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CITATION: 2019 SCTC 1
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SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN: AHOUSAHT FIRST NATION Claimant **– and –** HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Stan H. Ashcroft, for the Claimant Tanya L. Jorgenson and Terry A. McCormick, for the Respondent **HEARD:** July 12-14, 2016, October 19-20, 2017, April 17, 2018 and July 12-13, 2018

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Kitselas First Nation v Her Majesty the Queen in Right of Canada, 2013 SCTC 1; *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; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Canada v Kitselas*, 2014 FCA 150, [2014] 4 CNLR 6; *Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3; *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145; *Canada v Akisq'nuk First Nation*, 2017 FCA 175.

Statutes and Regulations Cited:

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

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

Land Act, SBC 1884, c 16.

Land Amendment Act, SBC 1891, c 15.

Headnote:

Aboriginal Law – Specific Claim – Reserve Creation – Fiduciary Duty – Cognizable Interest

This specific claim arises out the 1889 allotment of Marktosis Indian Reserve No. 15, a reserve set apart for the Ahousaht First Nation (Claimant). The claim relates to the non-inclusion of a parcel of land contiguous to IR 15. At issue is whether Crown fiduciary duties arose and

were breached in relation to the task of identifying tracts of land habitually used by the Claimant and wanted by them for their pursuits during the reserve creation process for what became Marktosis IR 15.

Peter O'Reilly was appointed by Canada and British Columbia in 1880 as the sole member of the Joint Indian Reserve Commission. He was tasked with identifying land habitually used by Indigenous groups in their pursuits and which they wanted reserved for their ongoing use and benefit.

In 1889, O'Reilly allotted Marktosis IR 15, a village and fishing site located on Flores Island in the Clayoquot Sound area of British Columbia for the Ahousaht. The land allotted did not include an area south of the village which, according to the Ahousaht's oral history, is known as aauuknuk, meaning a place belonging to a lake.

In 1914, the land known to the Ahousaht as aauuknuk was surveyed, assigned Lot number 363 and conveyed in fee simple title to the Presbyterian Church. Aauuknuk (Lot 363) forms part of a territory the Ahousaht won in war from the Ootsosaht in the early 1800s.

The Claimant argues that the Crown, acting through its agent Commissioner O'Reilly, breached the expected standard of conduct owed as a fiduciary in respect of the protection of the Claimant's interest in obtaining Lot 363 as a reserve. The Claimant relies on its use and occupation of Lot 363 to advance that these uses would have been apparent to O'Reilly as he knew, or ought to have known, of their habits, wants and pursuits.

The oral history evidence supports a finding that the Ahousaht used and occupied aauuknuk as part of their village life. The Claimant's interest in the claim lands was thus cognizable as the "Indian" interest in land habitually used by Indigenous collectives, then termed "bands" was recognized in colonial and post-Confederation provincial laws and policies. After Confederation Canada and the Province affirmed their recognition of the Indian interest in land habitually used by them in establishing, by reciprocal Executive Orders, the Joint Indian Reserve Commission, 1876. The federal Crown exercised its authority in the process of reserve creation as the exclusive intermediary for Indigenous groups.

The cognizable Indian interest was, even prior to the actual recognition of their interest, vulnerable to the exercise of Crown discretion, as the Crown had discretionary control over the identification of habitually used tracts of land. The Tribunal found that the Crown had a fiduciary duty of ordinary diligence in identifying land in which bands had an interest that was capable of recognition, i.e. a cognizable interest. At that stage of the reserve creation process, this means the Crown needed to make adequate inquiry to identify land in which the Ahousaht had a cognizable interest.

However, O'Reilly acted with ordinary diligence in his efforts to accurately ascertain the Ahousaht's habits, wants and pursuits in connection with the allotment of Marktosis IR 15. Although he made adequate inquiry, he was not informed of the particular value attributed to the land at issue. The Crown was not, therefore, capable of determining whether to make an allotment.

Held: The Crown did not breach its fiduciary duty in connection with the allotment of reserve land to the Claimant.

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I. THE CLAIM

[1] The Claim arises out of the 1889 allotment of Marktosis Indian Reserve No. 15 (IR 15 or Marktosis IR 15) as a reserve of the Ahousaht First Nation (Claimant or Ahousaht). The Claimant says that the Indian Reserve Commissioner, Peter O'Reilly, failed to include an area known to them as aauuknuk, which is located to the south of the village and contiguous to IR 15 and contains a lake. The Claimant took salmon from the lake and the timber in the claim area was used for various purposes. At issue are the Crown's (Respondent) alleged fiduciary obligations to the Claimant during the reserve creation process in 1889 for what became Marktosis IR 15.

[2] Marktosis IR 15 is located on the southeastern end of Flores Island, off the coast of Vancouver Island in the Clayoquot Sound area of British Columbia. The allotted land is part of the village site known to the Ahousaht as Maaqtusiis. The term "Maaqtusiis" is used throughout to refer to the village area as understood by the Ahousaht. The term "Marktosis" refers to the anglicized version of "Maaqtusiis", and the area allotted as reserve. The Ahousaht maintains that their interest in aauuknuk was cognizable, and that O'Reilly failed to exercise his discretion properly by not including sufficient land south of the village.

[3] Maaqtusiis was not always part of the Ahousaht traditional territory. It is within a territory that was won by conquest of the Ootsosaht in the 1820s: the spoils of a war waged between them and the Ahousaht and its allies over the previous twelve to fourteen years.

[4] There was a Roman Catholic Church in the village at the time of the allotment. In 1904, the Christian mission was taken over by the Presbyterian Church, which established a residential school at the place called aauuknuk. That same year the Crown conveyed the fee simple title to this land, known as Lot 363, to the Presbyterian Church. The Ahousaht has framed the claim area solely by reference to Lot 363.

[5] The oral history of the Ahousaht says that their title to aauuknuk has never been ceded or extinguished, and that they have occupied and controlled the land since they vanquished the Ootsosaht. They believe that this land was set apart by the Commission as an Indian Reserve for the Ahousaht. The expert findings and government records, including a survey, do not support this belief.

[6] The Ahousaht used the area south of the village, and some of the land that had not been developed for housing was included in the allotment of Marktosis IR 15. Their use of the claim area would not have been apparent to O'Reilly as to outward appearances it would have been no different than other timbered land in the area. The questions, then, are whether the interest of the Ahousaht in aauuknuk was cognizable and whether in fact O'Reilly was, or should have been, aware of it.

[7] If the particular uses of the claim area were not readily apparent, the question becomes this: Did O'Reilly make adequate inquiry into the habits, wants and pursuits of the Ahousaht as these pertain to the allotment of the reserve?

II. PROCEDURAL HISTORY

[8] The Ahousaht submitted a specific claim to the Minister in 2002 alleging that the Crown, through the actions of Indian Reserve Commissioner Peter O'Reilly, breached its fiduciary duty and duty of care to the Ahousaht in connection with the creation of Marktosis IR 15.

[9] After seven years, the Minister notified the Ahousaht that their claim was not accepted for negotiation. The Claimant filed a Declaration of Claim with the Specific Claims Tribunal (Tribunal) on June 20, 2012, asserting several grounds for the Claim under subsection 14(1), *Specific Claims Tribunal Act*, SC 2008, c 22. The primary ground is paragraph 14(1)(c):

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

[10] The Respondent, Her Majesty the Queen in Right of Canada, filed a Response on September 6, 2012.

[11] The Parties agreed to bifurcate the Claim into validity and compensation stages. These Reasons address the validity of the Claim.

III. POSITION OF THE PARTIES

A. The Claimant

[12] The Claimant argues that the Ahousaht's habits, wants and pursuits in the area of the village would have been apparent to O'Reilly, yet he failed to include the claim lands they used routinely for purposes associated with village life including taking salmon from the lake and harvesting timber for canoes, house construction and cedar bark.

[13] The Claimant argues that the Ahousaht's uses of the land at issue, which in time was surveyed, assigned Lot number 363 and conveyed to the Presbyterian Church, would have been apparent to O'Reilly as he knew, or ought to have known, of their habits, wants and pursuits, and that failure to allot these lands constituted a breach of fiduciary duty that was owed to the Ahousaht.

[14] The Claimant contends that it was the Crown's intention to include Lot 363 as part of IR 15. They rely on oral history testimony about the existence of survey markers (posts and pegs) that would have included the claim area in IR 15.

B. The Respondent

[15] The Respondent acknowledges and accepts the historical use of the claim area by the Ahousaht, but states that this usage did not meet the threshold of specificity required for a cognizable interest to arise. Canada says that even if the interest in the claim area were cognizable, in consulting with the Ahousaht throughout the allotment process O'Reilly acted with ordinary prudence in his exercise of discretionary control. Without O'Reilly's knowledge of, nor any reasonable expectation of him knowing about the claim area, Canada argues they could not have owed a fiduciary duty to the Ahousaht in 1889.

[16] The Crown relied on conclusions by its expert to refute the Claimant's assertion that the Crown intended to include Lot 363 as part of IR 15. It argues that no physical evidence of posts or pegs was ever located and the survey records do not support this assertion.

IV. FIDUCIARY DUTY

A. Fiduciary Relationship

[17] The identification of land to be set apart as reserve in areas not "settled" by treaty was recognized by the Tribunal in *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 [*Kitselas*], and *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3 [*Williams Lake*], as coming within the precept of the honour of the Crown, and thus the potential for Crown duties as a fiduciary.

[18] The Parties have set out their arguments in the framework for fiduciary analysis offered by *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*], *Kitselas* and *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development*), 2018 SCC 4 [*Williams Lake SCC*].

[19] In *Williams Lake SCC*, the Supreme Court of Canada confirmed that the relationship between the Crown and Indigenous peoples in British Columbia was fiduciary in nature both before and following the entry of British Columbia into Confederation. The Crown-Indigenous relationship in British Columbia may give rise to fiduciary duties that have their origin in the precept that the Crown will act honourably, i.e. the honour of the Crown. One method for demonstrating that specific fiduciary obligations attach in a particular setting is for a proposed beneficiary to show that the Crown has undertaken discretionary control over a cognizable Aboriginal interest in land (*Williams Lake SCC* at para 44; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at paras 49, 51, [2013] 1 SCR 623 [*Manitoba Métis Federation*]; *Wewaykum* at paras 79–83; *Williams Lake* at paras 180–81; *Kitselas* at para 96).

B. Cognizable Interests and Reserve Creation

[20] A cognizable interest may be based on historic use and occupation of the lands (*Williams Lake SCC* at para 53; *Manitoba Métis Federation* at para 58). The Supreme Court of Canada in *Williams Lake SCC* specifically affirmed that the interest may be a pre-existing Aboriginal interest in land (paras 66–68). Later recognition of the interest at stake, in that case by colonial enactments and policies, did not create the interest. Pre-existing Aboriginal interests meet the requirement that the interest is "independent of the Crown's executive and legislative functions",

or an "independent legal entitlement", as opposed to a lesser kind of government benefit (*Williams Lake SCC* at paras 68, 81).

[21] To form a foundation for a fiduciary obligation, the Aboriginal interest at stake must be "specific or cognizable" in the sense that officials acting on behalf of the Crown would have been able to identify specific land in which Indigenous peoples had an interest (*Williams Lake SCC* at para 67; *Manitoba Métis Federation* at para 51). The Supreme Court of Canada further explained: "[t]he Tribunal's approach to these circumstances has been to ground the Crown's fiduciary duty in interests in land 'capable of being known or recognized': *Lake Babine*, at para. 172, quoting *Black's Law Dictionary* (10th ed. 2014), *sub verbo* 'cognizable'" (*Williams Lake SCC* at para 80).

[22] In *Williams Lake*, the Tribunal predicated the cognizable interest in the Village Lands on habitual and historic use and occupation. The Supreme Court of Canada noted that the Tribunal had found that the band's use and occupation "would have been — and was — apparent as such to the officials charged with implementing the policy" (*Williams Lake SCC* at para 80). The Tribunal also found that use and occupation may be ascertained by consulting with the Indigenous peoples themselves (*Williams Lake* at paras 50–51; *Williams Lake SCC* at para 63).

