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CITATION: 2018 SCTC 6
DATE: 20180914

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN: WILLIAMS LAKE INDIAN BAND Claimant **– and –** HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Myriam Brulot and Kenji Tokawa, for the Claimant Nicholas Claridge and Shelan Miller, for the Respondent **HEARD:** September 26-27, 2017

REASONS FOR DECISION

Honourable William Grist

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

Cases Cited:

Williams Lake Indian Band v Her Majesty the Queen in Right of Canada, 2014 SCTC 3; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Tobacco Plains Indian Band v Her Majesty the Queen in Right of Canada*, 2017 SCTC 4; *Gosnell v Minister of Lands (BC) and Attorney General (Canada),* (26 February 1912 (BCSC), aff'd 24 June 1912 (BCCA), dismissed 7 March 1913 (SCC), all unreported; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746.

Statutes and Regulations Cited:

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

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

British Columbia Railway Act, RSBC 1911, c 194, ss 34, 35.

Pacific Great Eastern Incorporation Act, SBC 1912, c 36, ss 32, 34.

Land Act, RSBC 1911, c 129, s 127.

An Act to ratify an Agreement bearing Date the Tenth Day of February, 1912, between His Majesty the King and Timothy Foley, Patrick Welch, and John W. Stewart, and an Agreement bearing Date the Twenty-third Day of January, 1912, between the Grand Trunk Pacific Railway Company and the Grand Trunk Pacific Branch Lines Company and said Foley, Welch, and Stewart, SBC 1912, c 34, Schedule A, s 13.

Land Act, RSBC 1908, c 30, s 80.

Indian Act, RSC 1906, c 81 as amended by *Indian Act*, SC 1911, c 14, s 46.

Headnote:

Aboriginal Law – Specific Claim – Takings – Railway Right-of-Way – Reserve Creation – Provisional Reserves – Fiduciary Duty

This specific claim concerns whether Canada breached its legal obligations in reference to 4.37 acres of land taken from a 4,100 acre tract of land known since 1881 as Williams Lake Indian Reserve No. 1 (WLIR No. 1) for a right-of-way by the Pacific Great Eastern Railway Company in 1916.

Held: The Claim is not valid.

The Claimant's argument that WLIR No. 1 should be treated as having been a "full" *Indian Act* reserve at the time of the transfer is not accepted; the Tribunal finds that the reserve was provisional in status. Further, the taking was not illegal or ultra vires as the provincial Crown Grant was issued pursuant to the *Land Act*, RSBC 1911, c 129, which made special allowance for providing provisionally reserved land for railway purposes. Canada did have a fiduciary duty towards the Claimant, but in the context it discharged its obligations.

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I. THE CLAIM

[1] This specific claim concerns whether Canada breached its legal obligations in reference to 4.37 acres transferred by the Province of British Columbia by a 1916 Crown Grant to the Pacific Great Eastern Railway Company (PGER). The 4.37 acres was part of a 4,100 acre tract of land known since 1881 as Williams Lake Indian Reserve No. 1 (WLIR No. 1).

II. PROCEDURAL HISTORY

[2] On April 24, 2012, the Williams Lake Indian Band (Band or Claimant) filed a specific claim with Indian and Northern Affairs Canada's Specific Claims Branch. The Claim asserted breaches of lawful obligation and fiduciary duties by Canada resulting in, among other things, the diminution of WLIR No. 1.

[3] On June 4, 2015, an official of the Crown formally advised the Band by way of letter of the Government of Canada's rejection of the Claim on the ground that it failed to reveal an outstanding lawful obligation on Canada's part.

[4] The Band filed a Declaration of Claim with the Specific Claims Tribunal (Tribunal) on January 28, 2016, seeking compensation from Canada. Canada filed a Response on April 8, 2016. The Claimant filed an Amended Declaration of Claim on November 9, 2016, which was followed by an Amended Response from Canada on November 30, 2016.

[5] A Notice pursuant to section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22, was sent to the Canadian National Railway and the Attorney General and Minister of Justice of British Columbia; responses were received from neither.

[6] The Claim was heard by the Tribunal on September 26-27, 2017, and was argued solely based on the documentary record. No oral history or expert evidence was entered. The Claim was bifurcated with the consent of the Parties into validity and compensation stages. These Reasons address the validity of the Claim.

III. HISTORICAL OVERVIEW

A. The Creation of Williams Lake Indian Reserve No. 1

[7] Members of the Band are Secwépemc (Shuswap) people. Their ancestors traditionally

provided for their community by moving between various locations to fish, hunt, and collect plants and berries at locations over a large area, generally east of the Fraser River and extending considerable distances north, east, and south of the community of Williams Lake.

[8] The history of the creation of WLIR No. 1 is told at greater length in the Reasons for Decision of Tribunal Chairperson, Justice Harry Slade, in *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3 [*Williams Lake*, 2014 SCTC 3]. In short, the land was set apart in 1881 to provide a Reserve for the First Nations people who had earlier occupied a traditional village site at the opposite end of Williams Lake. Much of the village site had been pre-empted by settlers, and eventually became part of the City of Williams Lake.

[9] In March 1881, some of the approximately 4,100 acres subsequently set apart for the Band as WLIR No. 1 was acquired by the federal government through the purchase of land that had been pre-empted by early settlers at the present Reserve site. This land was known as the "Bates Estate". Other parts of the total area set apart as WLIR No. 1 had not been pre-empted and were still Crown land, which under the terms of Confederation were held by the Province. The 4.37 acres, the subject of this Claim, were in a part of the Reserve that was still provincial Crown land.

[10] When the land was compiled for reserve purposes in 1881, reserve creation was the ongoing undertaking of a federal-provincial Commission (the Joint Indian Reserve Commission (JIRC). Federal Privy Council Order 1088, dated November 10, 1875, gave direction to the Commission and read in part:

> 1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and Local Governments jointly.
>
> 2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian Nation...in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.

