the present case Canada made no such request. I conclude that both before and after the time in question, B.C. had a clear policy of reserving subsurface rights in all Provincial Crown lands, including when transferred to Canada for reserve creation purposes. That policy was reflected in the relevant provisions of successive *B.C. Land Acts*. It was also confirmed by B.C.'s actions in transfers of Provincial Crown lands both before and after the subject transaction, as demonstrated by the evidence. It could not be clearer.

[123] I also agree with the Respondent that there is no evidence of any discussion between British Columbia and Canada about acquiring the subsurface rights in the Replacement Reserves. There was no suggestion that British Columbia made any misrepresentation. Nor does it appear that B.C. deviated from its legislated policy of reserving subsurface rights in the conduct of this transaction. There is no allegation that B.C. did anything wrong or that it erred.

[124] Having reached this conclusion, and given the on-going history of conflict over reserve creation and provincial interests between Canada and B.C., it is all the more curious why Canada was not aware of the policy, or did not twig to it as the transaction unfolded. As the Claimants pointed out, Canada had many opportunities to do so. It is apparent from the agreed facts and supporting documentation that Canada failed to investigate title to the Replacement Reserves or to appreciate the effect of Form 11. It also failed to notice the wording of the B.C. Order-in-Council approving the transfer subject to reservations. Canada specifically conceded that it had made an error (see paragraph 34 above).

[125] Both opinions of the Supreme Court of Canada stated that Canada had a long-established policy of reserving subsurface rights on its own lands, including reserves. As McLachlin J. stated (*Blueberry*, at para 71), surface and subsurface rights are severable parts of a whole piece of land. Canada knew this and had considerable experience with it, as the fact and history of its own policy disclosed, and as the 1940 and 1945 surrenders of surface and subsurface rights in the Montney Reserve also demonstrated. The evidence also establishes that Canada's error went

further than its failure to investigate title. Canada actually believed it had acquired the subsurface rights in the Replacement Reserves because it sought and obtained the Band's surrender of those rights, which it then leased, accepted payment and issued an exploration permit for. Canada admitted that this was part of its error (see paragraph 34 above).

[126] It is also clear that the Claimants did not comprehend the legal distinctions in types of property interest. In *Blueberry*, the Supreme Court of Canada accepted that the Band did not understand the legal niceties of severability of surface and subsurface rights, and was probably unable to understand that legal concept. As I have noted, Gonthier J. made this finding (see paragraph 80 above) in the context of the Band's underlying intention in making the 1945 surrender. McLachlin J. accepted it (see paragraph 65 above) in the context of her analysis of the Crown's fiduciary obligation in respect of surface rights in the Montney Reserve. In reaching this conclusion, the court was not commenting on the acumen of the Band, but rather, recognized that Canadian property law concepts were foreign to the community, not to mention that they had not been raised at the surrender meeting.

[127] McLachlin J. also accepted that there had been no mention of mineral rights at all at the surrender meeting. This blanket finding is without distinction as between the Montney Reserve and replacement lands. It would be impossible for the Band to have been unable to understand the distinction between surface and subsurface rights in forming an intention with respect to surrendering surface rights in the Montney Reserve without the same being true of the Replacement Reserves. The surrender document and related orders-in-council were silent about there being an understanding that the surrender of the Montney Reserve was conditional on the acquisition of lands at a more favourable location, plus money. However, both sides accepted that this was the case, so there is no dispute on that point in this proceeding. There is no evidence that the distinction between surface and subsurface rights was ever discussed with the Band prior to acquisition of the Replacement Reserves or that it was ever a question for the DIA during the transaction.

[128] I agree with the Respondent that Canada had no control over acquiring the subsurface rights in the Replacement Reserves, and there is no evidence that it could have persuaded the Province to transfer the subsurface rights. However, given its experience and the conflicted

history of reserve creation in British Columbia, Canada ought to have been alert to the nature of title in the conduct of the transaction. Irrespective of these circumstances, Canada ought to have investigated the title as a normal conveyancing practice, even in 1950.