[23] Further explaining the modifier "cognizable", the Supreme Court of Canada in *Williams Lake SCC* said that the "interest at stake was 'cognizable', on the Tribunal's approach, because Crown officials were in a position to know of an Aboriginal land interest and of their discretionary power" (para 81). Through Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*], and the instruments and policies of reserve creation, Crown officials, and especially the reserve commissioners, were specifically directed to consider certain connections and attachments that Indigenous peoples had to the land. This is the acknowledgement that the Supreme Court of Canada referred to at paragraph 65 of *Williams Lake SCC* when it said that "[t]he Tribunal thus defines cognizable interests…as encompassing acknowledged Aboriginal interests in land whose protection was provided for in legislation and policy (see *Wewaykum*, at para. 95)". This acknowledgement by the Crown was significant for rendering a pre-existing interest cognizable for the purposes of fiduciary law (*Williams Lake SCC* at para 65). However, in the reserve creation setting, an interest need not have been

recognized in fact by a reserve commissioner in a specific location for the interest to meet the definition of "cognizable". To read paragraph 65 that narrowly would be inconsistent with the Supreme Court of Canada's other affirmations that the interests at stake may pre-date Crown recognition and that the fiduciary duty "existed from the outset of the reserve creation process" (*Williams Lake SCC* at para 66).

[24] The Supreme Court of Canada found that the Tribunal's approach in *Williams Lake* "will be reasonable provided that there was an Aboriginal interest at stake in the early stages of the reserve creation process that was sufficiently specific or cognizable for the assumption of 'discretionary control in relation thereto…to ground a fiduciary obligation': *Wewaykum*, at para 83" (*Williams Lake SCC* at para 66).

C. Discretionary Control

1. Introduction

[25] This Claim is the first before the Tribunal that addresses the question over Crown duties in relation to the *identification* of tracts of land in which Indigenous groups had recognizable, i.e. cognizable, interests in Crown land.

[26] The Federal Court of Appeal found in *Canada v Kitselas*, 2014 FCA 150, [2014] 4 CNLR 6 [*Kitselas FCA*], that the high degree of discretionary control assumed by the Crown over the lives of Indigenous peoples expressed in Article 13 of the *Terms of Union* could give rise to fiduciary duties (para 48). Article 13 was a unilateral undertaking by the federal Crown to act as exclusive intermediary with the Province on behalf of Indigenous people (*Kitselas* at paras 126–27). Article 13 and related colonial instruments and policies directed responsible government officials to determine and allot, for each Indigenous group, their village sites and land habitually used.

[27] In *Kitselas*, Commissioner O'Reilly was found to be the central actor in the initial exercise of Crown discretion over the allotment of reserves: "Commissioner O'Reilly was the vehicle by which federal discretion would be exercised over the establishment of reserves" (para 200). The same can be said for the present matter.

[28] When O'Reilly toured specific areas and met with Indigenous peoples for the purpose of setting aside reserves for them, he was performing a function on behalf of Canada, namely the allotment of reserves.

[29] Once a tract of land was allotted, the discretionary power of the Crown gave rise to those fiduciary duties that apply in relation to provisional reserves. But did fiduciary obligations exist in relation to land habitually used by Indigenous groups prior to the Crown having knowledge of the kind of pre-existing interest in a particular tract of land that the Crown recognized as calling for the allotment of a reserve? At first blush, the answer would be "no", as the exercise of discretionary control over the cognizable Indigenous interest presumes knowledge of its existence. One cannot directly exercise control over something that is not known to exist.

[30] This, however, begs the question whether a Crown duty of ordinary diligence exists prior to the actual identification of tracts of land to which Indigenous groups were recognized as being entitled to have allotted as reserve lands, namely, lands in which they had a cognizable interest.

2. Analysis

[31] Crown policy, formalized in the executive orders in council that established the Joint Indian Reserve Commission (JIRC), recognized that the tangible, practical Indian interest in habitually used tracts of land warranted their provisional allotment as reserves for the advancement of the objects of Article 13 of the *Terms of Union*. Their interest was cognizable.

[32] Such lands were, by law, Crown lands by reason of the assertion of Crown sovereignty. Therefore, the cognizable Indian interest was, even prior to the actual recognition of their interest, vulnerable to the exercise of Crown discretion. This is apparent on the facts in *Williams Lake*. There, land in which the Indians had a cognizable interest were pre-empted under provincial laws by a settler and considered by O'Reilly to be unavailable for allotment as reserve.

[33] The Respondent is Her Majesty the Queen in Right of Canada. Generally, the exercise of discretion over provincial Crown land lies with the Province. The question becomes this: At the material time in the present matter, did the federal Crown exercise discretionary control over provincial lands in which Indigenous groups were recognized as having an interest? This is

answered by the decision of the Supreme Court of Canada in *Williams Lake SCC* which upheld the decision of the Tribunal based on its findings. A review of the basis on which the Crown held discretionary control follows.

V. RESERVE CREATION ON PROVINCIAL CROWN LANDS

A. *Terms of Union*, 1871

[34] British Columbia entered Confederation in 1871 under terms and conditions set out in the *Terms of Union.* Article 13 provided:

> 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. [emphasis added]

[35] The federal Crown exercised its authority in the process of reserve creation as the exclusive intermediary for Indigenous groups (*Wewaykum* at paras 93, 97).

[36] Negotiations followed between Canada and British Columbia on how to give effect to the policy of setting aside tracts of land for Indians as called for by in Article 13 of the *Terms of Union*.

B. The Joint Indian Reserve Commission

[37] In the result, Canada and British Columbia approved by orders in council the establishment of the JIRC to address the Indian land question in British Columbia. The Memorandum attached to the Governor in Council's approval on November 10, 1875 provided 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 (meaning by Nation all Indian tribes speaking the same language) 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.
>
> ...
>
> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, 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. [emphasis added; Common Book of Documents filed November 30, 2017 (CBD), Vol 1, Tab 10]

C. The Commissioners, and their Tasks

[38] At the outset, the JIRC had a complement of three commissioners. Canada and the Province later agreed to proceed with Gilbert M. Sproat as sole commissioner. On Sproat's resignation in 1880, Peter O'Reilly took over as sole commissioner.

[39] Peter O'Reilly was appointed to the Commission by Canada and the Province, jointly, as the sole commissioner, a position he held until his retirement in 1898. As such, it was his responsibility to identify and mark off and reserve such land as would secure for the "Indians" (the descriptor for Indigenous peoples then in general usage, which I use in these Reasons as in the context of the time) the ongoing ability to use land in accordance with their habits, wants and pursuits.

[40] In *Williams Lake SCC*, the Supreme Court of Canada found that Crown fiduciary duties existed upon the identification of provincial Crown lands in which the Indians had cognizable interests.

[41] The present question is whether fiduciary duties arose in relation to the task of identifying tracts of land habitually used by Indians and wanted by them for their pursuits.

D. Awareness of the Indigenous Interest

[42] In *Williams Lake SCC*, the Supreme Court of Canada found, at paragraphs 80–81:

> The Tribunal's approach to these circumstances has been to ground the Crown's fiduciary duty in interests in land "**capable of being known or recognized**": *Lake Babine*, at para. 172, quoting *Black's Law Dictionary* (10th ed. 2014), *sub verbo* "cognizable". The Tribunal found that the band's use and occupation of the Village Lands had established a form of Aboriginal interest in land that would have been — **and was** — apparent as such to the officials charged with implementing the policy: para. 237. The band's interest was therefore sufficient for the exercise of discretion by federal officials to be subject to the Crown's fiduciary duty: T.R., at para. 317; see also *Kitselas* (S.C.T.), at paras. 153-55, aff'd *Kitselas* (F.C.A.), at paras. 49, 52-54 and 67; *Akisq'nuk*, at paras. 231-38; *Lake Babine*, at para. 170.
>
> The interest at stake was "cognizable", on the Tribunal's approach, because Crown officials were in a position to know of an Aboriginal land interest and of their discretionary power to affect it as they "carr[ied] out various functions imposed by statute or undertaken pursuant to federal-provincial agreements": *Wewaykum*, at para. 91. The interest at stake also reasonably met the requirement of an independent legal entitlement. The band's collective Aboriginal interest in the land it had habitually and historically used and occupied at the time decisions about reserve creation were being made, though *recognized* in legislation and policy, had not been created by executive or legislative action. [italics in original; emphasis added]

[43] Before reserve creation, the Crown's fiduciary duty is "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries" (*Williams Lake SCC* at para 55; *Wewaykum* at para 97; *Williams Lake* at paras 224, 319).

[44] The Supreme Court of Canada found that the existence of Crown fiduciary duties depended on its awareness of Indigenous use and occupation of tracts of land which, under "federal-provincial agreements" (*Williams Lake SCC* at para 81; *Wewaykum* at para 91), were to be considered for allotment as reserves. The JIRC was established by such an agreement.

[45] The JIRC was tasked with the allotment of tracts of land upon taking account of the subject group's "habits, wants and pursuits". It is self-evident that this calls for inquiry of the group for which reserves are to be allotted.

[46] Fiduciary obligations arise in the exercise of the power of reserve creation:

> In *Ross River*, *supra*, the Court affirmed that "[a]lthough this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power [of reserve creation] remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution Act, 1982*" (LeBel J., at para. 62). Further, "it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band…. [*Wewaykum* at para 88]

[47] Fiduciary obligations existed upon the identification of lands by the JIRC in which the Indians had an interest (*Williams Lake SCC*). Absent inquiry, it is unlikely that the lands habitually used in the local pursuits of those groups for which reserves were to be allotted would be known to Crown officials. Hence, fiduciary obligations would exist at this stage of the process. It is in relation to this circumstance that the content of the fiduciary duty must be ascertained:

> The starting point in this analysis, therefore, is the Indian bands' interest in specific lands that were subject to the reserve-creation process for their benefit, and in relation to which the Crown constituted itself the exclusive intermediary with the province. The task is to ascertain the content of the fiduciary duty in relation to those specific circumstances. [*Wewaykum* at para 93]

[48] As the Crown had discretionary control over the identification of habitually used tracts of land it must, in fiduciary law, exercise ordinary diligence. This, at this stage of the reserve creation process, means it must make adequate inquiry to identify land under its control in which the Indians have a cognizable interest. These are lands which they used habitually in their regular pursuits. However, if the Crown, despite having made adequate inquiry, remains unaware of the cognizable interest it is not in breach of duty by failing to allot the land as reserve.

[49] A duty of ordinary diligence cannot be met by doing nothing (*Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3 at para 246 [*Akisq'nuk*]). Ordinary diligence therefore imposes a standard of conduct on the Crown in its dealings with a beneficiary, thus requiring adequate inquiry by the Crown into the affected beneficiary's interests in land. Once interests are identified, the Crown must, at a minimum, be ordinarily diligent in pursuing this interest (*Akisq'nuk* at para 242). The identification of Indian interests in land for the purposes of reserve creation in British Columbia is contextual (*Akisq'nuk* at para 225). As such, the extent to which the Crown is said to meet the requisite standard of conduct is determined through a fact-based examination (*Williams Lake SCC* at para 92).

[50] The process is the focus of the inquiry, not the result — the fact that a cognizable interest has been identified does not guarantee that the only possible result is reserve creation in that location (*Williams Lake SCC* at para 73).

[51] As will be seen, the question in the present matter is not whether the Ahousaht had a cognizable interest, but whether it was apparent to Commissioner O'Reilly or, if acting with ordinary diligence, would have been apparent to Commissioner O'Reilly.

VI. COGNIZABLE INTEREST AND ORAL HISTORY

[52] In *Mitchell v MNR*, 2001 SCC 33 at para 37, [2001] 1 SCR 911, the evidentiary value of oral history was considered:

> Nonetheless, the present case requires us to clarify the general principles laid down in *Van der Peet* and *Delgamuukw* regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights. As Lamer C.J. observed in *Delgamuukw*, **the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight (para. 98). Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts" (para. 84)**. [emphasis added]

[53] Oral history is admissible in evidence for proof of Indigenous perspectives and use of land and resources at a time material to the question whether a section 35(1) right of the *Constitution Act*, 1982, has been established. The Ahousaht Claim before the Tribunal is not grounded in a claim of a section 35(1) right, but rather in a claim in relation to land which, by government obligations grounded in a Constitutional enactment, Article 13 of the *Terms of Union*, may qualify for allotment as reserve land.

[54] The commissioners were required to consider the Indians' habits, wants and pursuits in identifying land to set apart as reserves. As settler perspectives on the value attributed to a particular tract of land may fail to take account of Indigenous perspectives in relation to that land, engagement with the Indigenous group for which reserves were to be established was needed to identify land which, based on their perspective, had particular utility or meaning to them. Commissioner Sproat, in his Report of Progress to the Indian Reserve Commission dated October 26, 1878, said, in part:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change.…
>
> The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded. [CBD, Vol 1, Tab 22]

VII. EVIDENCE

A. The Oral History

1. Louie Frank Sr.

[55] Mr. Frank is 82 years of age. He was born in Ahousaht, as was his mother. His father was born in Kelthsmaht, a place on Vargas Island across the water from Tofino. His knowledge of oral history came from his elders, not from a book: "[o]ur ways are very different where we sit around the table and as a young, young person you sit back and listen when the elders speak. And you are supposed to pick it up and pass it on to the next generation. And that's our way of teaching and sharing our history" (Hearing Transcript, July 12, 2016, at 10).