> 3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia no basis of acreage be fixed for the Indians of that Province as a whole, but that each Nation of Indians of the same language be dealt with separately.
>
> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union...which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers. [Amended Common Book of Documents (ACBD), Vol 1, Tab 11]

[11] In June 1881, the JIRC issued a Minute of Decision outlining the allotment of the land to comprise WLIR No.1. The provincial Chief Commissioner of Lands and Works (CCLW) approved of the Reserve set out in the Minutes of Decision on May 8, 1882. The Band began to occupy and cultivate the site and, in the summer of 1883, the reserved land was surveyed and determined to be 4,074 acres.

[12] The *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*], setting the provisions regulating entry of British Columbia to the Dominion of Canada, which came into force May 16, 1871, contained the following:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies. [ACBD, Vol 1, Tab 6]

[13] Notwithstanding the provision in the Article that "tracts of land…be conveyed by the [provincial] Local Government to the Dominion Government in trust for the use and benefit of the Indians", tracts of land identified for allotment as reserves, including lands identified by the JIRC and approved by the provincial Chief Commissioner of Lands and Works, were not conveyed to the federal government until provincial Order in Council 1036, dated July 29, 1938. The process necessary for the transfer is set out in the following from *Wewaykum Indian Band v*

Canada, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*], at paragraphs 15 and 16:

> Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property. Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid: *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C.). Equally, the province had no jurisdiction to establish an Indian reserve within the meaning of the *Indian Act*, as to do so would invade exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians".
>
> Implementation of Article 13 therefore required a number of stages preliminary to the federal reserve-creation process described in *Ross River*. First of all, federally appointed Indian Reserve Commissioners undertook to define and survey the proposed reserves. Then the federal government and the provincial government, armed with the surveys, negotiated the size, location and number of reserves. Administration and control of such lands had then to be transferred ("conveyed" is the word used in Article 13) from the new Province of British Columbia to the federal government. The federal government would have to "set apart" the lands for the use and benefit of a band: *The Indian Act, 1876*, S.C. 1876, c. 18, s. 3(6); *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1) "reserve".

[14] The long delay in transferring many of the areas that had earlier been designated for reserves was in large part the consequence of a political dispute stemming from the provincial government's desire to limit the size of reserves and to retain reversionary interests in the reserve lands and an ability to dedicate the lands to other purposes. The Dominion was opposed to the limited allocation of land and provincial retention of reversionary rights. Approximately 40 years after Confederation an effort to settle the issues between the two levels of government resulted in the creation of the Royal Commission on Indian Affairs (RCIA), set up by a federal-provincial agreement (the McKenna-McBride Agreement, September 24, 1912). The direction to the RCIA was to, "settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia" (ACBD, Vol 2, Tab 76).

[15] Under section 8 of the McKenna-McBride Agreement, the RCIA was also given the following power to deal with reserve lands prior to release of its final report:

> If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for any

> Dominion or Provincial or Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect. [ACBD, Vol 2, Tab 76]

B. The Construction of the Pacific Great Eastern Railway

[16] During the time the RCIA was operative, the PGER began construction of a railway north from Vancouver to a terminus at Fort George, now the City of Prince George. The railway was to pass through a number of reserves along the route. In the case of WLIR No. 1, the rail bed plan was for a right-of-way across the southeast portion of the Reserve, along the foot of a hillside located on the southeast portion of the Reserve and continuing on to what is now the City of Williams Lake. The right-of-way planned was approximately 1,785 feet in length, and was to occupy 4.62 acres (later adjusted to 4.37 acres).

[17] After obtaining provincial approval of its plan on September 16, 1914, the PGER applied to the RCIA for approval of the right-of-way across part of WLIR No.1; and, on the same day, wrote to the Department of Indian Affairs (DIA) enclosing the PGER's plan for the rail bed, asking that permission be given for the railway to commence construction forthwith. The PGER set out that it would, "pay for the said right-of-way…such sum as an officer designated by your Department shall decide as being fair" (ACBD, Vol 2, Tab 95; ASOF at para 29).

[18] The Department of Indian Affairs also referred the matter to the Royal Commission on Indian Affairs, and asked a real estate company in Quesnel to undertake a valuation of the land to be used as rail bed.

[19] On October 5, 1914, the RCIA issued Interim Report No. 51, which provided as follows:

> The Commission, pursuant to Section 8 of the agreement referred to in the Commission, has had under consideration the application of the [PGER] for land required for right-of-way through Williams Lake Indian Reserve No. 1, in the Cariboo District, which Reserve is one of those allotted for the Williams Lake Tribe or Band of Indians. The land required for the said right-of-way, as shown on the certified plan, contains an area of 4.62 acres.
>
> The Commission having duly considered the said application and examined the said plan, and it appearing that the said land is required for such right-of-way purposes by the said Railway Company,

> The Commission recommends that, subject to compliance with the requirements of the law and to due compensation being made, permission be given to the said Railway Company to enter forthwith upon the said land and to acquire the same for such right-of-way purposes, according to the plan filed with the Department of Railways of the Province of British Columbia and duly certified by the Minister of Railways of the said Province of British Columbia on the 10th September, 1914, a copy of which certified plan is attached hereto. [ACBD, Vol 2, Tabs 102, 106–07]

[20] The federal government's formal approval of the PGER's access to the property and acquisition of the right-of-way is contained in Privy Council Order 3184, dated December 24, 1914. The Order provides:

> The land has been valued by a competent valuator employed by the Department of Indian Affairs at $44.35, being at the rate of $10.00 per acre for 4.25 acres and $5.00 per acre for .37 of an acre, and the amount has been paid in full to the Department of Indian Affairs by the Railway Company.
>
> The Minister recommends that under section 46 of the Indian Act as amended by Section 1, Chapter 14, 1-2 George V, authority be given for the sale by the Department of Indian Affairs of the above mentioned 4.62 acres, more or less, to the Pacific Great Eastern Railway Company upon the consent of the Lieutenant Governor of the Province of British Columbia being obtained therefor. [ACBD, Vol 2, Tab 130]

[21] The 4.62 acres required for the right-of-way was adjusted to 4.37 acres, and a transfer by way of Crown Grant of the land to the PGER was issued by the provincial government on June 1, 1916 (ACBD, Vol 2, Tab 163).

