FILE NO.: SCT-7003-14
CITATION: 2019 SCTC 4
DATE: 20191105

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
WE WAI KAI NATION Claimant	Allan Donovan and Kenji Tokawa, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	John Russell and Isabel Jackson, for the Respondent
	HEARD: December 5, 2017, April 24–26, 2018, October 18–19, 2018, November 27, 2018

REASONS FOR DECISION

Honourable William Grist

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

Cases Cited:

Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *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; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Lake Babine First Nation v Her Majesty the Queen in Right of Canada*, 2015 SCTC 5; *M(K) v M(H)*, [1992] 3 SCR 6; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 19, 22

Land Act, SBC 1884, c 16, ss 3, 30, 56

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

Land Act, SBC 1875, No 5, ss 60, 62, 66

Land Amendment Act, 1879, SBC 1879, c 21, s 6

Land Act, RSBC 1996, c 245

Authors Cited:

The Canadian Oxford English Dictionary, 2d ed, *sub verbo* "want".

Headnote:

Aboriginal Law – Specific Claim – Reserve Creation – Land Act – Construction of Minutes of Decision – Fiduciary Duty – Cognizable Interest – Scope of Fiduciary Duty – Breach of Fiduciary Duty – Acquiescence

The Claimant, the We Wai Kai Nation, claims compensation from the Respondent pursuant to the *Specific Claims Tribunal Act*, SC 2008, c 22, for a failure to include the extension of land comprising most of Rebecca Spit as part of the Drew Harbour Indian Reserve, set aside by Minutes of Decision in 1886 as We Wai Kai Reserve No. 9 (Reserve), on Quadra Island, British Columbia. Rebecca Spit is a protruding length of shoreline, extending north along the east side of Drew Harbour. All but a small portion at the base of the Spit was alienated by the Province of British Columbia on February 10, 1888, by a Crown grant to an individual, W. P. Sayward, who had applied the year before to purchase the land, an application advanced in accordance with the *Land Act*, SBC 1884, c 16 [*Land Act*, 1884].

Indian Reserve Commissioner Peter O'Reilly visited the area in October 1886. In light of the fact that his predecessor Gilbert Sproat's reserves were rejected by the provincial government, his instructions were that he should "revise" the work of Sproat in the allotments he intended. The Reserve boundaries were set by O'Reilly in his Minutes of Decision. The Minutes of Decision read in the last portion of the counter-clockwise description, "…thence east to the sea coast; and thence following the shore in a northerly, and westerly direction to the place of commencement." Surveyor Ashdown Green drew a sketch to accompany the Minutes of Decision which shows the Reserve extending north to an area marked "passage", with the more northerly projection of land to Rebecca Point indicated as an island cut off by the passage. O'Reilly's Minutes of Decision were approved by the Province shortly after O'Reilly's return to Victoria, on November 5, 1886.

The full survey of the land was made by E. M. Skinner, on July 28, 1888, six months after Sayward had received his Crown grant to Rebecca Spit. The 1888 Skinner survey did not include the portion of the Reserve indicated in the Minutes of Decision at the base of Rebecca Spit, which consisted of approximately 20 acres.

The Claimant submits that strict compliance with the Minutes of Decision leads to inclusion of all of Rebecca Spit as part of the intended Reserve, as the Spit is a contiguous piece of land extending to Rebecca Point. This interpretation is without foundation. The Minutes of

Decision were constructed on the mistaken belief that there was an intervening "passage", however, the length of the Spit was never intended to be included in the Reserve. This is consistent with Sproat's concept of the Reserve, and is also consistent with the sketch of the Reserve prepared by Green to better illustrate the Minutes of Decision. Further, if the entire Spit were to be included, the description in the Minutes of Decision would be deficient in describing the stretch of travel to the south along the inside of the Spit.

The Claimant also submitted that Canada acted improvidently in failing to recognize and contest the *Land Act* application that resulted in the loss of the 20 acres described as part of the Reserve in the Minutes of Decision. In response the Respondent refers to an 1879 resolution of the provincial legislature that is cited as illustrating that the Province refused to acknowledge reserves until surveys had been prepared, accepted by the Chief Commissioner of Lands and Works (CCLW) and the receipt of the survey published in the Government Gazette (*Gazette*). The resolution, however, only requires publication of a description of a completed survey received by the Lands and Works Department and does not speak to the status of Minutes of Decision approved by the CCLW. Further, it only expresses an opinion, but does not put forward an amendment to the legislation, nor was the *Land Act* amended to require publication of receipt of an Indian reserve survey at any time relevant to this case.