[56] Several elders were named, including one named Keitlah, a "second chief". All the chiefs had speakers, who would hold their songs. Together they would, at feasts "spell out the history and the family relationships and who owned what, and again you were supposed to pick it up and pass it on" (Hearing Transcript, July 12, 2016, at 11).

[57] Lot 363 is a small part of a territory the Ahousaht won from the Ootsosaht, a powerful nation which they, with several other allied tribes, defeated in a war: "[w]e maintain -- our ha'wiih maintain that we still own it. Our ha'wiih have never ceded or agreed with any government or any other group to say that you can do this or do that" (Hearing Transcript, July 12, 2016, at 18). Lot 363 is a small part of the spoils of the war:

> [The Ahousaht] -- gradually moved into Maaqtusiis Ahousaht, which we know as Ahousaht now because its exceptional harbour…
>
> [Lot 363 is] right next to the reserve on Ahousaht Maaqtusiis. Maaqtusiis we call it.
>
> …[It was a source] of timber on there, cedar, which was used for many things in our society, our people. And there's medicinal plants in the bog there. And there

> was a lake, a small lake there with a small run of sockeye and when Presbyterians moved in in…they drained the little lake and made ditches right around the property and planted cranberries there.
>
> …not everybody would go to lot 363 for cedar bark, but being close by I'm sure that it was utilized more than other areas, and again I find it hard to try and keep focusing on what the search is here for. I just want to -- I just want to say dammit, we own it. [Hearing Transcript, July 12, 2016, at 20–21, 34]

[58] Upon the arrival of the Presbyterians, Chief Billy (the then-head chief) opposed the placement on Lot 363 of the Presbyterian residential school.

[59] Mr. Frank was aware that the Ahousaht ownership of Lot 363 was denied by the Canadian government:

> Never mind what you think you own. Never mind. You don't own it. And this is very hard to accept. Not accept but we totally reject that line of thinking. How can anyone or any group come in here and tell us we don't own something that we fought for? [Hearing Transcript, July 12, 2016, at 26]

[60] On cross-examination, he testified that the cedar was used for basketry and planks for houses. Being close (to the village) it was utilized for cedar bark more than other areas. There was better timber for canoes on Flores Island.

[61] Mr. Frank took exception to the descriptor "Lot 363" for the land in question: It is known as "aauuknuk", "[a]auu" translates as "lake", and the name means "a place…belong[ing] to [a] lake" (Hearing Transcript, July 12, 2016, at 37). It is within land under the stewardship of a chief:

> [The word ha'wiih] means land, river that achieves [apparent transcript error, likely "a chief"], owns, I think that's strong enough word, looks after…. The chiefs were fully responsible for their ha'wiih. [Hearing Transcript, July 12, 2016, at 43]

[62] The territory gained from the Ootsosaht was vastly larger than "Lot 363". Mr. Frank understands that the Ahousaht ownership extends to the entire territory gained from the Ootsosaht.

2. Clifford Atleo

[63] Mr. Atleo is 74 years of age. His father, Mark Atleo and mother, Elsie (*née* Little), were born in Ahousaht. His father passed on the oral history that had been passed to him by his

grandfather, Shamok, and in turn his great grandfather, Kriista. Shamok was ha'wiih, one of the three principal chiefs of the Ahousaht, and as such was responsible for lands.

[64] Kriista gave the Presbyterian Church permission to use "Lot 363" to build the school. Asked what was to become of the land after the school ceased operations, he testified:

> Well, there was never any expectation that it would go into fee simple. That it would return to Ahousaht lands and subsequent to that when we got involved in the treaty process, elders talked about actual markings for the reservation area for home after the reserve commission came through, and it included lot 363. [Hearing Transcript, July 12, 2016, at 68–69]

[65] Asked about the war with the Ootsosaht, he testified, in part:

> A There are many versions of the war but I'm not really certain of who transcribed that story that I have an 18-page document at home that talks about the war. Needless to say, we won that war. Where we live now was the land there called hisookt, they are lands that are from the war. The land where we live now belonged to Ootsosaht.
>
> Q And when Ahousaht won that war, did the area that it took in include all of Flores Island?
>
> A Yes. [Hearing Transcript, July 12, 2016, at 70]

[66] After the war the Ahousaht settled in Maaqtusiis, territory gained by their victory over the Ootsosaht. The oral history evidence relating to "Lot 363" is that there was a sockeye lake there, which was productive until drained by the Presbyterians and was used to grow cranberries.

[67] There was an Ootsosaht burial site there, in the trees not the ground:

> Q And from your oral history how long had the Ahousaht people been using that as a burial site? From the time they went there or something later?
>
> A Wasn't so much Ahousaht. I think it was Ootsosaht that used that area for burial grounds, because we have only been there since 1823, 1824, after the war.
>
> Q But did the Ahousaht then use it after the Ootsosaht?
>
> A That part I'm not so certain of. [Hearing Transcript, July 12, 2016, at 72]

[68] Questions were asked on cross-examination about burial sites. Mr. Atleo spoke of Ootsosaht sites and, when asked about the Ahousaht burial sites, marked one on a plan. He was not aware of any others. Then:

> Q Okay. Thank you. One other question in regards to the burial site that you marked with your B. And where you said that -- I think you used the term ran

into trouble on lot 363 where there was the remains that you said were probably the Ootsosaht remains. Were there any markers there or was it the remains that led you to believe that that's where a burial site had been?

A Remains. [Hearing Transcript, July 12, 2016, at 91–92]

[69] When housing was developed on the reserve:

A …we actually had problems with new houses that spirits were always present, and our people that are knowledgeable had to come in and cleanse some of the homes that were newly built in a new area of lot -- not so much lot 363, but on our reserve. But it makes sense that parts of lot 363 were also burial site areas for Ootsosaht.

Q And you say it makes sense, why does it make sense from your perspective?

A Because it's part of -- you know, it's right next door. I mean, like, in our view when the reserve commission came in, it included lot 363 and we have people that were around that understood where some of the markings were for that and we understand that every time a surveyor came around, our acreage was reduced every time. For reasons that were never run by our people in terms of understanding that that was going to be the case. [Hearing Transcript, July 12, 2016, at 72–73]

[70] Mr. Atleo was selected by his peers to lead treaty negotiations for the Ahousaht. Lot 363 was discussed. His role was "to get it back without paying a dime" (Hearing Transcript, July 12, 2016, at 77). This was eventually achieved in direct dealings with the forestry company that had acquired fee simple title to Lot 363. Lot 363 was later set aside and added as reserve land to Marktosis IR 15 effective February 25, 2009, by Order in Council PC 2009-138 dated January 29, 2009.

[71] Asked why the Ahousaht pursued Lot 363 in particular, Mr. Atleo testified:

In our view Ahousaht territory goes from Escalante Point all the way to Indian Island in terms of the east side, and treaty negotiations for us was really important then. And our purpose was to right some of the wrongs that occurred over the years that really shouldn't have happened. And they never happened with our permission. They never happened with any consultation with our people or our chiefs and, you know, the stories that we had in terms of understanding lot 363. There was clearly marked areas in terms of understanding lot 363. There was clearly marked areas in terms of the original survey of lot 363 that should have been part of Ahousaht -- that was part of Ahousaht reservation, recognized as reservations. And we quite appreciated assistance of MacMillan Bloedel and -- but in our view lot 363 was always part of our lands, our chiefs' lands but even under new governments that created reservations it was part of Ahousaht Reservation. [Hearing Transcript, July 12, 2016, at 77–78]

3. Andrew William Webster

[72] Mr. Webster is 71 years of age. An Ahousaht member, Murray John, told him about there being a lake on Lot 363:

> He just said there was a sockeye run that used to go there. Like, but, it was a very small run. It wasn't a huge one. [Hearing Transcript, July 12, 2016, at 123]

[73] Asked about survey boundaries, Mr. Webster related having been about Lot 363 by his father from the time he was around 12 years old. He recalls his father and others "always out there looking" for the posts throughout his childhood (Hearing Transcript, July 12, 2016, at 112). He recalled them indicating that they had found one. This was "out at Kutcous" (Hearing Transcript, July 12, 2016, at 122). This is a location to the southwest of Marktosis.

4. Sidney Sam Sr.

[74] Mr. Sam is 85 years of age. He attended the Presbyterian residential school for a couple of months before it was destroyed by fire around 1940. It is his lifelong belief that the school site and adjacent land, Lot 363, were always within the boundaries of the reserve. Sometime in the 1950s his older brother, Dixon, told him about finding a corner post "in the depth of the bay" (Hearing Transcript, July 13, 2016, at 9–10). His brother-in-law, Ambrose Titian, also told him he had seen a corner post at the same location. It was stamped "IR". Also, on cross-examination, he testified that "[he] just kn[e]w that it was brass and IR 15" (Hearing Transcript, July 13, 2016, at 15–16). Although he had not seen it he believes that it is still there. Mr. Sam testified that he had seen two surveyors in the area and asked what they were doing:

> They told me they were surveyors hired by the Department of Indian Affairs. And they said they were looking for a corner post. I just told them I don't think you'll find it here because it probably washed away. There used to be a house in the front of what we call Sea Lion Rock. A home. A house. But it's no longer there. It's all washed way.… They were told to do another survey on the reserve where the corner posts were. [Hearing Transcript, July 13, 2016, at 12]

[75] Sometime in the 1980s, Mr. Sam went to Ottawa with the chief councillor and Band manager on Band business. This had to do with the day school at the site of the former residential school. They went to the Department of Indian Affairs (DIA) archives, where they saw a document on which IR 15 was depicted:

> It is a reserve that had IR 15 on there on the corner post. That's what we were looking for and that's what was pointed out to us. [Hearing Transcript, July 13, 2016, at 7]

[76] The document showed the location of the corner posts. He did not obtain a copy of the document. Earlier in his testimony, he was shown a document by Counsel, and marked the place where he understood his brother and Ambrose Titian saw the post. In chief, he marked the location of the corner posts he recalled seeing on the archival document. The markings denote an area that would encompass Lot 363.

[77] As for the timber, on cross-examination, Mr. Sam testified:

> Q And we've heard that it was used to collect timber. Do you have any knowledge about other uses or to you it was used for the residential school?
>
> A I just know it was used for residential school. I didn't know anything else. [Hearing Transcript, July 13, 2016, at 18]

5. David George Jacobson

[78] Mr. Jacobson, age 59, explained his Ahousaht lineage and the means by which he received its oral history. He spoke of events from 1795 onward, and gave a compelling account of the events leading to the war with the Ootsosaht. This started early in the 1800s and continued for over a decade. The area including Kutcous and Lot 363 was an Ootsosaht stronghold. The Ootsosaht — and after they were vanquished, the Ahousaht — used the area:

> The Ootsosaht, one of their strongholds was that area that we are talking, lot 363, Kutcous. They were very fortified in making their last stand in that area. And just in behind were what we call Paul Beach and inside of what we call Maaqtusiis or Matilda Inlet there used to be a lake and a stream that was utilized for feeding the people. There was salmon that was resourced from there. But the result of that war was that area was attained by Ahousaht. It was secured by Ahousaht through those many years of spillage of blood on both sides. The Ahousaht side and the Ootsosaht side. [Hearing Transcript, July 13, 2016, at 32–33]

[79] Regarding the lake:

> Q Now, you mentioned a lake where they would obtain the fish on lot 363. Did the Ahousaht do the same thing after they defeated the Ootsosaht?
>
> A Yes, the resource was still used.
>
> Q What kind of fish were in there?
>
> A My understanding would have been coho.
>
> Q And when did the Ahousaht stop using -- taking the coho?

A I'm not able to put an exact date to when that happened, but I do know that the lake was drained.

Q By who?

A By Europeans. It became a cranberry bog. The Europeans very much wanted First Nations people to be farmers. To utilize the land, to create crops and opportunity to feed our people. [Hearing Transcript, July 13, 2016, at 33–34]

[80] Other uses:

Q And have you been told in your oral history other uses for lot 363 that the Ahousaht used it for?

A Beyond the resource of salmon, I do know that there was a lot of geese and ducks that were hunted just on the inside in the inlet.

…

A A lot of our reserves are around rivers, around fishing stations and areas of importance to that First Nation for day-to-day living. And they weren't big reserves because when I mentioned earlier that the European was very fond at trying to make First Nations people farmers, our crops and where we sold the food that fed our nation came from that ocean, hence the size of our reserves. [Hearing Transcript, July 13, 2016, at 34, 38]

[81] "Burial" sites:

Q Were you told of any Ahousaht people being buried in trees?