IV. EVIDENCE

[22] The chronology of the documentary evidence of what transpired on the presentation of the PGER's application for transfer of the rail bed land is as follows:

1. **September 16, 1914**

   - Letter from D. Tate, Vice President, Pacific Great Eastern Railway Company, to J.G.H. Bergeron, Secretary and Solicitor, Royal Commission on Indian Affairs submitting the plan of the PGER's right-of-way through WLIR No. 1, for approval by the Royal Commission (ACBD, Vol 2, Tab 90); and,

   - Letter from Vice President, PGER, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, enclosing a sketch of the rail bed

right-of-way and applying for a grant of the land indicated in the plan and permission to commence construction (ACBD, Vol 2, Tab 88).

2. **September 29, 1914**

- Letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to the Secretary, Royal Commission of Indian Affairs, informing of the receipt of the PGER's plan and application for right-of-way, and asking for the Royal Commission to take action at as early a date as possible (ACBD, Vol 2, Tab 92);

- Letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.S. Vaughan, Land Appraiser, asking that he conduct an additional appraisal to those he provided in respect of other reserves, relating to the 4.62 acres of WLIR No. 1. The letter instructs, "[p]lease note that in all cases the Indian Council and the Indians specially interested are to be consulted and you should endeavour to obtain their concurrence with the values…" (ACBD, Vol 2, Tab 93); and,

- Letter from C. Pringle, Solicitor for the PGER, to D.C. Scott, Deputy Superintendent General of Indian Affairs, assuring that the PGER will pay "such sum as an officer designated by your Department shall decide as being fair" (ACBD, Vol 2, Tab 95).

3. **September 30, 1914**

- Telegram from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to I. Ogden, Indian Agent, providing instructions to permit the PGER to begin construction (ACBD, Vol 2, Tab 98).

4. **October 1914**

- Letter signed by the mark of Chief Baptiste William, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, advising that

the Band is satisfied with the valuation assigned to the rail bed land totaling $44.35 (ACBD, Vol 2, Tab 100).

5. **October 5, 1914**

- Interim Report No. 51 signed by N.W. White, Chairman, Royal Commission on Indian Affairs, and addressed to the Governor General of Canada-in-Council and to the Lieutenant-Governor of British Columbia-in-Council. The Report recommends that: "…subject to compliance with the requirements of the law and to due compensation being made, permission be given to the said Railway Company to enter forthwith upon the said land and to acquire the same for such right-of-way purposes, according to the plan filed with the Department of Railways of the Province of British Columbia and duly certified by the Minister of Railways of the said Province of British Columbia on the 10th September, 1914…" (ACBD, Vol 2, Tab 102).

6. **October 12, 1914**

- Letter from A.S. Vaughan, Vaughan Realty Company, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, acknowledging receipt of the request to value the rail bed land. The letter states: "[w]e note that you wish us…to endeavour to obtain the concurrence of the Indians interested, with the valuations" (ACBD, Vol 2, Tab 112; ASOF at para 33).

7. **October 27, 1914**

- Letter from A.S. Vaughan, Vaughan Realty Company, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, enclosing the evaluation of the right-of-way land, the letter is signed by the mark of the Chief Baptiste William, informing:

> You will observe by the enclosed letter signed by the Chief that the Indians are satisfied with the valuation placed upon [this land], but make the following request, viz:

> That instead of being paid cash for the land [an equal] area on their Northern Boundary (where there is available Crown Land) equivalent to that taken by the [Railway]. [ACBD, Vol 2, Tab 118; ASOF at para 36]

8. **November 9, 1914**

- Letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to D. Tate, Vice President, PGER, requesting that the PGER forward the payment indicated by the appraisal (ACBD, Vol 2, Tab 122).

9. **November 25, 1914**

- Letter from Vice President, PGER, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, enclosing payment (ACBD, Vol 2, Tab 127).

10. **December 24, 1914**

- Privy Council Order 3184, approving the sale of the 4.62 acres of WLIR No. 1 to the PGER under section 46 of the *Indian Act*, RSC 1906, c 81 as amended by *Indian Act*, SC 1911, c 14 [*Indian Act*, 1911] (ACBD, Vol 2, Tab 131).

11. **February 18, 1915**

- Letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to J.G.H. Bergeron, Secretary and Solicitor, Royal Commission on Indian Affairs, informing that "the Indians expressed a desire that instead of being paid cash for the land taken from the reserve for the right of way, that they be given an equal area on their northern boundary". The letter continues, "[t]his request is equivalent to a request for an addition to their reserve. I shall be obliged if you will be good enough to bring it to the attention of the Royal Commission for such action as they may think proper at the time they are dealing with the reserve" (ACBD, Vol 2, Tab 136).

12. **March 4, 1915**

- Letter from J.G.H. Bergeron, Secretary and Solicitor, Royal Commission on Indian Affairs, to J.D. McLean, Assistant Deputy and Secretary, Department

of Indian Affairs, acknowledging receipt of the letter of February 18, 1915, and to advise that, "the matter which is the subject of your [communication] will obtain due attention when additional lands applications of the Williams Lake Agency are dealt with" (ACBD, Vol 2, Tab 137).

13. **August 13, 1915**

- Letter from C.H. Gibbons, Secretary, RCIA, to Secretary, Department of Indian Affairs – Ottawa, replying to his letter of February 18, 1915:

> …re. expressed desire of the Indians of the Williams Lake… Reserve No. 1 that lands to the North of the Reserve be allotted them in lieu of money compensation by the Pacific Great Eastern Railway Company for right-of-way through the Reserve in question, approved by the Commission in its Interim Report No. 51.
>
> I have to say that if such application on the part of the Indians meets with the approval of the Department, its course would appear to be either to arrange with the interested Railway Company for it to purchase and convey to the Department (in trust for the Indians) acceptable lieu lands equivalent to the acquired right-of-way; or, alternatively, to devote to the purchase for the Indians of the lieu lands described the price received from the Company for such granted right-of-way through the Reserve.
>
> The Department would not, of course, suggest that the Commission should allot out of lands of the Crown in British Columbia, lands in lieu of lands acquired for right-of-way by a railway company and granted upon the condition of due compensation being made therefor. [ACBD, Vol 2, Tab 150]

14. **August 21, 1915**

- Letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to I. Ogden, Indian Agent, referencing that the Indians "expressed a wish to the valuator, Mr. Vaughan, that the money received from the Pacific Great Eastern Railway for the right of way through their reserve should be used to purchase other land for them adjacent to their reserve. The area taken was only 4.26 acres for which the sum of $44.35 was received. This appears to be a very small sum to be invested in land. You may however at any convenient opportunity you may have, look into the matter and report

whether it is possible to make purchase in the direction desired by the Indians" (ACBD, Vol 2, Tab 151).