The Respondent further submits that the *Land Act*, 1884, the operative statute in respect of the Crown grant, gave an applicant for a Crown grant the right to receipt of the grant once the application was filed, making it beyond challenge by the federal Crown. This is contrary to the wording of section 30 of the *Land Act*, 1884, which makes it clear that no right or title passed until full payment, contrary to the assertion that a voidable right was acquired at an earlier stage.

The Respondent additionally submits that it was not reasonable for its representatives to monitor the *Gazette* notices published by prospective applicants under the *Land Act* and that the provincial government presented significant obstacles rendering it unrealistic to expect protection of intended reserve lands. Providing an opportunity to object to the notice of intention to apply for a grant of unsurveyed Crown land was obviously the intention of instituting the requirement for two months of *Gazette* notices. The provincial CCLW required a complaint before determining whether an objection to a Crown grant would be considered, and Canada was held to close

observance of this stricture. An examination of disputed reserve sites reveals that, in a number of cases, Canada successfully challenged third-party allocations of land earlier designated as reserve sites, and in many cases safeguarded lands allocated as reserves, refuting the Respondent's position that there was no reasonable expectation of a successful challenge with respect to the 20 acres taken up by Sayward.

Finally, the Claimant submits that it had a cognizable interest in all of Rebecca Spit in the Drew Harbour Indian Reserve which should have resulted in its inclusion in the Reserve. Supreme Court of Canada and Specific Claims Tribunal decisions make clear that a cognizable interest can arise from a needs-based allocation or contemporary use of the land, as well as through the band's historical connection to the land.

Recognition of the then-contemporary use and the need to secure the area as a future resource seems to have been the most significant factor motivating the Crown to set aside the Drew Harbour Indian Reserve. The evidence shows that the Drew Harbour site was a place occupied by the We Wai Kai people while taking work in the logging camps at the south end of the Harbour. There is no record of O'Reilly consulting with the We Wai Kai before he arrived at the Cape Mudge village on October 8, 1886, however, and the initial decision that a reserve was needed at the site appears to have been made by Sproat. There is no record of Sproat actually visiting Drew Harbour, but his instructions were to first learn of the First Nations' habits, wants and pursuits and his efforts appear to have prompted initial consideration of the site. O'Reilly's role in revisiting the reserves set by Sproat was to revise Sproat's work and in this instance he seems to have accepted Sproat's decision that a reserve was required of roughly the size intended by Sproat, but with the addition of more shoreline at the base of the Spit.

The oral history evidence given by Mr. Daniel Billy indicated the historical connection and set out that the area, both inside the Harbour and on the shore of Sutil Channel, was a significant resource for shellfish, chum salmon, spawning herring, and water fowl. Drew Harbour presented a plentiful, sheltered and pleasant place where the We Wai Kai harvested these food sources and was in fairly close proximity to the village site at Cape Mudge. These factors lead me to conclude that the site was chosen as a significant reserve site founded on cognizable Indigenous interests. Specifically, the site was used by Band members when working in nearby logging camps, and was

in use and needed as a food and recreation source for the village.

Canada does not dispute that it owed a fiduciary duty to the We Wai Kai during the reserve creation process, but whether this included a duty to set aside the full length of the Spit remains in dispute. The question, once it is determined that O'Reilly did not intend to include the full Spit, is whether the boundaries of the Reserve he set by the Minutes of Decision sufficiently recognized the area in which the "habits, wants and pursuits" of the Claimant were identifiable.

The Spit itself presented deficits in that it was exposed to weather, was without a convenient water source, and there is no evidence that the Reserve site as set in the Minutes of Decision was insufficient in providing areas of food resources needed by the Band. The interest specifically identified by O'Reilly was to provide an area from which Band members could take work in the logging camp. This was sufficiently met by the Reserve set. Accordingly, the argument that the Reserve did not accommodate the full cognizable interest is rejected and the obligation was met by the Minutes of Decision set by O'Reilly.