A Yes. Unlike the European, there isn't what you would call cemeteries. For our First Nations people to lay to rest, our deceased, our ancestors who passed, not only putting them in trees, but also putting them in caves. Putting them under the tree as well. At the time of the first opening of the first residential school there was incidents of First Nations people who had been laid to rest where their resting place was disturbed.

Q Would that include Ahousaht people?

A Yes. The first residential school opened in 1895, I believe. Latter part of the 18th century.

…

Q Okay. And in your oral history have you been told of other areas in lot 363 where there were bodies in trees or under trees or wherever?

A My understanding and my teaching of when we put our people to rest or when we laid our people to rest was that it wasn't a part of the area we occupied for a living, but it was in behind. Like I said, it's not in the sense of what you understand is a cemetery.

…

Q Now, after Ahousaht defeated Ootsosaht when did they start putting bodies on to Maaqtusiis or including lot 363?

A How you put the question makes it difficult to answer. We don't have a written history. [Hearing Transcript, July 13, 2016, at 34–36, 42–43]

[82] The peg (post):

Q Where did you get the information regarding the peg and the IR 15?

A From my grandfather Harold Little Sr.

Q And did he talk to you at all about whether lot 363 was or was not reserve?

A It was reserve. [Hearing Transcript, July 13, 2016, at 39–40]

[83] Regarding the church on lot 363, Mr. Jacobson recounted: "[t]he Roman Catholics were in our village to begin with at the start" (Hearing Transcript, July 13, 2016, at 54). The Catholics were replaced by the Presbyterians, who established a residential school, circa 1904. After the residential school burned, a day school was established.

[84] On cross-examination, Mr. Jacobson spoke about the Ahousaht practices in relation to remains of the deceased. When Europeans arrived in the last part of the 18th century they took skeletal remains and valuables that had been placed with the remains from the trees where they had been placed. This practice changed, as:

> If they knew it was going to be in a tree, then why put our loved ones in that tree when we knew that the European or non-First Nations people were going to go and either take that skeleton or take the valuables of that loved one that were put to rest with them. [Hearing Transcript, July 13, 2016, at 66]

[85] There was no common place where remains and valuables were placed:

THE CHAIR: So there were spots where people would be cared for as it were.

THE WITNESS: There were people who had the responsibility for looking after that situation and they knew.

THE CHAIR: Okay. And did the rest of the community know those spots?

THE WITNESS: People that took care of the situation, they knew. So they took care of it in the way that it should be taken care of and they made sure that it was done right. And it didn't adversely affect the rest of the community or the community members.

THE CHAIR: And the rest of the community members might not know?

THE WITNESS: Well, if you went out for a walk and seen it, you might know what, yeah. [Hearing Transcript, July 13, 2016, at 79–80]

B. Expert Report

[86] The Crown retained Steven Minnie, BCLS, CLS, to describe surveys and boundaries in

general and explain how surveys were conducted in an historical context, including the instructions, regulations and standards surveyors were expected to follow in preparation of surveys of Indian reserves (Minnie Report).

[87] The Minnie Report also addresses the initial survey of Marktosis IR 15 up to the addition of Lot 363 and confirms the boundaries of the reserve set aside. Mr. Minnie's evidence is therefore relevant to establish the original boundaries of IR 15. Mr. Minnie concluded that boundaries between IR 15 and Lot 363 is the same location as the south boundary of the reserve as surveyed by F. A. Devereux in 1893.

[88] Mr. Minnie's Report explains his conclusions on the survey boundaries:

> It is my opinion that the boundary between District Lot 363 and Marktosis Indian Reserve No. 15 as shown on Land Title Plan VIP81957 is in the same location as the south boundary of the reserve as shown on Canada Lands Surveys Records Plan 74753, which is an accurate re-establishment of the boundaries of the reserve as surveyed by F.A. Devereux in 1893. [Minnie Report at 4]

[89] In short, Mr. Minnie retraced the history of surveys conducted in respect of IR 15 and found no record of survey markers (posts or pegs) outside of the boundaries in the Devereux survey.

[90] Mr. Minnie discusses the role of the surveyor assisting the reserve commissioner:

> 10.2. The Commission's visit to any one area was brief and did not provide sufficient time for the surveyor to fully survey any of the allotments. The surveyor would record observations and details of the intended allotment which would assist the Commissioner with describing the lands, and would assist surveyors at a later date when he or she returned to fully survey the allotted reserves.
>
> …
>
> 10.10. The duties of the surveyor assisting the Indian Reserve Commissioner were:
>
> …
>
> (b) Accompany the Commissioner as he visited First Nations, taking field measurements and recording observations of occupation such as buildings, fences, gardens, roads, and graves, so that he could prepared a rough map of the area. The surveyor would assist with measuring distances and calculating areas which the Commissioners could use in their allotment descriptions…;

> (c) Document in their field notes the allotment described by the Commissioner…;
>
> (d) Prepare sketches of the Commissioner's allotments to be included with the Minutes of Decision. The sketches would be prepared from the field observations taken by the surveyor, combined with any addition land related documents found during their research. [Minnie Report at 32–33]

[91] Ashdown Green had to establish a property boundary. The Minnie Report states that:

> 3.2. A property boundary is an invisible line which defines the limit between interests in land…
>
> 3.3. An artificial boundary, that is a line defined by corners created by man, is fixed in location by the first demarcation of the boundary on the ground. All subsequent attempts to locate that boundary must search for evidence of where the corners were originally placed.
>
> 11.6. Accompanying Commissioner O'Reilly was surveyor A.H. Green. It is my opinion that Green kept a record of the visit in his field book and this field book is recorded as FBBC455 CLSR (Tab 15). His field book notes only have one page related to Marktosis IR 15. (See Figure 15.) On this page Green sketches the approximate size and shape of the allotment, the location of houses and a church on the allotment, and a written description of the area. There is no record of field measurements taken by Green.
>
> …
>
> 14.5. I found no evidence that O'Reilly, or the surveyor with him, A.H. Green, measured the length of the proposed south boundary… [footnote omitted; Minnie Report at 8, 37, 71]

[92] Mr. Minnie testified with respect to the allotments generally and in relation to "Maaqtusiis":

> Yes. Like I say, they are very sparse. Maaqtusiis is one page. There's not a lot of measurements on it. It reflects, I believe, how quickly or how little time they [O'Reilly and Green] were there. He [Green] didn't actually measure the boundaries. He just took quick notes of what he saw and what they observed at the time. But to be clear, he didn't actually survey the parcel. [Hearing Transcript, October 19, 2017, at 35]

[93] Green estimated the length of the southern boundary at 60 chains. It is apparent that his intention was to extend the boundary from the Commissioner's Tree westward to the shoreline opposite, as Mr. Minnie, in his discussion of the 1893 Devereux survey, says:

> 12.38. The surveyor started at the marked Spruce tree – the Commissioner's Tree (page 45 of the field book) and surveyed west until he hit the shoreline at 46.10 chains (page 46 of the field book). The Minutes of Decision call for the south

> boundary of the reserve to be 60 chains long. This required the surveyor to go a further 13.90 chains west from where he hit the shoreline of the Inlet on page 46.
>
> 12.39. Since the surveyor cannot include the large body of water in the reserve he must traverse along the shore until he can resume running the west boundary north. [Minnie Report at 53]

[94] O'Reilly's Minutes of Decision describe the northern boundary as commencing at a point 80 chains to the north of the shoreline, thence eastward to the shoreline opposite. From there it follows the shoreline southward to the starting point, i.e. the Commissioner's Tree. The area surveyed takes in the village structures and forest land to the north and south of the village.

VIII. DID THE CROWN INCLUDE AAUUKNUK (LOT 363) AS PART OF IR 15?

[95] Admissible oral history is transmitted from generation to generation according to the cultural practices of a given Indigenous group. The evidence of uses of an area encompassing Lot 363 in times past is admissible as oral history.

[96] The witnesses' belief that Lot 363 was set apart as reserve relied on what they and their predecessors were told by those who recalled seeing survey markers which would encompass a larger area than that which was in fact shown on the sketch prepared by Ashdown Green. The official survey conducted by Devereux likewise shows a smaller marked off area.

[97] The witnesses were firm in their belief that Lot 363 was within the allotted reserve. Although incorrect, there is a foundation for this belief. Lot 363 is contiguous to the place named Maaqtusiis which, anglicized to Marktosis, became the name of the reserve. The Presbyterian Church asked for permission to establish a school on Lot 363, thus acknowledging the Ahousaht's interest. Finally, the strength of the conviction of the elders concerning the Ahousaht people's relationship to the land makes no distinction between lands set apart as *Indian Act* reserve and all land gained from the Ootsosaht.

[98] I do not doubt the veracity of any of the witnesses. However, their belief that there were survey posts encompassing a larger area than what was in fact surveyed relies on hearsay and double hearsay of observations made long after colonization, the imposition of British law, and the exercise of foreign control over the land. As their evidence pertains to reserve creation, there would be a government record of such surveys. There is none. While this would not preclude the introduction of this as oral history, the oral history of the presence of additional survey posts

outside of the area sketched by Green and surveyed by Devereux does not support a finding of fact that a larger area was surveyed and reserved.

IX. COGNIZABLE INTEREST: A CENTRAL QUESTION OF FACT

[99] The oral history witnesses tended not to make a distinction between traditional territory and land within their territory that became reserve land. Their perspective does not take account of the process by which land would ultimately become "created" reserves.

[100] However, the fact that Lot 363 was not within the reserve allotted by O'Reilly does not resolve the question of whether the Ahousaht had a cognizable interest. Their perspective on the use of the land is relevant to the question of whether O'Reilly failed to ascertain their "habits, wants and pursuits".

[101] The Claimant argues that the habits, wants and pursuits of the Ahousaht in relation to Lot 363 were, from their perspective, obvious. The land was forested, and there was a lake populated by salmon. They used timber, and were sustained primarily by fishing. Therefore, whether or not O'Reilly had actual knowledge of their usage of Lot 363, their interest was cognizable.

X. ISSUES

[102] The Issues:

1. By analogy to the proof of Aboriginal title, is the Indigenous perspective relevant to the question of whether a cognizable interest has been established?

2. Did the Ahousaht have a cognizable interest in what became Lot 363?

3. If the Ahousaht had a cognizable interest in the lands that later became known as Lot 363, was this apparent to Commissioner O'Reilly?

4. Did O'Reilly make adequate inquiry into the habits, wants and pursuits of the Ahousaht as these pertain to the allotment of Maaqtusiis as a reserve?

XI. COGNIZABLE INTEREST AND ABORIGINAL TITLE

[103] The Claimant seeks to apply the findings of the Supreme Court of Canada with respect to

proof of Aboriginal title to establish a cognizable interest based on the Indigenous perspective.

[104] The Claimant argues, by analogy to the elements of proof of Aboriginal title, that the Indigenous perspective is relevant to the question of whether a cognizable interest has been established.

[105] O'Reilly was told to take into account the places used by the Indians "to which they may be specially attached". In 1880, O'Reilly received these instructions from the DIA:

> In allotting Reserve lands to each Band you should be guided generally by the spirit of the Terms of Union between the Dominion and local Governments which contemplated a "liberal policy" being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it…
>
> …
>
> The Government considers it of paramount importance that in the settlement of the land question, nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, **you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached.** Their fishing stations should be very clearly defined by you in your reports to the Dept. and distinctly explained to the Indians interested therein so as to avoid further future misunderstanding on this most important point. [emphasis added; CBD, Vol 1, Tab 34]

[106] The Claimant cites *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 35 [2014] 2 SCR 257 [*Tsilhqot'in*], for the requirement that the Aboriginal perspective must be considered for the purpose of establishing Aboriginal title: "[t]he Aboriginal perspective focuses on laws, practices, customs and traditions of the group...'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'" (Claimant's Submissions at para 5).

[107] The Claimant argues:

> With respect to occupation, Chief Justice McLachlin stated, at paragraph 38:
>
> > To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its

> own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.
>
> [Claimant's Submissions at para 6]

[108] In *Williams Lake SCC*, the Supreme Court of Canada cited the decision of the Specific Claims Tribunal in *Kitselas* for the approach to determining the existence of a cognizable interest.

[109] In the case of *Kitselas*, the Tribunal concluded at paragraph 125 that "it is not necessary that the Kitselas First Nation base its claim to a cognizable interest on proof of a 'pre-existing distinct and complete legal entitlement' to the land in question. It is, however, necessary to establish an interest that is contemplated by Article 13" (citing *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 51 [2011] 2 SCR 261). Article 13 refers to Article 13 of the *Terms of Union*.