15. **April 14, 1916**

- Memorandum from Accountant, Department of Indian Affairs, to D.C. Scott, Deputy Superintendent General of Indian Affairs, referring to a letter received April 2nd from Agent Ogden, "recommending that the money received from the Pacific Great Eastern Railway Company for damages caused by the railway to land on the William[s] Lake or Sugar Cane Reserve, be paid to the Indians. He states that they need the money badly. The amount received for Right of Way through the reserve was $43.70. Interest amounting to $2.86 has accrued on this capital. To admit of a distribution of all the capital an Order-in-Council would be necessary. I shall be glad to know what you wish to have done in the matter. As the account is small, I suggest that it be closed out by the distribution of the money in the manner proposed" (ACBD, Vol 2, Tab 161).

16. **April 17, 1916**

- Letter from J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to I. Ogden, Indian Agent, advising that 50% of the amount received from the Railway Company plus interest, totaling $24.51, "is available and can be expended on the Indians' behalf, but as the amount is too small to be used in making a per capita distribution, the Department does not propose to distribute the same. The money will be used towards paying for the seed and implements which you were authorized to pur[chase] for Indians of this band" (ACBD, Vol 2, Tab 162; ASOF at para 69).

17. **June 1, 1916**

- Provincial Crown Grant of the 4.37 acres issued to the PGER (ACBD, Vol 2, Tab 163).

18. **June 30, 1916**

- Final Report, Royal Commission on Indian Affairs for the Province of British Columbia. This Report records the "[a]pplication for additional land in lieu of money compensation for railway right-of-way" as item 70 under "Williams Lake Agency—Additional Lands Applications". The decision of the Commission is recorded as, "Not entertained: Departmental" (ACBD, Vol 2, Tab 164).

V. POSITIONS OF THE PARTIES

A. Claimant

[23] The Claimant argues that WLIR No. 1 was a full *Indian Act* reserve, and not only a provisional reserve. At paragraphs 46 and 47 of the Amended Declaration of Claim, the Band alleges breaches of fiduciary obligation by Canada *inter alia* in failing to take action to oppose or challenge the Crown Grant of the rail bed land to the PGER because it was reserved for the Williams Lake Indian Band and actually occupied by the Band; and, accordingly, not available for the Company to take up under the provisions of the *British Columbia Railway Act*, RSBC 1911, c 194 [*British Columbia Railway Act*], or the railway's incorporating statute, the *Pacific Great Eastern Incorporation Act*, SBC 1912, c 36 [*PGER Act*], or under a statute passed to ratify the agreement between the Province and the private developers of the PGER for the construction of the railway (Railway Statutes).

[24] The Band also states that Canada failed to adequately make disclosure and consult with the Band, and did not ensure fair compensation was provided for the land, and did not meet its obligation to minimally impair the Band's interest in the land via a transfer of land in lieu, when this form of compensation was the preference expressed by the Band.

B. Respondent

[25] Canada acknowledges that WLIR No. 1 was provisionally reserved, but denies that it was a fully constituted *Indian Act* reserve at the time in question. Canada argues that any restrictions limiting the railway from taking up lands under the *British Columbia Railway Act* or the *PGER Act* did not apply to the transaction transferring the rail bed land by way of the 1916 provincial Crown Grant of this land to the PGER. Canada says that the transfer of the land was a transaction provided for under section 127 of the *Land Act*, RSBC 1911, c 129 [*Land Act*, 1911] and that

Canada acted appropriately to comply with its fiduciary obligations to the Band by ensuring that adequate monetary compensation was paid.

[26] Canada denies an obligation of minimal impairment, but goes on to say that the compensation was adequate and says land in lieu was proposed to the RCIA, but that in the circumstances monetary payment was adopted as a reasonable form of compensation. Canada argues that requiring monetary compensation be paid fulfilled its legal obligation and, further, that the compensation ultimately paid was badly needed for another purpose and that the payment was approved by the Band.

VI. ANALYSIS

A. WLIR No. 1: Provisional or "Full" *Indian Act* Reserve?

[27] The 4,074 acre parcel assembled in 1881 to become WLIR No. 1, was approved by the provincial Chief Commissioner of Lands and Works in 1882, and a survey of the reserved land was prepared in 1883. This was as far as the process of reserve creation stipulated in Article 13 of the *Terms of Union*, proceeded until the intergovernmental impasse was finally resolved in 1938. The land comprising the Reserve (by this time minus the 4.37 acres transferred by Crown Grant to the PGER) was then transferred by Provincial Order in Council 1036 to the federal Crown. The federal Crown then took the steps necessary to set apart the land for the Band under the *Indian Act*.

[28] In *Wewaykum*, reserve creation took a similar course. At paragraphs 17 and 18, the Court's comments on the status of B.C. reserves affected by this dispute were as follows:

> For more than 60 years after the entry of British Columbia into Confederation, the reserve establishment issue remained an on-going source of friction between the federal and provincial governments. The trial judge found, for instance, that the British Columbia government initially considered the federal government's target of 80 acres *per capita* for reserve lands to be excessive. The provincial position was that a *per capita* allocation of 20 acres was sufficient, particularly where the principal source of livelihood of a band was fishing. There was even disagreement as to the mechanism to accomplish the "conveyance".
>
> The issues were ultimately resolved by federal-provincial agreement and the transfer in 1938 of administration and control to the federal Crown of provincial land on which the reserves were to be established: G. V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (1969), at p.

