FILE NO.: SCT-7005-12
CITATION: 2019 SCTC 2
DATE: 20190418

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

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

SUPPLEMENTAL 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; *Canada v Kitselas*, 2014 FCA 150, [2014] 4 CNLR 6; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Ontario Mining Co v Seybold*, [1902] JCJ No 2.

Statutes and Regulations Cited:

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 5.

Federal Courts Rules, SOR/98-106, r 397(1).

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

Headnote:

Aboriginal Law – Specific Claim – Reserve Creation – Fiduciary Duty – Supplemental Reasons

Reasons for Decision in the present matter were released on February 8, 2019. The primary issue in the Claim was whether Reserve Commissioner O'Reilly's exclusion of aauuknuk or Lot 363 in his 1889 allotment of Marktosis Indian Reserve No. 15 breached the fiduciary duty of the Crown. The Specific Claims Tribunal found that the Crown had not intended to include aauuknuk or Lot 363 in the allotment of Marktosis Indian Reserve No. 15 for the Claimant and that the Claimant had not established a breach of legal obligation of the Crown in relation to that land. The Claim was dismissed.

The Claimant requested these Supplemental Reasons for Decision to address two matters that arise in the Claim and had not been addressed in the Reasons for Decision. The first matter concerns an offer for the Crown to purchase Lot 363 in 1930 ("1930 Offer"). The second matter concerns a delay in the eventual creation of Lot 363 as a reserve between 1973 and 2009 ("Delay"). Both Parties agree that Justice Slade is not *functus officio* in relation to these two

issues and that it is open to him to deal with the "1930 Offer" and the "Delay" as separate and distinct questions.

In oral submissions, the Claimant's Counsel had stated that the "1930 Offer" was based on the duty to correct O'Reilly's initial alleged breach. That breach was not found to have occurred. Moreover, the evidence of the "1930 Offer" was a letter found in a government archive, which is not sufficient to establish the probability that the Crown was in fact offered the land. It is therefore unnecessary to embark on an analysis of whether the elements for fiduciary duty were present, an unwise endeavour in the absence of full evidentiary submissions on the subject. The "1930 Offer" claim is dismissed.

The Respondent's Counsel acknowledged in oral submissions that the Tribunal could find a breach of lawful obligation for the "Delay". The "Delay" claim was not pled as a cause of action or ground for relief, and no reference was made to it by the Claimant in written or oral submissions. This matter should not be decided without a full evidentiary record and submissions based on the application of the principles established in decades of jurisprudence. There was no evidence or argument presented to support a finding that the Crown was bound by fiduciary duty to pursue the addition of Lot 363 to its reserve lands in the period of the "Delay". The claim based on "Delay" is dismissed.

TABLE OF CONTENTS

I. REQUEST FOR SUPPLEMENTAL REASONS FOR DECISION

[1] Reasons for Decision in the present matter were released on February 8, 2019.

[2] On February 13, 2019, Mr. Ashcroft, Counsel for the Claimant, wrote to advise that two matters that arise in the Claim had not been addressed in the Reasons for Decision.

[3] Mr. Ashcroft describes the first matter (herein, "1930 Offer") in these terms:

> …Ahousaht submitted that Canada breached its legal obligation owed to the Ahousaht in failing to pursue the opportunity to have Lot 363 added as part of Marktosis I.R. 15 [in] 1930 when Reverend J. Jones of the Presbyterian church offered to transfer Lot 363 to Canada to be added to the Ahousaht reserve lands…

[4] Mr. Ashcroft describes the second matter (herein, "Delay") in these terms:

> [An acknowledgement by Counsel for the Respondent in the course of oral submissions] that the Tribunal could find that there was a breach of lawful obligation by Canada arising from its failure to pursue Lot 363 being added to reserve once it had knowledge of Ahousaht's desire that this be done, that being as at May 22, 1973 (Common Book Doc. 10107), until those lands were added to I.R. 15 on January 29, 2009 (Common Book Document 160).