[129] The Respondent argues, however, that the Crown's error (which it does not concede as such) was of little consequence because the whole purpose of the transaction was not to acquire subsurface rights, and for this reason the question was not pertinent. The Respondent submits that it should not bear a fiduciary obligation for something that was not an expected part of the transaction and that it could not control or acquire in any event. Also, the fact that Canada may have mistakenly believed it had acquired subsurface rights in the Replacement Reserves does not create a fiduciary obligation to acquire them, or an understanding in that regard. I do not disagree with this latter proposition.

3. Scope of the Fiduciary Duty: Party Positions and Evidence

[130] The Respondent argues that there was no mutual understanding between the Band and Canada that Canada would obtain subsurface rights in the replacement lands or that they would be included.

[131] As already noted, there was no discussion at all about mineral rights, either with respect to the Montney Reserve or the Replacement Reserves. Smith J. (in the interlocutory proceeding) accepted this finding by Addy J. (in *Apsassin*) and held that it was not *obiter*. I agree, although the same conclusion results from the Supreme Court of Canada's finding that there was no discussion of subsurface rights between Canada and the Band at the time of the surrender.

a) Purpose of Replacement Reserves

[132] The Respondent argues forcefully that the purpose of obtaining the Replacement Reserves, and therefore also the underlying understanding between Canada and the Band, was location-driven. I do not disagree that location was a central issue, although I would add that the reason for finding a new location was the real heart of the matter. In *Blueberry*, the Supreme Court of Canada recognized that the Band understood that the sale of the Montney Reserve would generate the funds, as Gonthier J. put it (at para 9), to "purchase alternate reserve sites better suited to their traditional hunting and gathering activities", or as McLachlin J. put it (at

para 39) "would better suit its life of trapping and hunting."

[133] The Respondent submits that the terms under which the Montney Reserve was surrendered required Canada to:

1. Sell or lease the lands on terms Canada may deem most conducive to the welfare of the Band;

2. Deposit the surrender proceeds to the Bands credit in the usual way;

3. Acquire new reserves from the proceeds of the surrender upon which the Band could build cabins, grow gardens and put up hay to feed their horses during the winter. [Respondent's Written Submissions, at para 131]

[134] It was evident from the documents filed that trapping was an important part of the Band's life in the area it inhabited. For example, its trap lines and need for more trap lines were discussed in the documents at Tabs 42, 45 and 51 of the CBD. The importance of trapping to the Band's subsistence was also outlined there, and it was suggested that the Band needed more area for trap lines. There was also a suggestion that restocking of beaver would be undertaken in order to restore the species to the top producing area it had been for the Hudson Bay Company.

[135] The Parties' understanding of the purpose of the Replacement Reserves is demonstrated repeatedly in communications both before and during the conduct of the transaction, as exemplified in extracts from the following documents:

> a. Indian Agent Brown to Indian Affairs Branch on July 21, 1944: At the Treaty Meeting held here on the 19th inst. I discussed the matter of the sale of this Reserve with the Indians of the Fort St. John Band; and they are all agreed that they would consent to a cash sale to the Government for a sum the proceeds of which would net them $50 interest annually … They suggested that in addition to a cash sum for the sale of this Reserve they be granted another tract of land elsewhere, not necessarily for agricultural purposes, but that they might have a landed "stake" in the country which they might feel was their "home". [CBD at tab 42)
>
> b. Indian Agent Grew to the Superintendent of Reserves and Trusts on August 8, 1945: The Chief, Councillor and other members of the Band all said they were willing to surrender the land for sale or lease providing they would be supplied with land elsewhere on which they could build cabins, grow gardens & put up hay to feed their horses during the winter … These sites are located near

> to their registered trap lines and where they spend most of the summer months. They nearly all have cabins built at these locations & some of them do some gardening. They say they can put up enough hay at these places to winter their horses and that there is also sufficient summer grazing. [CBD at tab 43]
>
> c. Acting Director, Indian Affairs Branch to E.J. Paling, Secretary, Canadian Legion, Fort St. John Branch on October 5, 1945: We have just succeeded in obtaining a surrender of the Indian interest in this land, conditional, however, on our being able to secure for them from the province of British Columbia other lands in locations selected by the Ft. St. John (Beaver) Band and conveniently located to their traditional trapping grounds. [CBD at tab 51]