> 132. Until then, "[a]ll rested in the realm of bureaucratic recommendation and political intention with nothing conclusive accomplished in any effective legal sense": *Dunstan v. Hell's Gate Enterprises Ltd.*, [1986] 3 C.N.L.R. 47 (B.C.S.C.), *per* Cumming J., at p. 65.

[29] The Claimant argues that the *Wewaykum* analysis of the status of the reserved lands is *obiter*, or should be limited to the facts of the *Wewaykum* case, or the decision should be revisited; and, that WLIR No. 1 should be considered as having been established at law as an *Indian Act* reserve as of 1883 at the latest.

[30] In my view, the conclusion by the Supreme Court of Canada in *Wewaykum* that the incomplete process delayed reserve creation until 1938 was the result of a considered analysis of the history of the reserve creation process. This analysis should be recognized by this Tribunal. Ultimately, Canada was not able to manage the reserve lands pursuant to the *Indian Act* until the lands had been transferred from the Province to Canada. The status of the reserve lands dating from about 1883 was, in this sense, provisional.

B. Which Legislation was Operative?

1. The Provincial Railway Legislation

[31] The *British Columbia Railway Act* and the *PGER Act* both contain sections allowing the railway to acquire land.

[32] Section 34 of the *PGER Act* empowers the corporation, "to purchase, hold, lease, or sell land for any of the purposes of the Company". Section 32 of the statute also provides the corporation with the power to expropriate lands:

> **32.** Whenever it shall be necessary for the purpose of securing sufficient lands for terminals, stations, or gravel-pits, or for constructing, maintaining, or using the said railway, also for any other purpose connected with the said railway…the said Company may expropriate, purchase, hold, use, and enjoy such lands…

[33] However, here title to the land in question was still held by the Province. It had been reserved within the meaning of the provincial *Land Act*, but was still subject to being alienated by the provincial Crown. The Province was supportive of construction of the railway and no expropriation of the rail bed was undertaken. Other statutory means were employed for the acquisition of the land.

[34] The *British Columbia Railway Act* was a statute of general application to railways. It sets out the process for a railway company to take up Crown lands at sections 34 and 35:

> **34.** A railway company shall not take possession of, use, or occupy any lands belonging to the Province, to any further or other extent than the making of location surveys, without the consent in writing by certificate in duplicate of the Minister, under his hand and seal of office; but with such consent a company may take and appropriate for the use of its undertaking so much of the unoccupied and unreserved lands of the Province lying on the route of the railway, or within the scope of the undertaking, as have not been granted or sold, and as may be desired to be acquired for the undertaking, as also so much of the public beach or foreshore or of the land covered with the waters of any lake, river, stream, or canal, or of their respective beds, as is necessary or desired to be acquired for making and completing and maintaining the undertaking of the company. 1911, c. 44, s. 17.
>
> **35.** The company shall forthwith, after the obtaining of a certificate of consent under the last preceding section, make application to the Minister of Lands to fix the price and compensation to be paid by the company to the Crown for the taking of the respective land and properties mentioned and described in such certificate of consent; and the Minister of Lands shall have power in his absolute discretion to fix, and shall fix, such price and compensation, and the price and compensation so fixed shall be paid by the company to the Minister of Lands as a condition precedent to the grant to and occupation by the company of such land and properties, and upon payment of such price and compensation the lands and properties shall be granted to the company, its successors and assigns, by grant in such form as may be approved by the Minister of Lands; and in the event of any company desiring to appeal in respect of the amount fixed to be paid for compensation, such appeal shall be by way of arbitration proceedings as in the case of a disagreement between individual owners, in which arbitration proceedings His Majesty shall be represented by the Minister of Lands, or some person or persons appointed by him, and the price and compensation fixed as a result of such arbitration proceedings, which may be more or less than the amount fixed by the Minister of Lands, shall be the amount which shall be payable and paid by the company. 1911, c. 44, s. 18. [emphasis added]

[35] The process provided for taking up "unoccupied and unreserved" Crown lands. In the case of WLIR No.1, the land had been set aside and reserved under the *Land Act*, 1911, which provided some protection from pre-emption, and actually occupied by the Band since 1881. The statute was therefore inappropriate for use in the process of acquisition of the rail bed land.

[36] In the case of the PGER, specific legislation was passed in anticipation of incorporation of the PGER that enabled grants of rail bed land to the railway. At subsection 13(a) of Schedule A of *An Act to ratify an Agreement bearing Date the Tenth Day of February, 1912, between His Majesty the King and Timothy Foley, Patrick Welch, and John W. Stewart, and an Agreement*

bearing Date the Twenty-third Day of January, 1912, between the Grand Trunk Pacific Railway Company and the Grand Trunk Pacific Branch Lines Company and said Foley, Welch, and Stewart, SBC 1912, c 34:

> 13. The Government hereby covenants and agrees with the Firm that it will covenant and agree with the Company in manner following, that is to say: –
>
> (*a.*) To convey to the Company by a free grant a right-of-way not exceeding one hundred feet in width for the said line of railway above described, in so far as the same extends or shall extend through vacant Crown lands of the Province of British Columbia: [emphasis added]

[37] The power to convey vacant land under this section implies the same restriction as contained in the *British Columbia Railway Act*, restricting appropriation of Crown land to "unoccupied and unreserved lands of the Province".

[38] The Band argues that these restrictions made the land provisionally reserved as WLIR No. 1 unavailable for transfer to the PGER. I agree that the Railway Statutes were inappropriate for such a transfer; however, the Railway Statutes were not the only authority for the acquisition of rail bed lands.

2. The B.C. *Land Act*

[39] The *Land Act*, 1911, provided for the Crown to both reserve and grant Crown lands for Indian reserve and railway purposes; and, the discretion, in the case of provincial Crown land designated for an Indian reserve to, notwithstanding the reserved status, make a Crown grant of the interest of the Province in the land on terms deemed advisable.