[5] The Claimant's request for Supplemental Reasons for Decision characterizes the "1930 Offer" and the "Delay" as breaches of Crown obligations distinct from the primary issue raised by the Claim, namely: Did the Crown breach a fiduciary duty owed to the Ahousaht when Reserve Commissioner O'Reilly, on June 22, 1889, did not include Lot 363 in the allotment of Marktosis Indian Reserve No. 15 (IR 15 or Marktosis IR 15)?

[6] The Respondent agrees that the "1930 Offer" and the "Delay" are distinct from the primary issue and ground for the Claim in that, if found valid in law, relief is available under the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], despite the dismissal of the primary ground.

[7] I invited the Parties to make written submissions on the question whether due to my failure to consider the "1930 Offer" and the "Delay" as independent grounds under the *SCTA* I am, as a matter of law, able to address these by way of Supplemental Reasons for Decision. Both Parties submit that, having not considered these two matters in the Reasons for Decision, I am not *functus officio* and therefore able to determine them by way of Supplemental Reasons for

Decision. The Parties agree on the applicable rules. They cite Rule 5 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, which provides that:

> **5** The Tribunal may provide for any matter of practice or procedure not provided for in these Rules by analogy to the *Federal Courts Rules*.

[8] Subsection 397(1) of the *Federal Courts Rules*, SOR/98-106, provides a mechanism by which a decision may be reconsidered:

> **397** (**1)** Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that
>
> **(a)** the order does not accord with any reasons given for it; or
>
> **(b)** a matter that should have been dealt with has been overlooked or accidentally omitted.

[9] The Parties say it is open to me to deal with the "1930 Offer" and the "Delay" as separate and distinct questions, unrelated to the question whether O'Reilly's omission of Lot 363 in the allotment of Marktosis IR 15 was in breach of Crown fiduciary duty.

[10] My "inadvertent omission" in my Reasons for Decision was a failure to appreciate that the Parties considered the "1930 Offer" and the "Delay" as distinct matters for decision, unrelated to O'Reilly's omission of Lot 363 in the 1889 allotment of Marktosis IR 15.

[11] Both ask that Supplemental Reasons for Decision be delivered in relation to the claim arising from the "1930 Offer". The Respondent submits that, although I may determine the "Delay" claim, it is not necessary that I do so.

II. ISSUES RAISED IN THE PLEADINGS

[12] In the hope that it may be instructive to counsel representing parties in claims before the Tribunal, I will, before embarking on an analysis of the claims on their merits, comment on the disconnect between the views of the Parties as to what was at issue and the issues raised by the pleadings.

[13] The central issue is clearly stated in the prayer for relief of the Declaration of Claim:

> This claim is brought on the grounds that O'Reill[y], as agent of the Crown, breached his fiduciary obligations and duty of care owed to the Ahousaht by:

a. failing to accurately ascertain the requirements of the Ahousaht;

b. failing to allot sufficient lands (in quality and size) to meet their needs;

c. failing to allot lands that were clearly Indian "clearings, burial places and fishing stations occupied by them and to which they may be specially attached", and

d. in particular, by failing to allot the lands comprising Lot 363 as part of Marktosis I.R. 15. [para 17]

[14] The Parties filed an Agreed Statement of Issues. It sets out the following:

> NOW THEREFORE the parties agree as follows:
>
> 1. In June 1889, when Commissioner Peter O'Reilly recommended the creation of Marktosis IR 15 for the use and benefit of the Ahousaht First Nation ("Ahousaht"), did the Ahousaht also have a cognizable interest in the lands that later became known as Lot 363?
>
> 2. If so, did Canada owe a fiduciary obligation to the Ahousaht in respect of those lands, and what historical facts give rise to that obligation?
>
> 3. If a duty was owed to the Ahousaht, did Canada breach that duty by failing to allot Lot 363, either as part of Marktosis IR 15 or as a separate reserve, for the use and benefit of the Ahousaht?