[136] I conclude that the Band was consistent and clear on the importance of obtaining alternate lands and cash, as well as why. Canada also clearly understood the Band's needs and undertook to fulfill them.

b) The Claimant's Understanding

[137] The Claimants take the position that there was an understanding between Canada and the Band that the Replacement Reserves were to include both the surface and subsurface rights. This was based in part on the fact that subsurface rights were expressly included in the definition of "reserve" in section 2(*j) the Indian Act* in force at the time of the surrender:

> "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

[138] The Claimants also submit that in Blueberry (at paras 9 and 10) Gonthier J. concluded that the Band's intention in the surrender of the Montney Reserve would have accorded with the above definition of "reserve" in the *Indian Act*:

> The Band understood that by agreeing to the 1945 surrender, they would be transferring all their rights in I.R. 172 to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. The sale or lease of I.R. 172 by the Crown would provide the funds necessary for the Band to purchase alternate reserve sites better suited to their traditional hunting and gathering activities. The Band neither expected nor intended to hold rights over I.R. 172 once the 1945 surrender was completed. This was entirely appropriate, as my colleague McLachlin J. points out, because I.R. 172 was virtually useless to the Band at the time.
>
> The Band's intention is evidenced by the terms of the 1945 surrender instrument, signed by Chief Succona, Joseph Apsassin and two councillors on

> behalf of the Band. This instrument states that the Band did "release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises ... composed of St. John Indian Reserve No. 172". Since this instrument effected the surrender of certain land forming a *"reserve", it is reasonable to conclude that the term "Reserve", as used in the surrender instrument, was intended to have the same meaning as the term "reserve" in the Indian Act. As I noted above, s. 2(j) of the Act defines "reserve" as an unsurrendered tract of land including the "minerals ... thereon or therein". Therefore, the 1945 surrender included the tract of land forming I.R. 172, the minerals in that tract of land, and the right to exploit those minerals. On this basis, I must respectfully disagree with McLachlin J.'s assertion that the surrender document was silent concerning the mineral rights*. [emphasis added]

[139] The Claimants reason that since the Band understood and intended that the Reserve to be surrendered (i.e. the Montney Reserve) included "the minerals in that tract of land, and the right to exploit those minerals", the parties would have equally understood that the Reserves that were to replace the surrendered Reserve would also include the minerals, unless expressly excluded. The Claimants bolster this argument with the proposition that a transfer of public land is presumed to include subsurface rights (except precious metals), unless expressly excluded. There was no discussion of subsurface rights at the surrender meeting nor evidence of any other discussion of or agreement to exclude subsurface rights from the contemplated transfer. Therefore, in keeping with the applicable legal presumptions, the parties would have understood that the transfer of replacement lands should include the subsurface rights. The Claimants argue that this understanding was further supported by Canada's post-surrender conduct of obtaining a surrender of subsurface rights in the Replacement Reserves and leasing them to Halfway.

[140] Needless to say, the Respondents do not agree. Noting that the word "reserve" was also often used in the correspondence surrounding the negotiation and transfer of the Montney Reserve (e.g. CBD at tab 63), the Respondents argue that it is too much to infer that any use of that term by the Parties during the transaction imported or assumed the technical definition of "reserve" in the *Indian Act*. The Respondents submit that use of the word was shorthand for the geographic site, i.e. IR 172 or the Montney Reserve. Furthermore, it would be difficult to presume that Band members imported the *Indian Act* definition into their understanding of "reserve" in communications about the Montney Reserve or replacement lands. The Crown also questioned the literacy of Band members and their proficiency in the English language.