[40] Section 127 of the *Land Act*, 1911, provided:

> **127.** The Lieutenant-Governor in Council may at any time, by notice signed by the Minister and published in the Gazette, reserve any lands not lawfully held by pre-emption, purchase, lease, or Crown grant, or under timber licence, for the purpose of conveying the same to the Dominion Government in trust for the use and benefit of the Indians, and in trust to reconvey the same to the Provincial Government in case such lands at any time cease to be used by such Indians; and the Lieutenant-Governor in Council may also similarly reserve any such lands for railway purposes or for such other purposes as may be deemed advisable: Provided always that it shall be lawful for the Lieutenant-Governor in Council to at any time grant, convey, quit-claim, sell, or dispose of, on such terms as may be deemed advisable, the interest of the Province, reversionary or otherwise, in any

> Indian reserve or any portion thereof; provided that a return of any alienations made under the provisions of this section be submitted to the Legislature at the next sitting following such alienations, within fifteen days after the opening thereof. 1908, c. 30, s. 80; 1911, c. 29, s. 14 (*part*). [emphasis added]

[41] This section recites the wording of the previous enactment of the *Land Act*, the *Land Act*, RSBC 1908, c 30 [*Land Act*, 1908], section 80, but in the former statute the last sentence beginning "Provided, always, that it shall be lawful…" was expressed in a separate paragraph.

[42] The law regulating the allocation and taking up of provincial Crown land was consolidated by this statute. From the perspective of a member of the public who met the criteria for entitlement under the statute, a grant of Crown land for agricultural purposes was available by pre-emption. The statute also provided a system for setting aside Crown land for specific purposes. These reservations included land set aside for Indian reserves and railways but also included land to be dedicated for other purposes, including parks, cemeteries, churches, and municipal works.

[43] The distinction between land designated as reserved land and land granted through the process of pre-emption, or otherwise alienated by the Crown, was largely in that land reserved under the statute remained Crown land.

[44] During the process of reserve creation in B.C. areas put forward to be considered as reserves were often determined through a process of consultation with First Nations people. Land to be set aside would be loosely described in a decision of the Commissioner or Commissioners involved in setting aside appropriate land. This would often be followed by preparation of a survey plan generally incorporating the description in the decision. The survey would be submitted for acceptance to the CCLW, as in fact happened in 1883 with respect to WLIR No. 1. In other cases, the survey might not be accepted. This was the case in respect of the reserves dealt with in *Wewaykum*.

[45] This process through to acceptance by the CCLW was as far as reserve creation proceeded in British Columbia for the majority of reserves until the transfer of lands from the Province to Canada in accordance with Provincial Order in Council 1036 on July 29, 1938.

[46] While the railway legislation only allowed the railway on its own initiative to expropriate

land and to acquire "unoccupied and unreserved lands of the Province", the last paragraph of section 80 of the *Land Act*, 1908, and the last sentence of section 127 of the *Land Act*, 1911, make it clear that any limitations inherent in the railway legislation were not an impediment to the provincial Crown taking action to grant Crown land to be used for railway purposes, and in particular even if the land had earlier been reserved for Indians under the *Land Act*. It is clear that this was the means adopted for the transfer, the recital paragraph of the 1916 Crown Grant of the rail bed land makes specific reference to this legislation. The recital reads:

> Whereas it is provided by Section 80 of Chapter 30 of the Statutes of 1908, being the "Land Act", that it shall be lawful for the Lieutenant-Governor in Council at any time to grant, convey, quit claim, sell or dispose of, on such terms as may be deemed advisable, the interest of the Province, reversionary or otherwise, in any Indian reserve... [ACBD, Vol 2, Tab 163; Exhibit 3]

[47] The only conclusion that can be drawn from this is that the Claimant's premise that the land transfer was not authorized by provincial legislation is incorrect. The provincial *Land Act* gave express authority for the Crown grant of the rail bed lands.

[48] The Band also argues that the Railway Statutes required strict compliance by the PGER with procedures not followed in this case for the transfer of the rail bed lands in order for the Crown Grant to have been valid. The Band's argument, at least in part, references the requirement that expropriation procedures strictly follow any statutory requirements. The acquisition of Crown lands, however, was not an expropriation and the requirements referenced in this argument were not procedures stipulated under the *Land Act.*

C. Fiduciary Duty

1. Canada's Duty Towards the Claimant

[49] Independent of the question of the status of the Reserve, since the land was compiled in 1881, and in fact prior to this date when the very significant need of the Band for a reserve was impressed upon the Crown, Canada owed a fiduciary duty to the Band to take action on its behalf in the reserve creation process (*Williams Lake*, 2014 SCTC 3).

[50] At paragraph 89 of *Wewaykum*, the Court commented on the history and Canada's representative role in the process:

> In the present case the reserve-creation process dragged on from about 1878 to 1928 [*sic*], a period of 50 years [*sic*]. From at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had. It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion.

[51] In *Wewaykum*, the reserves in question were not created at traditional sites and at least when first set aside, the members of the bands who were allocated the sites had no history of actually occupying them (in one case the reserve was adjacent to a fishing site but never actually occupied prior to it becoming a reserve location). In these circumstances where the bands' connection to the sites was more tenuous, the Crown's fiduciary duty to the bands in dealing with the reserve sites was described in *Wewaykum* as follows, at paragraph 94:

> 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.

[52] In the present case, the reserve creation process had proceeded further than in *Wewaykum*, in that the land set aside to comprise WLIR No. 1 met the approval of the provincial Chief Commissioner of Lands and Works in 1882, indicating that the land should be considered as unavailable for pre-emption by members of the public entitled to pre-empt Crown lands under the *Land Act*. The Reserve land was occupied by the Band since 1881 and were within the traditional land utilized by the Band, and were reserved to stand in the stead of the traditional village site that had at an earlier date been taken up and allocated by pre-emptions to settlers (*Williams Lake*, 2014 SCTC 3). As discussed in *Wewaykum*, the last step necessary for the reserved land to be recognized as a reserve meeting the definition under the *Indian Act* did not occur until 1938, and the reserved land was in that sense provisional and could not be formally dedicated as a reserve (or dealt with directly by Canada in the case of reserved land required for a public purpose as authorized under section 46 of the *Indian Act*), but for matters of general administration of the reserve, Canada was seen as the relevant authority and the reserve had been for many years administered as if it were an *Indian Act* reserve. The local district representative administering this role was the regional federal Indian Agent.