[15] In the Claimant's written submissions filed January 10, 2018, Mr. Ashcroft introduced this allegation of breach of duty:

> (c) Failing to pursue the opportunity to have Lot 363 added to I.R. 15 in 1930 as the Presbyterian Church had offered. [para 50]

[16] This, however, was preceded by the following:

> (b) Failing to follow through with its intention to include the lands comprising Lot 363 as part of I.R. 15 as evidenced by the placing of survey posts or pegs and the inclusion of those lands on drawings of I.R. 15. [Claimant's Written Submissions filed January 10, 2018, at para 50]

[17] The relationship between (b) and (c) quoted above was explained by Mr. Ashcroft in oral submissions:

> MR. STAN ASHCROFT: And the same in 1930, all Canada had to do was fund improvements to the school. The documentary record shows that, in fact, funding was being provided by Canada to the residential schools, including this one.
>
> JUSTICE SLADE: Mm-hmm.
>
> MR. STAN ASHCROFT: And, you know, they were providing reports to Canada. And so it wouldn't have taken much for them to say, "Oh yeah, we're

> going to give you -- we're going to do a little bit more to do the improvements and, you know, we'll take over as reserve."
>
> JUSTICE SLADE: Well, let's say there was an opportunity, but what would you say, Mr. Ashcroft, is the basis for legal obligation at that time?
>
> MR. STAN ASHCROFT: Well, I would say that the breach had occurred back in the -- with O'Reilly.
>
> JUSTICE SLADE: Mm-hmm.
>
> MR. STAN ASHCROFT: And that this was -- it was their duty, when offered the opportunity, to have the land become reserve, to seize upon that opportunity.
>
> JUSTICE SLADE: Mm-hmm.
>
> MR. STAN ASHCROFT: Because, you know, if the land had been Crown granted, there would have been no difficulty in having that Crown grant transferred to Canada. [Hearing Transcript, July 12, 2018, at 40–41]

[18] According to the Claimant's Counsel, the "1930 Offer" was based on the duty to correct O'Reilly's initial alleged breach, which was not found to have occurred. I found that O'Reilly did not intend to include Lot 363 in the reserve. This is not to be re-visited in Supplemental Reasons for Decision.

[19] As for the Respondent Counsel's acknowledgement in oral submissions that the Tribunal could find a breach of lawful obligation for the "Delay", there is no pleading of this as a cause of action or ground for relief under the *SCTA*. It is not in the Agreed Statement of Issues. The Claimant made no reference to this as a ground for relief in written or oral submissions.

III. THE "1930 OFFER"

[20] This is the question that both Parties wish answered: Did Canada breach a legal obligation owed to the Ahousaht in failing to pursue the opportunity to have Lot 363 added as part of Marktosis IR 15 in 1930 when Reverend J. Jones of the Presbyterian Church offered to transfer Lot 363 to Canada to be added to the Ahousaht reserve lands?

[21] The Claimant relies on one document, entitled "EXTRACTS FROM [A] LETTER WRITTEN BY REV. J. JONES, MARCH 1, 1930" (Common Book of Documents, Vol 2, Tab 94). The document is partially illegible.

[22] It is common ground that Reverend J. Jones of the Presbyterian Church did, in March

1930, write to the F.M.C. (the F.M.C. is thought to be the Foreign Missionary Committee) regarding the residential school it operated on Lot 363, to suggest that the "Indian Department" be approached with respect to the claim lands:

> May I outline the needs of the Ahousaht and the method by which these needs can be met.
>
> …
>
> The other improvement contemplated will entail considerable expenditure. My suggestion is that the F.M.C. approach the Indian Dep[artment] and offer to transfer this property… [Common Book of Documents, Vol 2, Tab 94; Respondent's Written Submissions filed February 26, 2018, at para 75]

[23] There is no direct evidence that the F.M.C. approached the "Indian Department" with an offer to transfer Lot 363 to the Crown. Mr. Ashcroft argues that the existence of the letter in a government archive establishes that the Crown was offered the land and, because the land did not at some later time become reserved under the *Indian Act*, the Crown breached its fiduciary duty to the Band.