[141] I am not persuaded that Canada's representatives involved in the negotiations and subsequent transactions carried the *Indian Act* definition of "reserve" imprinted in their minds so that the statutory definition was the default meaning every time the word was used. That is too much to ask or presume without convincing evidence in support. I agree with the Respondent that use of the word in written and spoken communications was more likely a convenient way of describing a physical piece of land or a location as it was by definition under the Indian Act. As for Band members, I think it highly unlikely they had any awareness of the statutory definition. Why would they under the circumstances? The Claimants' proposition is simply too speculative.

[142] I do not think this conclusion is at odds with Gonthier J.'s statement just quoted. In those passages, Gonthier J. was referring to the specific surrender instrument in relation to the Montney Reserve, where both surface and subsurface rights were included because the Reserve had been created out of Dominion land. If, as Gonthier J. found, the Parties intended all rights in the Reserve to be surrendered, including the Band's understanding that it would never have any future right to use the Reserve, then both surface and subsurface rights would necessarily be included. Given the formal legal context of documents and procedures, Canada must at least be taken to have been legally aware of the definition and the consequence of surrendering all interest in the Reserve, whether it actually put its mind to it or not. However, the Replacement Reserves were not the same. One cannot presume that all lands acquired as reserves for the benefit of First Nations must necessarily include subsurface rights, especially if such rights are a divisible interest. The evidence clearly shows that other reserves were created in the same area around the same time, and subsequently, without the inclusion of subsurface rights. Also, there would be nothing wrong with a Band acquiring only surface rights or only subsurface rights, if that was the actual intention and direction given.

4. Findings of Law

a) Existence and Breach of Fiduciary Obligations

[143] Dealing now with the necessary components of the Crown's fiduciary duty in its relationship with First Nations, the Respondent stated its position succinctly at paragraph 98 of its Final Written Argument:

> In the Crown-Aboriginal context, a fiduciary duty arises where the Crown administers, in a trust-like way, lands or property in which Aboriginal peoples have a communal interest. The duty arises if two elements are present:
>
> (1) a specific or cognizable Aboriginal interest; and,
>
> (2) a Crown undertaking or assumption of discretionary control over that interest. [footnotes omitted]

[144] The foundation of this argument is found in *Wewaykum*. It is worth reviewing the principles stated there by Binnie J.

[145] Firstly, he noted that the Crown's fiduciary obligation is not triggered simply by the Crown-Aboriginal relationship. It is more focused:

> …The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures…[*Wewyakum*, at para 81]

[146] The First Nation's vulnerability while the Crown exercises discretionary control over its interest is an important feature of the fiduciary duty:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in *Royal Proclamation*, 1763, R.S.C. 1985, App. II, No. 1, to the "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians"), but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in *Guerin, supra*, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." See also: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J., at pp. 599-600*; Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, per La Forest J., at p. 406; *Frame v. Smith*, [1987] 2 S.C.R. 99, per Wilson J., dissenting, at pp. 135-36. Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown": *R. v. Taylor* (1981), 34 O.R. (2d) 360 (C.A.), *per* MacKinnon A.C.J.O., at p. 367, leave to appeal refused, [1981] 2 S.C.R. xi; *Van der Peet, supra, per* Lamer C.J., at para. 24; *Marshall, supra*, at paras. 49-51. [emphasis in original; *Wewaykum*, at para 80]

[147] Not all obligations between the Crown and a First Nation give rise to a fiduciary duty. It

depends on the nature of the obligation, the interest in question and whether the Crown assumed discretionary control over it:

> …I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature *(Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation. [*Wewaykum*, at para 83]

[148] The fact that a reserve has been created is an important factor in determining the scope of a fiduciary duty:

> Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation. [*Wewaykum*, at para 86(3)]

[149] Binnie J. then summarized the dual requirements of cognizable interest and discretionary control:

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, 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", as discussed below. [*Wewaykum*, at para 85]

[150] In assessing whether the Crown had a fiduciary duty to the Bands based on the facts before him, Binnie J. referred to situations where the Crown failed to carry out a mandate conferred by a Band with respect to the disposition of an existing asset. Where a fiduciary did not carry out its mandate, he characterized it as a "faithless fiduciary". Clearly, the faithless fiduciary would be in breach of its duty (*Wewaykum*, at para 91). Chief Justice McLachlin and Karakatsanis J. similarly stated that the Crown binds itself when it undertakes to do something for a Band even where land is not involved (Manitoba Métis, at para 50).