[53] The role of Canada in administering the reserved land as if it were a completed reserve

went so far as to cite the supposed authority of section 46 of the *Indian Act*, 1911, to receive and process the PGER's application for the rail bed land, and the actions taken by Canada in this regard culminated in Privy Council Order 3184, dated December 24, 1914, approving the transfer of the rail bed to the railway expressly referencing this section.

[54] Here, not surprisingly in the circumstances, the dealings in respect of the rail bed land took a confused course. Canada dealt with the allocation of the reserved land as if the Reserve had been formally dedicated under the *Indian Act*, 1911, and went so far as to indicate it was acting under section 46 of the *Indian Act*, 1911, to receive and process the PGER's application for the rail bed land. At the same time, Canada referred the matter to the RCIA to be dealt with in accord with its interim powers. Lastly, the Province ultimately acted under its own legislation, the *Land Act*, in issuing the Crown Grant in accordance with section 127 of that statute.

[55] The actions taken by Canada in this case with reference to section 46 of the *Indian Act*, 1911, have to be seen as inappropriate following the analysis in *Wewaykum*. A purported use of section 46 is also evident in the history of a parcel of reserve land being excluded from the reserve in question in *Tobacco Plains Indian Band v Her Majesty the Queen in Right of Canada*, 2017 SCTC 4 [*Tobacco Plains*], in 1915. In that case, the allocation of reserve land by the DIA was for use as a customs facility. Both agencies were federal departments and the allocation of land to customs was solely dictated by Canada. In *Tobacco Plains*, the fiduciary duty towards the band indicated in *Wewaykum* was supplemented by inclusion of an obligation of minimal impairment when allocating reserved land for a competing public purpose. At paragraph 127 of *Tobacco Plains*:

> The general description of the Crown's fiduciary duties applicable to a *provisional* reserve is: "...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). This duty, in the context of an expropriation of part of the reserve in these circumstances, includes an obligation on the Crown to approve only the minimum expropriation needed to achieve the required public purpose. [emphasis in original]

[56] The fiduciary duty to act on the band's behalf here could be no less than that described in *Wewaykum* and in fact should be informed by the significance of the land transfer to the band in

light of the historical background and the band's inability to replace the land taken. Here, Canada was not allocating reserved land to a federal department; however, the requirement to do what it could to see to minimal impairment should be added as a facet of its fiduciary obligation.

[57] Article 13 of the *Terms of Union* established that the federal Crown was the authority placed in charge of, "Indians, and the trusteeship and management of the lands reserved for their use and benefit". Under the provincial *Land Act*, the interest created when lands were reserved for Indians was not a secure allocation of title. It was sufficient to prevent public pre-emption of the reserved land (*Gosnell v Minister of Lands (BC) and Attorney General (Canada),* (26 February 1912 (BCSC), aff'd 24 June 1912 (BCCA), dismissed 7 March 1913 (SCC), all unreported) but was subject to the land being alienated by Crown grant within the discretion of the Lieutenant-Governor in Council.

[58] In 1911, the *Indian Act*, RSC 1906, c 81, was amended and section 46 enacted to provide:

> **46.** No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve; and in any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

[59] This section allowed a portion of an *Indian Act* reserve to be taken for a railway or other public purpose, by any entity having statutory power, either Dominion or provincial, to expropriate lands or an interest in lands, on terms to be set by Canada and the payment of compensation to the band. Here, however, Canada's purported consent under this section to a transfer of the rail bed land, on the authority contained in *Wewaykum*, was of no real effect in transferring any interest in the rail bed land, title to which remained with the Province and subject to the provisions of the *Land Act*. At best it stands as an indication Canada was not objecting to the transfer on condition of compensation.

[60] Further adding to the complexity of the situation, the Royal Commission on Indian Affairs had been expressly charged with disposing of questions relating to the acquisition of railway land by an interim report made during the course of its tenure. The transfer in exchange for monetary compensation was the disposition proposed by the Commission. The Commission had no specific power to enact its recommendation, but in the McKenna-McBride Agreement, the federal and provincial authorities had agreed to do "everything necessary to carry the recommendations of the Commissioners into effect" (ACBD, Vol 2, Tab 76).

[61] In light of the legislation of the day and the inchoate state of reserve creation, Canada had the responsibility to do what it could to disclose, consult and take any action available to advance the interest of the Band, acting with ordinary prudence as if managing its own affairs, and as in *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 [*Osoyoos*] and *Tobacco Plains*, had a duty to pursue minimal impairment of reserved land, but as is now understood from *Wewaykum*, had limited ability to directly oppose unilateral actions of the Province under provincial legislation.

2. Canada's Conduct

a) Was the Monetary Compensation Adequate?

[62] The evidence available relating to adequacy of the compensation paid is limited. The real estate company that proposed the payment of $44.35, based the figure on $10.00 per acre as appropriate for grazing land, and $5.00 per acre for steep hillside.

[63] When the land for the Reserve was acquired, the most desirable portion of the Reserve, the Bates Estate, constituted of something better than 3,364 acres and was purchased for $5,000.00. This was, however, over 30 years before, in 1881.

[64] In an effort to value the land set aside for bands in the Cariboo the year following the appraisal of the rail bed land, the local Indian Agent valued the 4,069 acres then comprising WLIR No. 1 at approximately $25.00 per acre.

[65] The rail bed land was a small parcel, most of which was at the foot of a steep hillside and described as only having agricultural potential as grazing land. Large portions of the Reserve were arable land more suitable to producing hay or other agricultural crops and a comparison of

this area with the balance of the Reserve suggests that the 4-acre parcel would be of significantly lesser value than the average per acre assessment in the year following.

[66] Reaching further for indications of land value, the payment for pre-empted land under the *Land Act* was set at $1.00 per acre during this time. The process of settlers pre-empting land in the area, however, began many years before and the opportunities to acquire land by this means may have become remote.