[24] In oral submissions, Counsel for the Respondent explained that the letter was found in a collection of documents, among "about…three million other residential school documents" (Hearing Transcript, July 12, 2018, at 87).

[25] There is no evidence of the presence of the letter in a collection dedicated to the administration of reserves. Moreover, if it was presented to a government official as an offer to transfer the land one would expect that it would be among other documents on the subject, at the least a letter from the F.M.C. forwarding Reverend J. Jones' suggestion to the Department of Indian Affairs (DIA). There are none. The presence of the letter in a government archive is not sufficient to establish the probability that the Crown was in fact offered the land.

[26] It is therefore unnecessary to embark on an analysis of whether, if there was proof that the DIA was offered the land, the elements for fiduciary duty, namely cognizable interest and discretionary control, would be present. It would also be unwise, as matters of such general importance should not be decided without a full evidentiary record upon which the context in which land might be considered for designation as reserve land, and the particular relationship between the Indigenous Claimant and the Crown, can be ascertained. As considerations of

federal and provincial jurisdiction and the application of the precept of the honour of the Crown would come into play, full submissions would be necessary.

[27] The claim based on the alleged failure to establish Lot 363 as a reserve following the suggestion in 1930 by Reverend J. Jones that the DIA be approached with an offer to transfer the property is dismissed.

IV. THE ALLEGED BREACH DUE TO "DELAY"

A. Evidence

[28] The Respondent's February 26, 2018 written submissions touch briefly on the transfer in 1953 of Lot 363 to the United Church, the sale of the land to a private owner in 1956 and the eventual transfer of the Lot to Canada and its designation as reserve in 2009.

[29] In 1973, the Band enquired of the DIA about the sale of the land to the Church. In 1979, the Council of the Band asked the DIA to purchase the land on its behalf, but this was not acted on. The land was purchased by MacMillan Bloedel (MacBlo), a forest company. MacBlo agreed to convey its title to the Crown for the Band at no cost to the Band. Negotiations ensued among MacBlo, the DIA and the Band. In the result, MacBlo received a tax credit as consideration for the transfer of its title to Canada. The record through to 2009 illustrates the complexity around the transfer of title to Canada and creation of a reserve out of "private" land within the province.

[30] The Respondent's relating in oral submissions of the history of the land from 1953 to 2009 is narrative, and not responsive to a claim by the Ahousaht that any breach of duty occurred (see Hearing Transcript, July 12, 2018, at 86–99).

[31] When relating the history of the land at issue, Counsel for the Respondent said:

> MS. TANYA JORGENSON: So the question I have, if I was to play devil's advocate for Canada, is did Canada behave appropriately in the 1970s and going forward, once it had knowledge that there was an issue there? I'm not saying the issue was right or wrong, I'm just saying was their conduct appropriate?
>
> JUSTICE SLADE: Mm-hmm.
>
> MS. TANYA JORGENSON: And my advice to my client, which they accepted, is that no, I don't think it was.

JUSTICE SLADE: Mm-hmm.

MS. TANYA JORGENSON: I think we eventually -- in 2009, it was added to reserve and it was done fairly quickly following a 2008 band council resolution, but between the mid-1970s into the early 2000s, I'm not seeing enough here on Canada's part to investigate the issues when it came to Canada's attention. They obviously knew and tried. They looked for the title history, but I would have anticipated some investigation, some inquiries, some decision made and this would of course, wait till the compensation phase, but I understand that the Ahousaht spent a fair bit of money trying to convince Canada between the mid-1970s and 2009 when it was made reserve land, of their plight. And so if I'm looking for a breach of legal obligation, I don't see it in O'Reilly. I do see that in the mid-1970s, I don't think Canada met the standard that would be required for it to meet once that -- once they had that knowledge.

…

JUSTICE SLADE: Yeah, what I missed is I understood you to say, perhaps incorrectly, my part that there was a time in the mid-'70s to the early 2000s when Canada failed to conduct itself to an appropriate standard.

MS. TANYA JORGENSON: I think that 30 years is a long time.