[151] The Respondent also relies on principles stated in *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247 ["*Galambos*"]. That case involved Perez, the bookkeeper and manager of a law firm founded by Galambos. Perez voluntarily (and on her own initiative) advanced $200,000 to the firm, often without informing Galambos beforehand. When Galambos discovered one of

the advances, he directed Perez to reimburse herself with interest but she did not do so. The law firm had represented her in the preparation of wills and the conduct of two mortgage transactions, all without charge. The firm went bankrupt and Perez became an unsecured creditor. Perez sued Galambos with leave of the Bankruptcy Court, alleging breach of contract, negligence and breach of fiduciary duty. She hoped to obtain recovery against Galambos' professional liability insurance. The trial court dismissed her claim. On appeal though, the B.C. Court of Appeal reversed the trial judge, holding that Galambos had breached fiduciary duties owed to Perez. The Supreme Court of Canada reversed the appeal decision and restored the trial judgment. Of interest are the Court's following statements:

> *It is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests.* In *Guerin*, Dickson J. spoke of this discretionary power as "the hallmark of any fiduciary relationship" (p. 387)
>
> …
>
> The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in Hodgkinson, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power: see, e.g., *Lac Minerals and Hodgkinson*. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. *The presence of this sort of power will not necessarily on its own support the existence of an ad hoc fiduciary duty; its absence, however, negates the existence of such a duty*. [emphasis added; *Galambos*, at paras 83-84]

[152] The Respondent takes the position that because B.C. followed a consistent policy of reserving subsurface rights in the transfer of provincial crown lands, including for reserve creation, Canada could not have discretionary control of subsurface rights. In support of this position, the Crown reviewed the history of federal-provincial discussions and agreements on their respective obligations in reserve creation, which resulted in the provincial statutory regime already discussed. The federal Crown could not acquire subsurface rights from the Province.

[153] The Respondent also submits that the Band may not have had a cognizable interest in the subsurface rights of the Replacement Reserves. It could only have a cognizable interest in the surface rights, which it obtained when those reserves were set-aside for it upon acquisition from

the Province. In any event, Canada never made an undertaking to acquire subsurface rights in the Replacement Reserves and there was no evidence that the Band had been interested in the subsurface rights or attempted to use them. Therefore, the Respondent submits that there was no fiduciary obligation in respect of the subsurface rights in the Replacement Reserves, and therefore there could be no breach of fiduciary duty in that regard.

[154] While this is an interesting argument, I do not agree. In my view, the Band did have a cognizable interest based on the Montney Reserve. This was not a reserve creation situation. The reserve had already been created so the Band had an existing quasi-property interest in land. The Band surrendered the Montney Reserve upon the conditions or understanding that the Crown would obtain replacement lands meeting the Band's needs, including cash. Once the Crown accepted discretionary control over the Band's cognizable interest, namely the Montney Reserve, together with the underlying conditions it had the obligation or mandate to fulfill those conditions as a fiduciary. Once the surrender had been made by the Band and accepted by the Crown, the Band was then also vulnerable and at the mercy of the Crown's discretion. The Crown had undertaken to act on the Band's behalf, and no one else's. It was in a position to affect the Band's legal or practical interests, and it was the only party or entity in such a position. The Crown could not dispose of the Montney Reserve without addressing the underlying conditions, including the intended purpose for the acquisition of replacement lands.

[155] The Crown's failure to meet its mandate would result in it becoming a "faithless fiduciary" (*Wewaykum*, at para 91). If the conditions could not be met, the Crown had a duty to inform the Bands, present the available options, seek direction and act in the Band's best interests (see paragraphs 99 to 102 above). It could not ignore the intended purpose of acquiring the Replacement Reserves, which was part and parcel of the fiduciary duty arising when the Crown accepted sole discretionary control of the Band's cognizable interest (i.e. the Montney Reserve). The question therefore is whether the Crown satisfied its undertakings in relation to its dealings with the Band's cognizable interest, and whether it did so in the best interests of the Band and with the intended effect on the Band's legal or practical interests.