[110] In *Kitselas*, the Tribunal went on to say: "[w]here the evidence supports a finding of fact that the land in issue was habitually used, the Indian interest is cognizable" (para 145). As a result of conclusions of fact concerning the use made of the land that was excluded from Kitselas IR No. 1 by the Kitselas people, the Tribunal Judge held that the "Kitselas [First Nation] had a cognizable Indian interest in [those] excluded [lands]" (*Kitselas FCA* at para 16).

[111] Aboriginal title is, in Canadian common law, an interest in land. The basis for recognition of the Indigenous interest in title lands and reserve lands differ. Indigenous occupation and control ground Aboriginal title (*Tsilhqot'in*). Full legal recognition of Aboriginal title is established by court declaration or agreement with the Crown. Recognition of a tract of land as an *Indian Act* reserve is based on executive action which brings a particular tract of land within the *Indian Act* definition of a "reserve" (*Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Wewaykum*; *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2).

[112] The Indigenous interest in reserve land is, however, the same as in Aboriginal title land (*Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321). For an analysis of the relationship between

Crown duties and the presence of reserves set apart for bands within the traditional territory of an Indigenous Nation, see the Reasons of the Tribunal in *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2 at paragraphs 252–280. The Parties to the present matter agree that Maaqtusiis is within the traditional territory of the Ahousaht, and this is supported by the evidence.

[113] Although the Aboriginal interest in reserve and title land is the same (*Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321), the test for proof of a cognizable interest in proceedings before the Specific Claims Tribunal and proof of Aboriginal title before a court differ. The former is directed to the question of whether the Crown is a fiduciary in the reserve creation process in relation to a tract of land that was recognized by government as being habitually used or occupied by a distinct Indigenous group for which an *Indian Act* reserve was to be created. The latter is directed to the question of whether an Indigenous Nation has established a territorial title at common law.

[114] The reference to the amount of territory in the Country habitually frequented by Indigenous groups for which reserves would be set apart was not, considered in the historical context, directed at ascertaining the full extent of the territorial title of an Indigenous Nation. The colonial government had, after Governor Douglas stepped down, dismissed the idea that Indigenous peoples had a legal interest in land they used and occupied and considered there to be no need to treat with them to clear the way for occupation by settlers. This view prevailed after the colony joined Confederation in 1871, at least until the decision of the Supreme Court of Canada in *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145.

[115] For an analysis and findings on the history of reserve creation in British Columbia see *Akisq'nuk* at paragraphs 36–99, 106–36 (set aside on other grounds, *Canada v Akisq'nuk First Nation*, 2017 FCA 175), and *Kitselas*, affirmed in *Kitselas FCA*, at paragraphs 51–52:

> In this case, the Judge appropriately had regard to the unique context of reserve creation history in British Columbia. Contrary to Ontario and most of Western Canada, reserve creation in British Columbia did not result from a treaty process, but rather from a unilateral undertaking of the Crown, notably set out in Article 13 of the *British Columbia Terms of Union* and in the various Crown instructions issued to implement that Article. As a result, there were no negotiations with aboriginal peoples to determine the parameters of the reserve allotment policy,

> and the actual allocation of land for reserve creation purposes was largely left to the discretion of Crown officials acting pursuant to the instructions they received.
>
> As the Judge found in this case, the instructions that governed the implementation of the unilateral Crown policy of reserve allocation in British Columbia clearly required the Crown officials responsible for the implementation of the policy to take into account and to have regard to the actual land uses of the various aboriginal nations for which the reserves were being created. This is notably reflected in the instructions given by the Department of Indian Affairs to Commissioner O'Reilly in 1880: "In allotting Reserve Lands […] [y]ou should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to claims of the White settlers (if any)": Reasons at para 15. In essence, as noted in Commissioner Sproat's report of 1878, "[t]he first requirement is to leave the Indians in the old places to which they are attached": Reasons at para. 16.

[116] The government objective behind the establishment of the JIRC was the identification of provincial Crown land to be conveyed to Canada as required by Article 13 of the *Terms of Union* and brought under the *Indian Act*. In accordance with his August 1880 instructions, the focus for O'Reilly was on the places where Indians could be seen, the "villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached" (CBD, Vol 1, Tab 34). The habits, wants and pursuits to be considered in relation to these places were those valued for not only their practical advantages but also the Indian perspective.

[117] The penultimate paragraph in the August 1880 instructions to O'Reilly (see paragraph 131 below for full instructions) refers to "Sproat's Report of progress for 1878 and the Report of the Dept of the Interior for 1878 which contains separate copies of the various documents showing the basis proposed by the Dominion Govt and accepted by the Provincial Govt for the settlement of the Indian Land question in British Columbia" (CBD, Vol 1, Tab 34).

[118] In *Kitselas*, the Tribunal noted the instructions to O'Reilly contained in Sproat's 1878 Report. An extract from this Report was also referenced in *Kitselas FCA* at paragraph 52:

> …Commissioner O'Reilly in 1880: "In allotting Reserve Lands […] [y]ou should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to claims of the White settlers (if any)": Reasons at para 15.

[119] The text of Sproat's Report to the Indian Reserve Commission dated October 26, 1878,

includes the following:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change.…
>
> The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.
>
> …
>
> …I am sorry, as a matter of historical truth, to have to say that the facts disclosed in several of my Field Minutes forwarded from different places are inconsistent with the fair and reasonable attention to Indian business which might have been expected from the British Columbia government in pre-confederation days, and which was enjoined upon the colonial authorities in repeated dispatches from the Home government.
>
> …
>
> **It is almost unnecessary to say that the manners and customs of the native population must be understood before land reserves can be satisfactorily assigned for their use**…. None of the rulers of British Columbia since Sir James Douglas left office seem to have appreciated this fact.…
>
> …
>
> **I have solved several apparently insoluble problems this year by discovering, that what the Indians really wanted was not so much good ploughland, as some old "places of fun" up in the mountains or some place of fishing-resort where, at certain seasons, they assemble to fish, dig roots and race their horses**.…
>
> …
>
> **As a sample of what I mean by too "summary" procedure, I may mention that, in assigning a compact reserve in a district, proper arrangements do not, in all cases, seem to have been made to obtain the intelligent consent of the Indians to the change**… [emphasis added; CBD, Vol 1, Tab 22]

[120] Sproat's words, which were provided to O'Reilly as instructive for his work, establishes that proof of a cognizable interest for the purpose of identifying Crown obligations at the time reserves were allotted calls for consideration of the Indigenous perspectives and usages. It was not, however, contemplated that the inquiry would be so far reaching as to identify the whole of

the traditional territory of the Indigenous groups. This means that venturing into the test for proof of territorial title by taking account in times past, of "the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed" (Claimant's Submissions at para 5 citing *Tsilhqot'in* at para 35) is unnecessary, as occupation alone, if cognizable, together with discretionary control, will establish fiduciary duties.

XII. DID THE AHOUSAHT HAVE A COGNIZABLE INTEREST IN AAUUKNUK (LOT 363)?

A. Finding on the Ahousaht's Usage of Aauuknuk

[121] The oral history establishes the following historical uses of aauuknuk:

1. harvesting salmon from the lake;
2. cutting trees for house planks;
3. stripping cedar bark for weaving of clothing and baskets;
4. hunting ducks and geese;
5. harvesting medicinal plants; and,
6. placement of human remains, from the Ahousaht perspective a burial site.

[122] Although these uses were undoubtedly made of the territory beyond Lot 363, the oral history suggests that the proximity of the place known as aauuknuk to the land that was allotted as Marktosis IR 15, namely the area where houses were located was, from the Ahousaht perspective, an integral part of the village. The oral history establishes these usages within Lot 363.

[123] The oral history evidence suggests that the Ahousaht of the village routinely used the land at issue for various purposes and their interest was "capable of being known or recognized" (*Williams Lake SCC* at para 80). This may also, if supported by the evidence relevant to a claim of Aboriginal title, be said of the entirety of the territory gained from their defeat of the Ootsosaht. However, this is not the task at hand.

[124] I take account of the perspective of the Claimant on the use of Lot 363 as integral to the village and accept, for the present purposes, that the Claimant has proven uses associated with village life that were cognizable. The question, then, is whether Crown representatives exercising their discretion in the process of the creation of reserves were in fact aware of the occupation of the land.

B. Cognizable Interest and Crown Knowledge

[125] The present matter is factually distinguishable from *Kitselas* and *Williams Lake*. In *Kitselas*, the Aboriginal interest in the excluded land was apparent, as it was surrounded by and no different than the land that was reserved. In *Williams Lake*, the Crown, by its representative, O'Reilly, acknowledged the Aboriginal interest in the land but declined to allot it as reserve as it had been pre-empted by a settler.

[126] Here, the evidence reveals no obvious distinction between aauuknuk and the vast surrounding forested areas that were also not included.

[127] It is, I think, uncontroversial to say that one cannot take action affecting that which is not known to exist. Of course O'Reilly was to ascertain the habits, wants and pursuits of the Indians in relation to land, which called for the exercise of discretion prior to the identification of uses that may ground a cognizable interest. What, then, was the expected standard of conduct in the exercise of that discretion, and was its observance a fiduciary duty? If so, did the Crown "meet the prescribed fiduciary standard of conduct *in relation to that interest*" (emphasis in original; *Williams Lake SCC* at para 89)?

XIII. ALLOTMENTS, CLAYOQUOT SOUND

[128] In June 1889, O'Reilly travelled to Clayoquot Sound to identify land to be set apart as reserve for the Indigenous peoples of the region. In the space of seven days, he allotted 29 reserves for the Clayoquot Indians, 12 of which were for the Ahousaht (Indian Reserves Nos. 15 to 26). One of these, an Ahousaht village site and fishing station, was allotted on June 22, 1889, as Marktosis IR 15.

[129] Marktosis IR 15 was officially surveyed by F.A. Devereux in September 1893. The official plan was approved on May 16, 1894, and signed by O'Reilly and F.G. Vernon, Chief

Commissioner of Lands and Works.

XIV. DID O'REILLY MEET THE EXPECTED STANDARD OF CONDUCT?

A. Standard of Conduct

[130] The evidence reveals the standard of conduct required of O'Reilly in performing this obligation.

[131] The prescribed standard of conduct for O'Reilly is found in the Memorandum attached to the Governor in Council's November 10, 1875, approval of the JIRC, the Order in Council 1334, July 19, 1880, appointing him as reserve commissioner, and the August 1880 instructions from the DIA:

1. Memorandum attached to the Governor in Council, November 10, 1875:

> 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 (meaning by Nation all Indian tribes speaking the same language) 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.**
>
> …
>
> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, 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. [emphasis added; CBD, Vol 1, Tab 10]

2. Order in Council 1334, July 19, 1880:

> That it consequently becomes necessary to procure the services of a suitable person to fill the position rendered vacant by Mr. Sproat's resignation; **the responsible duties connected with which consist mainly in ascertaining accurately the requirements of the Indian Bands in that Province, to whom lands have not been assigned by the late Commission,** and allotting suitable lands to them for tillage and grazing purposes. [emphasis added; CBD, Vol 1, Tab 33]

Order in Council 1334 refers specifically to lands for tillage and grazing purposes. The Ahousaht were fishers, not agriculturists. Nevertheless, the purpose of reserve creation was to ascertain accurately the requirements of the Indian bands "to which they may be specially attached" (CBD, Vol 1, Tab 34). According to the oral history, the Ahousaht were "specially" attached to the claim land at issue in this proceeding. The question is whether this was apparent to O'Reilly or would have become apparent if he had acted with ordinary diligence by making adequate inquiry of the Ahousaht spokespersons.