[67] The evidence does not suggest the real estate company acted inappropriately in giving its opinion on value, and by its report, members of the Band approved of the value put forward. With this limited evidence, and on balance, I cannot find support for the assertion that the compensation was inadequate in the sense that the dollar value of the land was too low.

b) Should Canada Have Secured Replacement Land?

[68] The second question is whether Crown failed to secure a more satisfactory form of compensation suggested by the Band, through proposal of compensation of land in lieu of the parcel to be taken from the Reserve.

[69] Land removed from reserved land set aside for band use is not often easily replaced. As recognized in *Osoyoos* at paragraphs 45 and 46:

> Second, it follows from the sui generis nature of the aboriginal interest in reserve land and the definition of "reserve" in the Indian Act that an Indian band cannot unilaterally add to or replace reserve lands. The intervention of the Crown is required. In this respect, reserve land does not fit neatly within the traditional rationale that underlies the process of compulsory takings in exchange for compensation in the amount of the market value of the land plus expenses. The assumption that the person from whom the land is taken can use the compensation received to purchase replacement property fails to take into account in this context the effect of reducing the size of the reserve and the potential failure to acquire reserve privileges with respect to any off-reserve land that may thereafter be acquired.
>
> Third, it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community. This view flows from the fact that the legal justification for the inalienability of aboriginal interests in land is partly a function of the common law principle that settlers in colonies must derive their

> title from Crown grant, and partly a function of the general policy "to ensure that Indians are not dispossessed of their entitlements": see Delgamuukw, [*Delgamuukw v British Columbia*, [1997] 3 SCR 1010], at paras. 129-31, per Lamer C.J.; Mitchell, [*Mitchell v Peguis Indian Band*, [1990] 2 SCR 85], at p. 133.

[70] Lands administered by Canada as reserve lands may be subject to alienation as required to satisfy other public requirements. Section 46 of the *Indian Act*, 1911, made provision for the taking of reserve lands for a public purpose. In *Osoyoos*, section 35 of the *Indian Act*, RSC 1952, c 149, a subsequent section replacing section 46 of the *Indian Act*, 1911, was the authority for the transfer of title to land that had been used by the provincial government to construct an irrigation canal on reserve land. The special character of reserve land led to the principle established in *Osoyoos*, that the legal taking of reserve land should be of minimal impact to the band. This may require that the Crown assure that a reversionary interest be retained by the band, or at least that the transfer be constrained to as small a parcel as can be justified. Replacement land, if available, may also serve the principle of minimal impact.

[71] The situation that presented itself in this case, however, included the authority given to the RCIA, the body that had been charged with dealing with proposed additions or deletions to existing reserves, and to process proposals for the taking of reserved land for railway purposes.

3. Did Canada Meet its Fiduciary Duties?

[72] The record discloses that there was consultation with the Band on the question of compensation and that Chief Baptiste William agreed that the valuation was appropriate, but that the Band would have preferred to have replacement land. This was referred to the RCIA as a request for additional land to be added to the Reserve but DIA was informed by the RCIA that the RCIA would likely be opposed to having the Commission recommend a grant of provincial Crown land in lieu of the land to be used for the railway, for which monetary compensation had already been secured. This left only two options: 1) the railway purchasing the in lieu land from the Province and making it available to the Band; or, 2) the DIA using the monetary compensation paid by the railway to buy land for the Band. Both transactions would have been reliant on the doubtful co-operation of the Province. Ultimately the modest sum of money and the need for implements and seed won out.

[73] The request forwarded to the RCIA for replacement land did not find favour with the

RCIA and the result was cryptically recorded as "Not entertained: Departmental" (ACBD, Vol 2, Tab 164).

[74] In review:

- Although the compensation paid appears to have been modest, even on the scale of the times, it has not been shown to have been inadequate. It did not provide for a pro rata payment to Band members. The Band was badly in need of funds and it was used to add to funds available for purchase of seed and implements. Specific direction was given by the DIA that the Band be consulted in the process of establishing compensation;

- The Band agreed that the monetary value set for the land was appropriate but also proposed the alternative of land in lieu;

- This proposal was advanced by way of an application to the RCIA but on advice from the Commission's secretary it seems clear that the Commission would not favourably receive a request for replacement land and that acquisition of replacement land would therefore have required a purchase of provincial Crown land to be added to the Reserve; and,

- The modest sum of money and the option of use of the funds for implements and seed led to the determination that land in lieu should not be pursued further.

VII. DISPOSITION

[75] The case is different from the situation that was presented in *Tobacco Plains* where Canada was dealing with reserve land requested by the federal customs department. Customs likely did not need the entire area transferred, and may have had other options than taking reserve land. In that sense, in that case involving two federal departments, Canada had complete control over the transaction. Here, the Crown decision to not pursue land in lieu beyond the original request to the RCIA was a more complicated matter.

[76] I do not find that in weighing the options and applying the compensation to other Band needs rather than pursuit of an unlikely remedy by way of acquisition of replacement provincial

land, constituted a breach of fiduciary duty. Canada chose a reasonably prudent course of action, notwithstanding that it was not the Band's preferred outcome. The Band was informed, consulted in the process, and ultimately agreed to the receipt of compensation. The fiduciary duties outlined in *Wewaykum* were honoured.

[77] I find that the grounds advanced under section 14 of the *SCTA* for a finding of a valid complaint, based upon the assertion that the transfer of the rail bed land was illegal, and the further assertions that compensation was inadequate and should have been further pursued in the form of land in lieu, have not been established and that Canada's actions on the Band's behalf were within proper exercise of the Crown's fiduciary duty.

WILLIAM GRIST

Honourable William Grist

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20180914

File No.: SCT-7003-15

OTTAWA, ONTARIO September 14, 2018

PRESENT: Honourable William Grist

BETWEEN:

WILLIAMS LAKE INDIAN BAND

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant WILLIAMS LAKE INDIAN BAND**
As represented by Myriam Brulot and Kenji Tokawa
Donovan & Company

AND TO: **Counsel for the Respondent**
As represented by Nicholas Claridge and Shelan Miller
Department of Justice