[156] The answer to this question is best found in the intention of the Parties, particularly the intention of the Band. The direction of the majority in *Blueberry* was that the understanding and

intention of the Bands was the proper basis for analysis of the dealings between Crown and the Band – not a technical legal approach (see paragraph 77 above). This is also consistent with the policy of the law of equity, which tries to do justice where common law principle may render an unjust result contrary to the underlying intention or understanding in the particular course of events.

[157] In this case, the Band wanted land suited to its traditional hunting and trapping culture. Agriculture was foreign to its way of life, which was why the members of the Band did not use the rich agricultural land that had been set-aside for it in the Montney Reserve. Instead, Band members built cabins in a more remote area. They also needed hay to feed the horses that were their principle means of transportation in hunting and trapping, so they needed some open fields to grow hay. In short, they wanted to live according to the traditional norms, beliefs and practices that had been their way for time immemorial. The Band also wanted money that would produce some revenue to ease their members' poverty. This is all well-established in the documentary evidence earlier discussed (see paragraphs 126 and 127 above). I do not think that the Respondent disagrees. I am also satisfied that the Crown understood the Band's interests well at the time. The documentary evidence is replete with references to the Band's requirements in the transaction. Canada went to great effort to identify available replacement lands near where Band members had established themselves. It also involved the Band in selecting those lands.

[158] The difficulty, however, is the Crown's "inadvertence" as identified by the Supreme Court of Canada. I conclude that had Canada been alert to the quality of the title in the proposed Replacement Reserves, it might have thought about whether that title in fact fulfilled the Band's intention. That is especially so if it had informed the Band of the Province's reservation of subsurface rights and consulted with it. I conclude that the inadvertence identified and associated with the Crown's fiduciary obligations in the surrender and disposal of the Montney Reserve was simultaneously at play with respect to the acquisition of the Replacement Reserves, thereby resulting in further breaches.

[159] A man of ordinary prudence managing his own affairs at the time would have investigated the title of real property he was acquiring in order to ascertain the quality of title and that it met his needs. Canada was very experienced in the disposal and acquisition of land,

including reserve land. It ought to have known and taken this very ordinary precaution. As the Supreme Court of Canada found, Band members did not understand the precise nature of the legal interest it was surrendering in the Montney Reserve. As a matter of logic, that would also apply to its understanding of the legal interest being acquired in the Replacement Reserves. Because of its lack of sophistication in Canadian conveyancing law and practice at the time, the Band was vulnerable in such transactions.

[160] The Crown's inadvertence might have been inconsequential had the Band's intention been fulfilled. Unfortunately, I conclude that it was not.

[161] The problem lies in the very fact that the provincial Crown retained the subsurface rights, including broad access to it, as discussed at paragraphs 117, 118 and 119 above. As Replacement Reserves, the Band received 6,194 acres allocated into three separate reserves. By design, this was 34% of the size of the surrendered 18,168 acres in the Montney Reserve. Canada purposely sought to minimize the amount of replacement land set-aside so that the proceeds of sale remaining to the credit of the Band in its trust account would be maximized. I am satisfied that this decision on Canada's part was sensitive to the Band's desire and need for funds that would produce revenue. I do not doubt that the Band was satisfied with that part of the arrangement and that the area designated as Replacement Reserves (including size) appeared on its face to meet the community's needs for hunting, trapping, growing hay and accommodating established places of residence.

[162] In fact, however, the Band remained vulnerable to the enterprising discretion of the Provincial Crown. British Columbia could itself use or license the use of subsurface rights in the Replacement Reserves as it pleased for the exploration of minerals, including oil and gas. That meant that persons other than Band members could enter upon and use the Replacement Reserves for purposes of exploration, mining or drilling, including the use of water and any other part of the land that was necessary for such operations. It could also take aggregate, timber or "other materials" on the Replacement Reserves that might be required in the construction, maintenance, or repair of any roads, ferries, bridges or other public works. The Province or its licensees could move about the land to explore for minerals and set up works, including the construction of roads, bridges or other means of transportation to serve the functioning of

operations.