3. O'Reilly's August 1880 instructions: The accepted authority of the federal Crown as the intermediary for Indigenous peoples in the process of reserve creation is revealed by the fact that it was the DIA that gave O'Reilly directions on carrying out the task assigned to him jointly by Canada and the Province. Full instructions to O'Reilly from the DIA, by letter dated August 9, 1880, read:

> I have the honor to enclose herein a Copy of an Order in Council of the 19 ulto. appointing you to the position of Indian Reserve Comr for the Province of British Columbia.
>
> …
>
> In allotting Indian Reserve lands to each Band you should be generally guided by the terms of Union between the Dominion and local Government which contemplated a liberal policy being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> You should assure the Indians of the anxious desire of the Government to deal justly and liberally with them in the settlement of their Reserves as well as in all other matters; informing them also that the aim and object of the Government is to assist them to raise themselves in the social and moral scale so as ultimately to enjoy all the privileges and advantages enjoyed by their white fellow subjects.
>
> With regard to the views of the Govt on the land question, I have the honour to refer you to the documents in relation to this matter printed with the Annual Report of the Dept of the Interior for 1875, and I have the honour to request that you will act in the spirit thereof.
>
> The Government considers it of paramount importance that in the settlement of the land question, nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specifically careful not to disturb the Indians in the possession of any villages, fur

> trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached. Their fishing stations should be very clearly defined by you in your reports to the Dept and distinctly explained to the Indians interested therein so as to avoid future misunderstanding on this most important point. You should in making allotments of lands for reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.
>
> …
>
> **I forward by the same mail that takes this letter copies of the Report of the Dept of Interior for 1877 & 1879 which contain the Annual Reports of progress of your predecessor also printed copy of Mr. G.M. Sproat's Report of progress for 1878 and the Report of the Dept of the Interior for 1878 which contains separate copies of the various documents showing the basis proposed by the Dominion Govt and accepted by the Provincial Govt for the settlement of the Indian Land question in British Columbia**. [emphasis added; CBD, Vol 1, Tab 34]

[132] The "various documents" referenced in the second to last paragraph of the instructions to O'Reilly includes the 1878 General Survey Instructions drafted by surveyor Edward Mohun of the Commission. Paragraph 17 of which reads that "[t]he Surveyor before leaving a Reserve shall point out on the ground to the Chiefs and head men the boundaries of the Reserve" (CBD, Vol 1, Tab 23).

[133] The Minnie Report says, at paragraph 8.2:

> When the surveys of the Joint Indian Reserve Commission (JIRC) allotments began in 1878, the survey requirements of the 1875 Land Act were insufficient. As a result surveyor Edward Mohun, who was employed with the JIRC, drafted *General Survey Instructions for the Survey of Indian Reserves* in BC... [Minnie Report at 26]

[134] Ashdown Green accompanied O'Reilly to mark off the survey point of commencement for the lines of survey and prepare sketch plans of the lands allotted as reserves. His was not the official survey. These were done later in the process then sent to the Province's Chief Commissioner of Lands and Works for approval. However, the context in which Mohun's instructions were provided to O'Reilly indicates that the surveyor who accompanied him was required to point out the boundaries of the reserve to the chiefs and head men. It makes sense that this would be required while the commissioners were present. If the chiefs were dissatisfied the matter could be addressed on the spot. O'Reilly was appointed in 1880. In the years before he

allotted Marktosis IR 15 the instructions to surveyors became set out in the Province's *Land Act* (*Land Act*, SBC 1884, c 16; *Land Amendment Act*, SBC 1891, c 15), neither iteration of which called for the surveyor to go over the survey boundaries on the ground with the chiefs.

[135] Minnie says that the instructions crafted by Mohun, which would include the instruction, at paragraph 17, requiring the surveyor to "before leaving a Reserve…point out on the ground to the Chiefs and head men the boundaries of the Reserve" (CBD, Vol 1, Tab 23) no longer applied when Green prepared his sketch plan and Devereux his survey. Mr. Minnie testified on direct examination:

> So he [Mohun] gathered information, created up a draft for surveyors to follow. That draft was short-lived because in 1879 the province amended their *Land Act* and under the *Land Act* they provided very similar but under different statute and different authority they provided similar guidances to what surveyors should do when they survey properties. And these instructions included what type of posts to place, where to place posts, how to document their field notes. So this was the first time they were told this is the format of your field notes; this is what is expected. And it was to bring consistency to the type of survey information that was being submitted and created by surveyors around the province. [Hearing Transcript, October 19, 2017, at 31–32]

[136] Mr. Minnie cites the *Land Amendment Act*, SBC 1879, c 21, for the instructions to surveyors. It seems that Mr. Minnie did not know that, notwithstanding the *Land Amendment Act*, SBC 1879, c 21, the 1880 instructions to O'Reilly called on the field surveyor to point out, on the ground, the boundaries of the reserve.

[137] For reasons that follow, it is not necessary to make a finding on the currency of the 1880 instruction as of 1889 when Marktosis IR 15 was allotted.

[138] In summary, O'Reilly was to:

1. After full inquiry 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;

2. In the case of each particular Nation, have regard to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them;

3. Ascertain accurately the requirements of the Indian bands in that Province, to whom lands had not been assigned by the late Commission (the JIRC, while three commissioners, then Sproat as sole commissioner, then O'Reilly);

4. Interfere as little as possible with any tribal arrangements being careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached;

5. Clearly define their fishing stations in his reports to the Department and distinctly explain to the Indians so as to avoid further future misunderstandings "on this most important point" (CBD, Vol 1, Tab 34);

6. As the first requirement, to leave the Indians in the old places to which they are attached; and,

7. Ascertain and respect the Indian perspective on the places they wanted reserved: "**[i]t is almost unnecessary to say that the manners and customs of the native population must be understood before land reserves can be satisfactorily assigned for their use**" (emphasis added; CBD, Vol 1, Tab 22).

[139] O'Reilly was cautioned not to make the past errors identified by Sproat:

> **As a sample of what I mean by too "summary" procedure, I may mention that, in assigning a compact reserve in a district, proper arrangements do not, in all cases, seem to have been made to obtain the intelligent consent of the Indians to the change**… In some cases the reserves were laid off by a magistrate after a visit of a few hours, and in the absence of the headchief and the bulk of the tribe. No proper inquiry was made as to the desires of the people respecting the reserves, nor as to their fishing places and favourite places of resort, nor was any explanation offered as to the effect of laying off the reserve upon the Indian gardens and farms in the district. [emphasis added; CBD, Vol 1, Tab 22]

[140] The standard of conduct required of O'Reilly was established due to the need to resolve the tensions that had developed between the Indigenous peoples, settlers, and the iterations of the Crown reflected in the Constitution, namely the provincial and federal governments. With the concurrence of the Province, O'Reilly received his instructions from Canada, as represented for

that purpose by senior officials of the DIA. The commissioner's allotments did not "create" reserves in the sense of bringing the land under federal administration and the *Indian Act*. The existence of competing interests would therefore not affect the initial task of identifying land habitually used and occupied by Indians.

[141] Here, the Crown's promise was to identify land based on the Indian's habits, wants and pursuits, then consider whether to allot the land as a reserve. O'Reilly received specific instructions on what factors were to be applied. These instructions were particular to the context in which reserves were to be established, and are pertinent in assessing what constituted ordinary diligence.

[142] It will suffice for the present matter to consider the evidence of what O'Reilly actually did and measure this, in the context of the time and the standard of conduct expected of him, against the general requirement of ordinary diligence.

B. Fiduciary Duty and the Specific Interest at Stake

[143] In *Williams Lake SCC*, at paragraph 47 said the following:

> The conduct of the fiduciary that comes under scrutiny is its exercise of discretionary control over the specific or cognizable Aboriginal interest in respect of which the fiduciary obligation is owed: *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816, at paras. 68 and 77; *Wewaykum*, at paras. 90 and 93; *Guerin*, at p. 382.

[144] An Indian interest sufficient to attract Crown fiduciary duty arises when land becomes subject to the reserve creation process. In *Williams Lake SCC*, Wagner J. (as he then was), found:

> Where the alleged interest is in land subject to the reserve creation process, the process need not have been finalized for the interest to be "cognizable": *Ross River*, at paras. 68 and 77; *Wewaykum*, at paras. 88-90…
>
> The circumstances in which a fiduciary obligation arises shape its content: *Wewaykum*, at para. 92; *Ermineskin*, at para. 72, quoting *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149. The content of the Crown's *sui generis* fiduciary duty varies to take into account its broader public obligations: *Wewaykum*, at para. 96; *Haida Nation*, at para. 18. Prior to the acquisition of a "legal interest" in land that is subject to the reserve creation process, the Crown's *sui generis* fiduciary duty is "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries": *Wewaykum*, at para. 97; T.R., at paras. 224 and 319. [paras 54–55]

[145] Here, the interest was in land that met the criteria for allotment as reserve, even if not yet identified or known to Crown officials.

[146] The Crown regarded their best interest to be served by reserving land used in pursuance of their habits, wants and pursuits. As the interest of the Ahousaht was in having land it used allotted as reserve the duty of the Crown was to act in respect of that interest with loyalty, good faith, full disclosure appropriate to the subject matter and ordinary diligence in what it reasonably regarded as their best interest.

[147] As the sole commissioner, O'Reilly was thus required to exercise these duties and ordinary diligence in accurately ascertaining the habits, wants and pursuits of the Ahousaht in allotting reserves.

[148] Here, the specific interest is that of the Claimant in having reserves allotted to it upon O'Reilly adequately ascertaining their habits, wants and pursuits. It was in their best interests that this be done.

C. Claimant's Theory of Crown Liability

[149] The thrust of the Claimant's argument is that O'Reilly knew or would upon adequate inquiry have known that the Ahousaht's habits, wants and pursuits centered on fishing for salmon and hunting seals. That being the case, they needed timber suitable for building canoes. There was timber in the area south of the developed village and a lake populated by salmon. The Claimant contends that O'Reilly either ignored the obvious value of the timber and the lake or made no inquiry of the chiefs to ascertain their desires for the reserve at aauuknuk. The contention is that, had he inquired, he would have been told of their use of the standing timber and the lake.

[150] In particular, it is argued that there is no evidence of what O'Reilly was told when he met with the Ahousaht chief and members on June 19, 1889, and no evidence that any Ahousaht member was present when he made the allotments of reserves, including the June 22, 1889 allotment at Maaqtusiis.

[151] The Claimant argues that the Ahousaht uses of the area that became known as Lot 363

were cognizable, and that O'Reilly failed to meet the applicable standard of conduct. In the result, his exercise of discretion breached the duties of disclosure, loyalty, good faith and ordinary diligence.

D. O'Reilly's Inquiries and Actions

[152] O'Reilly was to accurately ascertain the habits, wants and pursuits of the Indians, taking into account the apparent usages of their villages and fishing stations and their unique perspectives with respect to the same.

[153] When O'Reilly travelled to the Clayoquot Sound area in June 1889, he had worked together with Ashdown Green for the past nine years.

[154] O'Reilly met with "the Chief" on June 19, 1889. This person is not identified by name. Others were present. He reported:

> On the 19th June I met the Chief, and such of his people as were not absent engaged in sealing, or working at the canneries; after a long conversation I ascertained from them where the several fisheries were situated that they wished to have reserved; all these I undertook to visit, and invited them to accompany me in the steamer, or, if they preferred it, to have them towed in their canoes, an offer which they gladly accepted. With the assistance, in every case, of some members of the tribe, I defined the following 29 reserves, all of which are fishing stations, a work which occupied me seven days. [CBD, Vol 1, Tab 43]

[155] O'Reilly noted on June 22, 1889, that he "[h]ad a long chat with Noukamis Chief of Ahousat and Yat-sim-a-house (Swan) Chief of Man-hou-set: after which laid off Reserves at Trout River – Cat faced Mountain – Matilda Cr" (CBD, Vol 1, Tab 41).

[156] Marktosis IR 15 is at Matilda Creek.

E. The O'Reilly Record

[157] The only evidence of O'Reilly's inquiries and actions on the ground is documentary and sparse. He kept a diary. This entry was made on Saturday, June 22, 1889:

> Rained heavily during the forenoon. Bitterly cold. Had a long chat with Noukamis Chief of Ahousat and Yat-sim-a-house (Swan) Chief of Man-hou-set: after which laid off Reserves at Trout River – Cat faced Mountain – Matilda Cr. [word crossed out — illegible]. Sent off to Revd Mr. Heymen a few provisions. [CBD, Vol 1, Tab 41]

[158] His Minutes of Decision, made two days later, on June 24, 1889, reads:

> Clayoquot Indians
>
> N^{o} 15
>
> Mark to sis, a reserve of two hundred and thirty (230) acres, situated on the southeast coast of Flores Island, Clayoquot Sound, and at the head of Matilda creek.
>
> Commencing at a Spruce tree, marked Indian Reserve, and running West sixty (60) chains, thence North eighty (80) chains, thence East to the seacoast, and thence following the shore in a southerly direction to the place of commencement. [CBD, Vol 1, Tab 42]

[159] There is nothing on the face of this and other Minutes of Decision to reflect what O'Reilly took into account in deciding on the location and extent of allotments. This came later in his March 5, 1890, letter to the Superintendent General of Indian Affairs:

> Proceeding northward from Ucluelet along the coast of Vancouver Island, "I visited Clayoquot Sound, the population of which, according to a census supplied by the Agent, Mr. Guilford, is 692. He informed me that originally this tribe was divided into four branches, viz, the Clayoquot, Ahousat, Kelsemart, and Manhouset, each branch having a distinct chief, but they are now so intermarried and intermixed that it is difficult to do otherwise than treat them as one tribe."
>
> On the 19th June I met the Chief, and such of his people as were not absent engaged in sealing, or working at the canneries; after a long conversation I ascertained from them where the several fisheries were situated that they wished to have reserved; all these I undertook to visit, and invited them to accompany me in the steamer, or, if they preferred it, to have them towed in their canoes, an offer which they gladly accepted. With the assistance, in every case, of some members of the tribe, I defined the following 29 reserves, all of which are fishing stations, a work which occupied me seven days. [CBD, Vol 1, Tab 43]

[160] O'Reilly allotted reserves for the Ahousaht and other Clayoquot Sound Indigenous groups. His report provides details, which correspond with notes made by Green:

> N^{o}1. Opitsat, is a reserve on the south-western shore of Meares Island, Clayoquot Sound, it contains two-hundred (200) acres, and on it stands the principal village, consisting of thirty one houses, and the Roman Catholic church, it is covered with Cedar, Spruce, and Hemlock of inferior quality. A few garden patches have been cultivated but the soil is poor in the extreme. The position of this reserve renders it valuable to the Indians, as it is contiguous to the sea fisheries, and well sheltered.
>
> About two hundred yards west of the village, is the graveyard, and a rock, about three quarters of a mile to the South, is used for a similar purpose, and is included in the reserve.