With respect to the 20 acres in the Minutes of Decision which were excluded from the Reserve, Canada had a duty to take reasonable care in the matter and to act reasonably in the Band's interest. Further, the extent of the measure of diligence is that expected of a person acting in such a matter on his own behalf. Here such an individual would have taken care to see that the land outlined in the Minutes of Decision was protected from alienation during the number of months necessary to present the survey for approval, and such an individual would have been able to identify the challenge presented by Sayward's application to purchase.

Finally, the Respondent's defense of acquiescence is likely barred by the *Specific Claims Tribunal Act*, SC 2008, c 22, and has not been made out here on the very definition offered by the Respondent. There is no evidence that the Claimant had an appreciation of the facts underpinning their Claim at the time during which they allegedly acquiesced to it. It is unlikely they would have thought advancing a legal claim was possible. Moreover, to seek to excuse its own failure to protect the reserve allocation by citing the Claimant's failure to do the same under more adverse circumstances is not equitable.

Held: The Crown breached its fiduciary duty in failing to protect the 20 acres in the Minutes

of Decision which were excluded from the Reserve.

TABLE OF CONTENTS

I. THE CLAIM

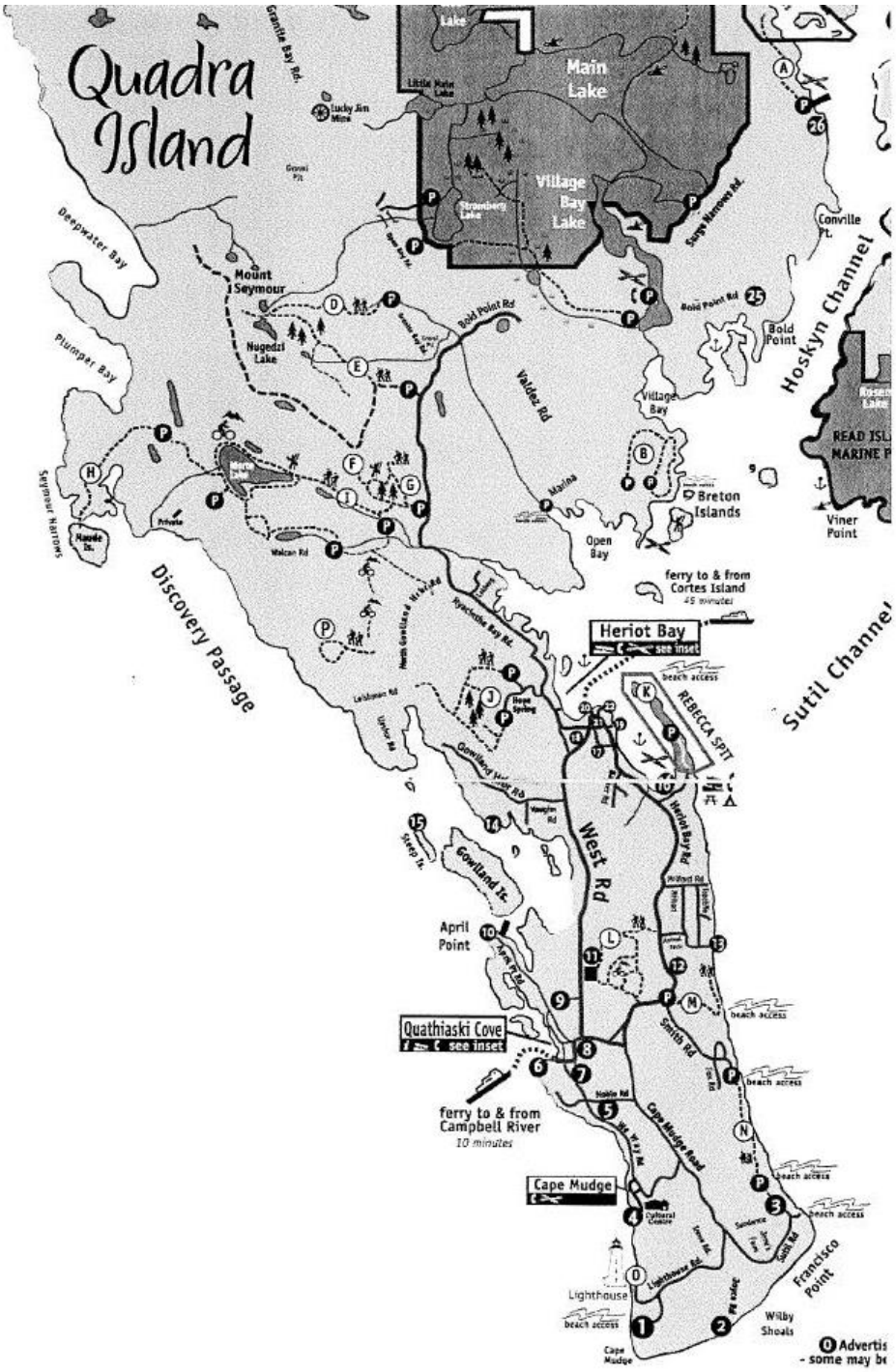
[1] The We Wai Kai Nation (We Wai Kai, Band or Claimant) claims compensation from the Respondent pursuant to paragraph 14(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] for a failure to provide the extension of land comprising most of Rebecca Spit as part of the Drew Harbour Indian Reserve, set aside in 1886 as We Wai Kai Reserve No. 9 (Reserve), in Quadra Island, British Columbia.