[163] None of this is consistent with the Band's use of the land for trapping, hunting, growing hay and pursuing its traditional culture. How much hunting, trapping and haying could be done if oil or other kinds of mining operations were active and moving about the Reserves, whether to explore for minerals or to retrieve them, including clearing for operations, building road and using the other resources on the Replacement Reserves for that purpose? One must also remember that the Replacement Reserves were roughly one-third the size of the Montney Reserve, and included the Band's settlements. The Band had a considerably smaller area in which to live, so the presence of mining activity would be more intrusive than in a larger area.

[164] The Province and its licensees did not have to consult the Band about the use of subsurface rights in the Replacement Reserves, and it did not have to share the profit or other benefit that might be derived from the subsurface rights, although it had to compensate the Band for some uses. In my view, the use and benefit of only the surface rights left the Band completely vulnerable to the disruption or frustration of its intended use of the Replacement Reserves. The surface rights would be of little benefit to the Band if they were being used to any extent for the exploration or retrieval of minerals from under the surface.

[165] If the Replacement Reserves had included subsurface rights, as had been the case in the Montney Reserve, the Band could have surrendered them for lease, as it had in fact done. In doing so, however, it could have placed limitations or restrictions on any such surrender. Moreover, it would have benefitted from the proceeds of such an arrangement, and if it had found the arrangement disruptive of the community's life, it could have directed the Crown to end the lease or to revoke the surrender. None of this was possible where the Provincial Crown reserved subsurface rights with the broad access and privileges attached to those rights.

[166] When one considers the far-reaching possible consequences of the Province's reservation of subsurface rights, I conclude that the Band did not achieve its intended purpose in acquiring the Replacement Reserves.

[167] Canada should have informed itself of the fact and full effect of B.C.'s reservation of subsurface rights in the Replacement Reserves, and in turn it should have informed the Band,

explained the meaning of the reservation and explored the Band's wishes. It is unnecessary to speculate what the Band would have done had it been informed. The point is that it ought to have been consulted so that it could make an informed choice. I therefore conclude that Canada's failure to investigate the nature and quality of the title it was acquiring on behalf of the Band was a breach of fiduciary duty. Canada's failure to inform the Band of the nature and quality of that title, to explain the practical consequences of the reservation of subsurface rights and to consult the Band on its wishes under those circumstances constitutes a further breach of fiduciary duty.

[168] To make things worse, when Canada discovered what had happened and conceded to B.C. that the Province was within its rights, Canada did not inform the Band of the "inadvertence". There is no evidence that it informed or consulted the Band in any way. The Band's behavior and that of the successor Bands was consistent with that fact. I note McLachlin J.'s finding in *Blueberry* (at para 29) that a concerned officer of the DIA, who was curious about how the Band had lost its subsurface rights in the Montney Reserve, brought it to the attention of the Claimants and took them to see a lawyer, resulting in the *Apsassin/Blueberry* proceedings and ultimately the present Claim. The clear implication of McLachlin J.'s finding is that this was how the Bands first discovered that subsurface rights in the Montney Reserve had been sold. I am satisfied that the disclosure also led to the Bands discovering that B.C. had reserved subsurface rights in the Replacement Reserves. The dual revelations occurred some 33 years after the transfer and approximately 25 years after Canada discovered what had happened. The Bands did not learn the true situation through Canada's efforts to inform and consult.

[169] The Respondent's behaviour in obtaining a surrender of mineral rights in the Replacement Reserves and licensing them to Halfway also support a finding that Canada believed the Replacement Reserves included surface and subsurface rights. Its correspondence with British Columbia confirmed this, together with an admission that it had made a serious error. The Supreme Court of Canada was clear that once the error/breach was discovered, Canada had the obligation to act diligently to correct it.