N°2. E-cha-chis, an island in Clayoquot Sound, at the entrance to Templar and Broken Channels, contains sixty-five (65) acres. Upon it are twenty-two well finished houses. There is a small belt of timber at the northern extremity, but for the most part the island is of rock. It is a convenient and valuable fishing station.

N°3. Eso-wis-ta, situated in Long Bay, about a mile East of Schooner Cove, contains nineteen acres. There are three houses upon it. Except as an Indian camping ground it is valueless.

N°4. Koo to wis, contains thirty-six (36) acres, and is situated at the head of a slough southeast of Indian Island, Tofino Inlet. A limited quantity of salmon of inferior quality are taken here. The land is low, and covered with Cedar, Spruce, and Hemlock of good size.

N° 5. Oke-a-min, a valuable salmon fishery of twenty-eight (28) acres, is on the right bank of Kennedy river, Tofino Inlet, at the foot of a succession of rapids. A small quantity of good cedar is found on this reserve, and three houses have been erected, which are used only during the fishing season.

N°6. Clay-o-qua, at the head of Kennedy Lake (Northwest Arm) contains one hundred, and twenty (120) acres. Upon it stand some fine specimens of cedar, which the Indians stated they wished to secure for the construction of canoes. Some seventy, or eighty acres are subject to overflow during the freshets; no portion is fit for cultivation.

A right of salmon fishing, in the stream that runs through the entire length of this reserve, is secured to the Indians.

N°7. Win-che, on the right bank of the river which flows into the head of the Northeast Arm of Kennedy Lake, about three hundred yards from its mouth, contains forty (40) acres. About fifteen of these are subject to overflow. The cedar on this reserve is of a size adapted for canoe building, the Indians therefore were anxious to secure it.

A large quantity of salmon is obtained from the river, the right to fish in which is reserve to the tribe.

N°8. Ilth-pay-a, a small salmon fishery containing thirteen acres, situated on the right bank of the Kennedy river, at the head of the rapids. The right to fish downstream, to the head of tidal water, is assigned to the Indians.

N°9. O-nad-silth, immediately at the head of Deer Creek, Tofino Inlet, contains fifty (50) acres. This reserve is for the most part low swampy land, and is of little value except for the salmon obtained from the river that flows through it.

N°10. Eel-se-uk-lis, a salmon fishery at the head of Tranquil Creek, Tofino Inlet, contains forty two (42) acres, a portion of which is covered with water at high tides. Spruce trees of large size are abundant.

N°11. Yark sis, situated on the eastern shore of Vargas Island, contains seventy seven (77) acres. This was formerly the site of the principal village of the Kelsemart Tribe. Three years ago twenty eight young men of this village were drowned in one night while sealing, and it has since been abandoned; the Indians however, have not destroyed their houses, as is usual in such cases, and it is more than probable that they will shortly reoccupy their old

dwellings, the site being admirably suited for a village. The soil fronting the seashore is sandy, and unfit for cultivation, while that near the western boundary is swampy.

N°12. Cloolth pich, on the western shore of Meares Island, contains fifty five (55) acres. This is at present the residence of the Indians who deserted Yark sis (N°11), it is not adapted to their requirements, and in all probability, they will, ere long, return to their old home.

N°13 Quorts o we, at the head of Warm Bay contains forty five (45) acres. Two houses have been built here, which are used by the Indians while fishing in the neighbourhood. The land is level, and covered with Cedar, and Hemlock of medium size.

N°14. O-in-im-it-is, is situated at the head of Bedwell Sound, on its eastern shore, and contains twenty (20) acres. It is valuable as being in close proximity to the mouth of Bear river, where a large quantity of inferior salmon are taken for winter consumption. This fishery, like nearly all on the West coast of Vancouver Island, is in tidal water.

N°15. Mark-to-sis, contains two hundred, and thirty (230) acres. It is situated at the head of Matilda Creek, on the southeast shore of Flores Island. The village contains twenty eight (28) houses, a Roman Catholic church, and Mission house. It was once the principal village of the Ahousat tribe. These Indians are expert canoe builders, a large number were in course of construction at the time of my visit. The land is rocky, and of small value; a few potato patches at the rear of the village (aggregating perhaps ¼ acre) are cultivated, but there is little prospect of these being enlarged.

N°16. A hous, is a well-sheltered fishing station on the West coast of Vargas Island, at the southern extremity of Open Bay. It contains thirty-five (35) acres of poor sandy soil. The Indians resort here when sealing, sea otter hunting, or halibut fishing.

N°17. Che tar pe at the entrance to Clayoquot Sound, west of the Catface mountain contains thirty six (36) acres. Dogfish, halibut, and cod are numerous in the neighbourhood of this reserve. One family of the Ahousat tribe lives here, and has a good house, about ¼ acre of garden, also chicken and pigs.

N°18. Sut-a-quis, a fishing station of twenty-seven (27) acres, lies half a mile west of Crane Island, and southeast of the Catface mountain. On it are seven houses. It is principally by the Indians when fishing for dogfish. This reserve is thickly covered with Spruce, Hemlock, and Cedar of medium size.

N°19. Wah ous, a valuable fishery at the mouth of Trout river, Cypress Bay, contains one hundred and ten (110) acres. Large quantities of salmon are taken here for winter consumption. The land is low, and subject to overflow during freshets. Two small houses, used for storing fish, are built on piles, the Indian dwelling houses being about half a mile to the eastward on Reserve No. 20.

N°20. Wah ous, on the northern shore of Cypres Bay, contains thirty-three (33) acres. It is the camping place of the Indians when fishing in Trout river. Five

small houses have been built by them. The land is flat, and covered with large Spruce, and Hemlock trees.

N°21. Tequa, a fishing station of six (6) acres, situated at the head of Bawden Bay, Herbert Arm.

N°22. Pen-e-etle, at the head of White Pine Cove, Herbert Arm, contains sixty five (65) acres. This is a good dogfish station. The cedar in the neighborhood is very fine, and much prized by the Indians for canoe building.

N°23. Mo-ye-hai, a reserve of seventeen (17) acres, is a fishing station on the western shore of Herbert Arm, near its head. The mountain rises precipitously within twenty yards of the seashore, there being barely room for four houses, and a small garden.

The stream from which the Indians procure their salmon is about ¼ mile north of the village and affords a large quantity of fish.

N°24. Seek-tuk-[is], a salmon fishery of thirty (30) acres on the eastern shore of North Arm and two, and a half (2 ½) miles north of Cone Island. There are five houses, and a small patch of potatoes on this reserve.

N°25. [Wat ta] (18) acres, at the head of Shelter Arm. Apart from the small quantity of salmon taken here, this reserve is of little value.

N°26. Wap pook on the northern shore of Shelter Arm, is a small salmon fishing station of ten (10) acres. A few inferior fish are taken at the mouth of a creek which flows past the two houses that constitutes the Indian camp.

N°27. Ope nit, contains eighty three (83) acres, and is situated on the western shore of Sydney Inlet, about a mile north of Sharp Point. This was once the principal village of the Manhauset tribe, now practically extinct, but two houses remaining. About ten acres of land might be cultivated at this place being level, and free from rock.

N°28. Too too wilt-e-na, a small salmon fishery of twenty (20) acres, situated on the eastern shore of Sydney Inlet, directly East of Reserve N° 27, is a well sheltered spot, otherwise it is valueless; the salmon caught here are few in number, and poor in quality.

N°29. Kish na cous, at the head of Sydney Inlet contains forty (40) acres of low ground, covered with spruce, hemlock and cedar. It is not occupied by the Indians except when fishing for salmon, and dogfish. [CBD, Vol 1, Tab 43]

XV. ANALYSIS OF EVIDENCE AND FINDINGS

[161] In the present matter, ascertaining the Ahousaht perspective concerning the use of Lot 363, and its use in fact, would have been more difficult than it was in connection with the allotment of reserves considered in Tribunal decisions in *Kitselas* and *Williams Lake*.

A. The Commissioner's Tree

[162] The evidence does not directly address how the starting point was chosen with respect to

the reserve at Maaqtusiis. As signs of occupation were apparent, the obvious starting point would be at the outer extremity of the limits of the village. If not apparent, the surveyor would have to rely on other information. This, in the circumstances of identifying land for allotment as reserve, would have come from the Indigenous group for which the reserve was set apart.

[163] At Maaqtusiis, it would have been obvious that the land developed for village use must be included, and it was.

[164] Some forested land lying south of the village was included in the allotment, other such land was not. The oral history evidence puts some value on the forested land but offers no basis for a distinction between the timber north and south of the surveyed boundary. So, how was the southern boundary established?

[165] O'Reilly and Green would have had to rely on what they were told by members of the group if the starting point for Green's sketch was to be located somewhere outwardly indistinguishable from land on either side.

[166] Green located the Commissioner's Tree immediately south of burial sites, as marked on his sketch and on the survey sketch in Devereux's field notes. This reveals that O'Reilly and Green were sensitive to the need to include burial sites, and likely inquired as to their location. There is nothing further in O'Reilly's notes or the Green sketch plan that reveals differences between the land included in the allotment and the land immediately south of the surveyed boundary, which was also forested.

[167] Chief Noukamis was present when O'Reilly and Green attended at the Maaqtusiis village site. O'Reilly was instructed to include burial sites. He would, in a forested area, have had to inquire as to their location. It is apparent that he or Green did so. Green must have consulted with Chief Noukamis when he established the southern boundary, as he located the Commissioner's Tree (the location from which the initial survey traverses are taken) immediately to the south of burial sites. He may have consulted further with respect to the northern boundary, as both were on the ground at the time. In any case, the evidence indicates that Green consulted Chief Noukamis with respect to the southern boundary, which is at issue in the present matter.

B. The Lake

[168] There was a small lake in the forest south of the southern line defined by Ashdown Green. The plan of survey later prepared by Devereux show elevated areas within the sketch and survey boundaries. As the elevation of the ground between the shoreline and the lake was higher than the elevation of the lake it would not have been visible where Green established the Commissioner's Tree at the southeast corner of the allotment.

[169] Green did not record the lake on his sketch plan. Mr. Minnie says, at paragraph 5.5 of his Report, that "[t]he surveyors working for the Indian Reserve Commission used the posting requirements outlined in the BC Land Amendment Act 1879", which provides:

> 8(3.) The Surveyor shall make full notes, as he proceeds, of the character of the country, nature of the soil, lakes, timber, &c., on both sides of the line. [Minnie Report, Tab 8, at 188]

[170] The lake was in a forested area, and O'Reilly noted that there was heavy rain on June 22, 1889, when IR 15 was allotted. This, and the absence of a notation of the presence of a lake on the south side of the boundary, suggests that the lake was not visible to Green from the Commissioner's Tree.

[171] The official survey was conducted by Devereux in 1893. Devereux would have walked the traverse line. He was required to show lakes adjacent to the surveyed property. He saw the lake, which is shown on the official plan of survey. He calculated the location of the lake at 3 chains (60 metres) south of the traverse line defining the southern boundary of the reserve. This point is mid-way on the downslope from the elevation of the line. Devereux commented that the vegetation along the boundary was "Timber Hemlock and Cedar. Scattered Yew and Balsam. Dense Sallal…" (CBD, Vol 2, Tab 49).