JUSTICE SLADE: Oh, I see. What was their opportunity in the early or mid-'70s ---

MS. TANYA JORGENSON: Well, I ---

JUSTICE SLADE: Is it that letter?

MS. TANYA JORGENSON: Well, I'm going back to sort of almost like common law principles, I guess, of what is appropriate of fiduciary.

JUSTICE SLADE: Mm-hmm.

MS. TANYA JORGENSON: I'm not saying that it should have been reserve lands. What I am saying is that once it comes to your attention, Canada, that you've got a First Nation who's saying, "There's a problem here. We think these are our lands. They're not. The church has them. How did that happen?" That not responding in any substantive way for 30 years is not the conduct that I would have had expected in response to that complaint.

JUSTICE SLADE: Okay.

MS. TANYA JORGENSON: So just to follow it through, and I appreciate this is a bifurcated proceeding, but if the Ahousaht spent money trying to persuade Canada to listen to their plight ---

JUSTICE SLADE: Mm-hmm.

MS. TANYA JORGENSON: --- that eventually ended up in the addition to reserve, I'm not persuaded the cost over 30 years should fall to the Ahousaht.

JUSTICE SLADE: Mm-hmm.

MS. TANYA JORGENSON: That to me seems unreasonable. [Hearing Transcript, July 12, 2018, at 94–95, 97–99]

[32] The spontaneous statement by the Respondent's Counsel that Canada inappropriately

delayed establishing Lot 363 as a reserve in and after 1973 was unconnected to anything in issue in the pleadings, the Agreed Statement of Issues, or argued by the Claimant to arise out of the evidentiary record.

B. Fiduciary Duty

[33] It is self-evident that a breach of fiduciary duty due to delay in establishing a parcel of land as a reserve presupposes the existence of a fiduciary duty to take steps to create a reserve. To determine whether such a duty existed in 1973 through to MacBlo's offer, the transfer of the land to Canada and the addition in 2009 of the land to the reserve calls for analysis, based on evidence, of the factors that ground fiduciary duty: In particular, the existence of a cognizable interest over which the Crown exercised discretionary control.

[34] It is useful at this juncture to review the basis on which Crown duties in relation to reserve creation have been found to exist.

C. Reserve "Creation" in British Columbia

[35] The history of reserve creation and related Crown duties was canvassed by the Tribunal in *Kitselas First Nation v Her Majesty the Queen in Right of Canada,* 2013 SCTC 1 [*Kitselas*] at paragraphs 126–127 and 132:

> The history of reserve creation in British Columbia, and the principles governing the role of the Federal Crown prior to and following the process established to create reserves, is canvassed in *Wewaykum:*
>
> 1. When British Columbia joined Confederation in 1871, Article 13 of the *Terms of Union*, provided that "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,…". Article 13 required that tracts of land reserved for the use and benefit of the Indians be conveyed "…by the Local Government to the Dominion Government in trust for the use and benefit of the Indians…" (para. 14)
>
> 2. The Federal Government could not unilaterally establish a reserve on the public lands of the province. Although the Federal Government had jurisdiction over "Indians, and lands reserved for Indians" under s. 91(24) of the Constitution Act 1867, Crown lands on which any reserve would have to be established remained provincial property. Hence, federal-provincial cooperation was required in the reserve creation process. (para. 15)

> 3. The degree of economic, social and proprietary control and discretion asserted by the Crown left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. Discretionary control is a basic ingredient in a fiduciary relationship: "The hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the others discretion." (para. 80)
>
> 4. The existence of a fiduciary duty facilitates supervision of the discretionary control assumed by the Crown over the lives of aboriginal peoples. Relief by way of fiduciary remedies is not limited to s. 35 rights or existing reserves. (para. 79)
>
> [5.] The fiduciary duty of the Crown could take hold prior to the final step in the reserve creation process, namely the enactment of Order in Council 1036, 1938.
>
> The Crown's intervention as the exclusive intermediary to deal with the province on the aboriginal peoples behalf took hold on British Columbia joining Confederation in 1871, and is evinced by the terms of Article 13.
>
> …
>
> The duty is grounded in the assumption by the Crown "... of the high degree of discretionary control gradually assumed...over the lives of aboriginal peoples." (*Wewaykum* at para. 79) [emphasis in original]