[170] There is no doubt that Canada's corrective powers under the *Indian Act* would not have applied to the Provincial Crown. Canada could not have revoked the transaction as the Supreme Court of Canada found it could have done in *Guerin*. Still, I do not think that absolves Canada of

the obligation to try to correct the error. I have no idea what the options might have been. Canada might have attempted to negotiate an arrangement with B.C. regarding the exercise of the Province's options in the use of the subsurface rights, including a consultative process or sharing arrangement with the Band. It might have investigated the availability of other lands in the area where both surface and subsurface rights were included in the title. It might have offered the Band a sum of money in lieu of the surface rights. It is unnecessary to speculate what might have happened at this point. The fact remains that Canada did nothing to try to rectify the situation. I conclude that this also constituted a breach of Canada's fiduciary obligation to the Band.

b) Other Crown Arguments

[171] Quite apart from the issues of discretionary control and cognizable Aboriginal interest, which have been discussed, the Respondent submitted that acquisition of the Replacement Reserves was not exploitative. It submitted that the Band received the lands on the same terms that any other prospective purchaser would have done (i.e. subject to reservation of mineral rights). In addition, it received the Replacement Reserves at half the usual price paid for the same lands by virtue of the Provincial Minister exercising his discretion. Obtaining the lowest possible price was "conducive to the welfare of the Band", given its poverty, need for revenue, and the fact that the purchase price would be deducted from its trust account. The Respondent therefore submitted that Crown had acted appropriately.

[172] Although there is no evidence of the fair market value of the Replacement Reserves at the time, because of the legislated policy there is no question that British Columbia's price was based on subsurface rights being reserved. It appears from an August 11, 1945 letter (CBD at tab 44) from the Director of the Indian Affairs Branch to Mr. Grew that there was a standing arrangement with British Columbia that ministerial discretion would be exercised to reduce the usual price. The arrangement was certainly an advantage to First Nations acquiring reserve land in B.C. It permitted the Band to minimize what it had to pay for the Replacement Reserves and to therefore maximize the remaining sale proceeds from the Montney Reserve as a source of revenue.

[173] The amount paid for the surface rights of the Replacement Reserves may well not have been exploitative. But that did not end the question. The Band remained vulnerable to serious

disruption of its intended use of the Replacement Reserves by virtue of B.C.'s reserved right of use of and access to the subsurface rights, and it had no recourse to prevent or regulate such use. I conclude that this result was both exploitative and improvident.

[174] On a separate point, the Respondent submitted that it has no liability because the Claimants had been made whole by virtue of the ultimate resolution of the *Blueberry* case. However, I can only conclude that the Bands were made whole by the damages ultimately paid in respect of the breaches found under the *Blueberry* decision. The Supreme Court of Canada dealt only with the loss of subsurface rights in the Montney Reserve. It did not deal with the question of whether Canada's acquisition of the Replacement Reserves may also have involved breaches of fiduciary duty to the Bands. That is the question before the Tribunal in the present proceeding. Whether the breaches just found involve a compensable monetary loss is not the subject of this phase of these proceedings. Validity having been established, compensation will be the question to be determined in the next phase of the proceeding. Questions of loss, if any, will be dealt with then.

VII. CONCLUSION

[175] For all these reasons, I conclude that the Respondent breached its fiduciary obligation.

[176] After the requisite passage of time for judicial review, the Registry is directed to schedule a Case Management Conference to begin the process of organizing a compensation phase hearing.

W.L. WHALEN

Honourable W.L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20151105

File No.: SCT-7007-11

OTTAWA, ONTARIO November 5, 2015

PRESENT: Honourable W.L. Whalen

BETWEEN:

DOIG RIVER FIRST NATION

Claimant

and

BLUEBERRY RIVER FIRST NATIONS

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 DOIG RIVER FIRST NATION**
As represented by Allisun Rana and Emily Grier
Rana Law, Barristers & Solicitors

AND TO: **Counsel for the Claimant BLUEBERRY RIVER FIRST NATIONS**
As represented by James Tate, Ava G. Murphy and Michelle L. Bradley
Ratcliff & Company LLP

AND TO: **Counsel for the Respondent**
As represented by Jonathan Sarin, Michael Mladen and Darlene Prosser
Department of Justice