[172] Devereux's field notes indicate timber within the surveyed boundaries of the reserve. Devereux noted that "the timber is also worthless [except] for fuel" (CBD, Vol 1, Tab 48; CBD Vol 2, Tabs 49–50). This may not have been the case from the Ahousaht perspective, but the information would have to come from them. I note that the oral history attributes value to the timbered land that was not included, but not for the construction of canoes.

[173] The oral history that pertains to the timber and fishery uses at aauuknuk does not suggest

that these were valued as highly there as at other places the Ahousaht identified to O'Reilly in June of 1889. The timber was not suitable for canoes.

[174] The oral history evidence contained no reference to O'Reilly having been told of the uses of the land south of the village, or of any assurances given by O'Reilly in relation to that land.

[175] It is apparent that information on the value of other sites the Ahousaht wanted reserved came from members of the tribe. For example, Indian Reserve No. 22 is described by O'Reilly as "a good dogfish station. The cedar in the neighborhood is very fine, and much prized by the Indians for canoe building" (CBD, Vol 1, Tab 43). O'Reilly was aware that the Ahousaht needed cedar of a size suitable for building canoes and took this into account in allotting Indian Reserve No. 22.

[176] The failure of the colony of British Columbia and, after Confederation the Province and Canada to treat with the Indigenous peoples in advance of settlement is a notorious fact. However, the "Indians" were not entirely left out in the process of reserve creation. Plainly, O'Reilly was told of the habits, wants and pursuits of the Ahousaht on June 19, 1889, and again on June 22, 1889, when he commenced with the allotment of reserves. Chief Noukamis was present, and would have advised O'Reilly of their wants.

[177] Each allotment is noted by O'Reilly as having particular value associated with the Ahousaht's habits, wants and pursuits. The same is the case in respect of the allotments for the Clayoquot.

[178] O'Reilly's notes pertaining to the Ahousaht reserves numbered 16 to 26 are based on what he was told by the chiefs. All make specific mention of fisheries at land they wanted reserved. Not so for IR 15. It was a village site.

[179] The absence of notes by O'Reilly attributing fishery, timber and other values to aauuknuk raises a strong inference that O'Reilly was not informed of them.

[180] The Claimant submits that there is no evidence that O'Reilly made on site observations of the habits, wants or pursuits of the Ahousaht or did anything to ascertain their "wants". The level of detail on the fishery, timber, and village uses of each allotted reserve reveals that O'Reilly

consulted with members of Ahousaht before embarking to Clayoquot Sound. He was given information on their desired locations for reserves. He invited members to travel with him, and recorded that "[w]ith the assistance, in every case, of some members of the tribe", he "defined 29 reserves" (CBD, Vol 1, Tab 43). He had a long chat with Chief Noukamis on June 22, 1889, after which he laid off 29 reserves.

[181] O'Reilly did not record that Chief Noukamis was physically present when each site was visited and allotments were made. It is, however, implausible to suggest that he was not present. The chief was there to inform O'Reilly. He would have known of the importance to his people of securing their fishing stations and villages. It is highly unlikely that he did not attend at each site, as this would have been his responsibility.

[182] The oral history is that the lake was a place where the Ahousaht took salmon. If O'Reilly knew the lake was there, should he have surmised that it was valued as a source of salmon and included it in the reserve?

[183] If O'Reilly knew of the existence of the lake, he might have inquired whether it was a valued source of fish, but then again he may not have. He had been informed of the location and particular value of land and fishing stations elsewhere, but apparently not at aauuknuk, and made allotments accordingly.

[184] The evidence does not establish that O'Reilly failed to exercise ordinary diligence. Moreover, it raises a strong inference that he was not informed of the presence of the claim area, which included a lake from which the Ahousaht took salmon, and a forest they put to other uses.

XVI. MCKENNA-MCBRIDE COMMISSION

[185] The Claimant does not argue that the Crown breached a fiduciary obligation in the course of consideration of its land requirements by the McKenna-McBride Commission. However, this step in the process of reserve creation is in evidence, and has been considered.

[186] On September 24, 1912, the Dominion and provincial governments established a joint Royal Commission on Indian Affairs for British Columbia (Royal Commission) "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" (CBD, Vol 2, Tab 75). The Royal Commission's mandate states:

> 2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:
>
> …
>
> (*b*) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved. [CBD, Vol 2, Tab 75]

[187] On May 18, 1914, the Royal Commission met with the Ahousaht on Marktosis IR 15 and interviewed Band representatives. It is clear that the Ahousaht members who testified understood that this was an opportunity to request additional reserve land.

[188] The Agreed Statement of Facts, at paragraph 32, says that "[d]uring the May 18, 1914 meeting with the Royal Commission, Lot 363…was referenced indirectly in that the school, which came up as a subject for discussion, was located on the land in question". There is no mention in the Transcript of Evidence from the Royal Commission on Indian Affairs for the Province of B.C. of the presence of the lake.

[189] There was no request for additional land at Marktosis IR 15. Applications for land at Kutcous Point and Bartlett Island were approved. Applications for land on Vargas Island, Mosquito Harbour and Blunden Island were not allowed by the Commission on the basis that the land applied for was not available.

[190] The Parties provided a transcript and a summary, both of which reflect the discussions on the occasion of the Commission attending at Marktosis on May 18, 1914. The latter relates, in narrative, what was said by the commissioners and Chief Billy. There is also a transcript of the discussion among the commissioners and Chief Billy, Chief Kietler (Chief Keitlah), Benson Kietler (Benson Keitlah), and Joe Didian Sr:

> …[there were] upwards of seventy adult male Indian being present.
>
> …
>
> MR COMMISSIONER SHAW having explained the origin, scope and purpose of the Commission.

…

> THE CHAIRMAN…[later asked] the Indians where additional lands were wanted, and would then see if such lands had already been sold or otherwise granted by the Crown to white people or if they were still available to be made additions to the reserves … [Testimony of the Ahousaht First Nation before the Royal Commission on Indian Affairs; CBD, Vol 2, Tab 79]

[191] There was testimony regarding the Band's additional land requirements. An interpreter, Ralph Deidien, is named.

[192] With respect to Marktosis IR 15, Chief Keitlah did not mention the lake, which by that time was a bog, having been drained in 1904:

> THE CHAIRMAN: Do you live on this reserve, Marktosis, No. 15?
>
> A. Yes; in the winter I live over here.
>
> Q. Do you know how many Indians there are on this reserve - men, women, and children?
>
> A. I don't know very well how many people there are. Many years ago I used to live here.
>
> Q. How many houses over here on this reserve?
>
> A. About 50.
>
> Q. What do they do here for a living?
>
> A. We go out fishing from here and catch herring.
>
> Q. What does the tribe do generally - what is their business[?]
>
> A. We go out fishing and catch salmon and halibut and tommy [cod]
>
> Q. Don't you get clams on the beaches?
>
> A. Some of them get clams, not all of them.
>
> Q. Do you catch halibut and seals?
>
> A. Yes.
>
> Q. Do you trap in the winter time?
>
> A. Yes; we get some mink and otter.
>
> Q. Do any work in the canneries?
>
> A. Some go to the canneries -- almost all of them. Some stay at home.
>
> Q. Do your women make baskets?
>
> A. Yes.
>
> Q. Any go hop-picking?
>
> A. Yes; some of the Indians go hop-picking.
>
> Q. Do they go out whaling?

A. Not now; they used to go out after whales.

Q. Any cleared land on this reserve?

A. This reserve is cleared only where the houses are.

Q. How much is cleared?

A. I don't know; I can't tell how big an acre is.

Q. Any gardens here? Do you raise any vegetables?

A. No; we don't raise vegetables because there is not room on the reserve.

Q. You have fruit trees here have you?

A. Yes; we have fruit trees, not all the people -- some of them have fruit trees. [CBD, Vol 2, Tab 78]

[193] With respect to the Band's other reserves, the Chairman asked if Wahous village (Indian Rerserve No. 20) was "one of the principal villages of the Band" and Chief Keitlah said that it "is a principal village" of the Ahousaht with "[v]ery good land there" (CBD, Vol 2, Tab 78). When asked specifically about the quality of the land on Indian Reserves Nos. 19 and 24, Chief Keitlah said it was "[g]ood land" (CBD, Vol 2, Tab 78). Chief Keitlah confirmed that the other reserves for the Ahousaht were primarily used as fishing stations and there was timber on several reserves.

[194] Considered in the context of reserve allotments and confirmation of the same, it is apparent that fishing stations were understood to be places at which the people had access to their traditional fisheries, i.e. places they fished from.

[195] Testimony regarding the school included the following:

[Exchange between the Chairman and Chief Keitlah]

Q. You have a school right near this reserve -- a boarding school?

A. Yes.

Q. Do all the children go to the school?

A. Yes; almost all go to the school. [CBD, Vol 2, Tab 78]

[196] Chief Keitlah did not 'correct' the Chairman on the school being "right near" the reserve. As the oral history evidence is that the Ahousaht believed the reserve included the site of the school, this is likely what Chief Keitlah believed. This may explain why no request was made of the Royal Commission to add the adjoining property to the south.

[197] The Report of the Royal Commission lists Marktosis IR 15 at 260 acres. The general condition of Marktosis IR 15 is described as a "[v]illage site with excellent beach" (CBD, Vol 2, Tab 81). The Band's other reserves are described primarily as fishing stations.

XVII. WAS O'REILLY AWARE OF THE AHOUSAHT'S INTEREST?

[198] Whether, in relation to a specific allotment, O'Reilly acted with ordinary diligence is grounded in the evidence in the particular matter before the Tribunal.

[199] In the present matter, O'Reilly was guided by the fact that the habits, wants and pursuits of the Ahousaht centred on their fisheries. Like their brethren in the region they were not agriculturists. The preservation of village sites and access to their fisheries was foremost.

[200] A claim related to reserve allotment may reveal markedly different habits, wants and pursuits. For example, in other regions of the Province some Indigenous peoples pursued stock raising and agriculture. As with Indigenous peoples in the prairies, the disappearance of the buffalo, government policies promoting reliance on agriculture and restrictions on individual mobility by the pass system altered their habits and pursuits and of course their needs and wants in relation to land.

[201] At tab 45 of the Minnie Report, the historian, Robin Fisher, is quoted as saying that O'Reilly did not proceed with the same care as taken by his predecessor, Gilbert Sproat (Minnie Report at 585 (Dorothy I.D. Kennedy, extracts from *A Reference Guide to the Establishment of Indian Reserves in British Columbia 1849-1911*, (1994) at 59)). This document is informative of the history leading to the establishment of the JIRC and the work of the commissioners. Dr. Kennedy's mention of Mr. Fisher's view, which may well be grounded in his investigations, is not proffered to adopt his views with regard to O'Reilly's actions. Writings in social science contribute to the general knowledge of past events and provide a basis for informed opinion. However, unless presented and accepted as an expert report on a discrete issue before the Tribunal or as a fact of which notice may properly be taken, such material may be of value for context, but not as a fact determinative of the issue.

[202] I find that without guidance from the Ahousaht with respect to their use of land and resources within Lot 363 they would not have been apparent to O'Reilly.

[203] O'Reilly acted with ordinary diligence in his efforts to accurately ascertain the Ahousaht's habits, wants and pursuits. He made adequate inquiry, but was not informed of the particular value attributed to the land at issue as presented in the oral history evidence.

XVIII. CONCLUSION

[204] The exercise of discretionary power over allotment of tracts of land as reserve depended on Crown knowledge of a cognizable Indian interest that existed independently of actions by the Crown. As the interest was in Crown land, the Crown had discretion over their interest.

[205] The JIRC was established, in part, to direct Crown agents to identify land which the federal and provincial Crown agreed should be reserved in accordance with Article 13 of the *Terms of Union*. O'Reilly was, in furtherance of the objectives of Article 13, instructed accordingly. O'Reilly was instructed to identify the land habitually used and wanted by the Indians in those of their pursuits that the Crown recognized as warranting the status of reserves. These included village sites and fishing stations.

[206] The Claimant has not established, as at 1889, that O'Reilly, despite having made adequate inquiry, was aware of Ahousaht's cognizable interest in Lot 363. The Crown was not, therefore, capable of determining whether or not to make an allotment.

XIX. DISPOSITION

[207] The Claimant has not established a breach of a legal obligation of the Crown in relation to Lot 363. Accordingly, the Claim is dismissed.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20190208

File No.: SCT-7005-12

OTTAWA, ONTARIO February 8, 2019

PRESENT: Honourable Harry Slade, Chairperson

BETWEEN:

AHOUSAHT FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant AHOUSAHT FIRST NATION**
As represented by Stan H. Ashcroft
Ashcroft & Company, Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Tanya L. Jorgenson and Terry A. McCormick
Department of Justice