[36] The Tribunal's findings on cognizable interest are set out in paragraphs 135–136 and 143–144:

> Article 13 of the *Terms of Union*, and the factors which the Reserve Commissioners were to consider in their allotments, recognized the Indian interest in the ongoing occupation of land they used. This was the policy of the colony, which had set apart reserves for the Indian Nations in lands they used.
>
> The instructions provided to the Reserve Commissioners by executive orders of Canada and British Columbia are an expression of colonial policy carried forward on confederation:
>
> > 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]
>
> …
>
> The Indian interest in the land they used and occupied was recognized by the colonial authorities. On confederation, the colonial policy continued as a constitutional responsibility of Canada. The JIRC was not mandated to allot

> reserves out of thin air. Commissioners were to allot as reserves the land habitually used and occupied by the Indian Nations.
>
> The direction to the Commissioners, formalized by order of the Governor in Council, was a policy of recognition that the Indian Nations had, at a minimum, a substantial practical interest in land they habitually used. This was a cognizable interest.

[37] The Tribunal decision in *Kitselas* was upheld on judicial review (*Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6). Mainville J.A. summarized the Tribunal's findings on the source of Crown duties in the process of reserve creation at paragraphs 6–7 and 10:

> When British Columbia entered Confederation in 1871, the *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10 addressed aboriginal matters in Article 13, which notably provided for the appropriation of tracts of land to be conveyed from the provincial government to the federal government in trust for the use and benefit of the various aboriginal populations of the province.
>
> For that purpose, Canada and British Columbia established a Joint Indian Reserve Commission which was to visit each aboriginal nation in British Columbia to inquire into reserve allotments and to fix and determine separately for each nation the number, extent and locality of reserves taking into account their habits, wants, pursuits, and the amount of territory available in the region occupied by them, as well as the claims of the White settlers.
>
> …
>
> British Columbia and Canada eventually approved the reserves recommended by Commissioner O'Reilly. Once proposed reserve allotments were approved by both governments, they were deemed "provisionally approved" and withdrawn from inconsistent uses. Provisionally approved reserves, such as Kitselas I.R. No. 1, did not become legally established reserves within the meaning of the *Indian Act*, R.S.C. 1985 c. I-5, until July 29, 1938, when British Columbia transferred the administration and control of the lands to Canada.

[38] The findings on fiduciary duty in *Kitselas* are specific to the period of reserve creation pursuant to Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*].

D. Reserve Creation after 1938

[39] The Claimant did not make submissions going to the existence in 1973 of the factors of cognizable interest and discretionary control that must be present to ground a fiduciary duty.

[40] The *Indian Act* defines "reserve" as land to which title is held by the Crown. This means the Crown in right of Canada (*Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245). The matter of reserve creation should not be decided without a full evidentiary record and

submissions based on the application of the principles set out in *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 and *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245. Among other questions of law, there is the potential for argument on the application of the decision of the Privy Council in *Ontario Mining Co v Seybold*, [1902] JCJ No 2.

[41] There is, in the present matter, no evidence or argument to support a finding that the Crown unilaterally undertook to the Claimant or Indigenous peoples at large that it would "create" a reserve, independently of Article 13 of the *Terms of Union*, where "private" land becomes available to a band by purchase or gift.

E. Conclusion

[42] For the reasons above, there is no basis in the present matter for a finding that the Crown was bound by fiduciary duty to the Ahousaht to pursue the addition of Lot 363 to its reserve lands. Absent such a duty there is no basis, despite the acknowledgement by the Respondent's Counsel, for finding the Crown in breach of duty due to delay in advancing that outcome. The desired outcome was, however, achieved in 2009.

[43] The claim based on "Delay" is dismissed.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20190418

File No.: SCT-7005-12

OTTAWA, ONTARIO April 18, 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, Terry A. McCormick and Alexandra Hughes
Department of Justice