[2] Rebecca Spit is a protruding length of shoreline, extending north along the east side of Drew Harbour. All but a small portion at the base of the Spit was alienated by the Province of British Columbia on February 10, 1888, by a Crown grant to an individual, W. P. Sayward, who had applied the year before to purchase the land, an application advanced in accordance with the *Land Act*, SBC 1884, c 16 [*Land Act*, 1884]. Sayward held the land until 1912, when it was sold to another private individual and ultimately Rebecca Spit was conveyed back to the Province and became a provincial park.

[3] Quadra Island is a short distance east of the Vancouver Island city of Campbell River, separated by Discovery Passage, a north-south waterway between Vancouver Island and the Discovery Islands and the British Columbia Mainland to the east. The reserve in question, We Wai Kai Reserve No. 9, is at the bottom of Drew Harbour, a bay protected from an open expanse of Georgia Strait to the east and southeast by Rebecca Spit, the low lying narrow piece of land extending northward for about two kilometers, to the opening to the Harbour opposite Heriot Bay, the west terminal of the Quadra Island—Cortes Island ferry.

[4] What now is known as Quadra Island was initially known as Valdes Island. There is a second Valdes Island among the Gulf Islands to the south of Nanaimo, prompting the renaming of the more northerly of the two islands. The passage to the east of Rebecca Spit, separating Quadra from Cortes Island, is known as Sutil Channel.

[5] A sketch of the general area is shown below (online: http://www.quadraisland.ca/map/quadra-island-map.html):



II. THE PROCEDURAL HISTORY OF THE CLAIM

[6] On December 11, 1998, with a supplementary submission on May 24, 2009, the We Wai Kai Nation filed the Drew Harbour Indian Reserve specific claim with the Department of Indian

Affairs' Specific Claims Branch.

[7] On December 24, 2010, an official of the Crown formally advised the We Wai Kai Nation by way of letter of the Government of Canada's decision not to accept the We Wai Kai Nation's Drew Harbour Indian Reserve specific claim for negotiation.

[8] The Band filed a Declaration of Claim with the Specific Claims Tribunal (Tribunal) on June 23, 2014, seeking compensation from Canada. The Claimant alleged breaches of legal obligation by the Crown under the *Indian Act* and other legislation, as well as breaches of legal obligation arising from the Crown's provision or non-provision of reserve lands, under subsection 14(1) of the *SCTA*.

[9] Canada filed a Response with the Tribunal on September 22, 2014. The Claimant filed amendments to its Claim on November 13, 2015, December 5, 2016 and April 12, 2017. Canada filed its updated responses on April 15, 2016 and June 7, 2017 respectively.

[10] Notice of the Claim was provided to the Attorney General of British Columbia pursuant to section 22 of the *SCTA* on February 2, 2015; no response was received.

[11] The Claim was heard by the Tribunal in the following way: oral history evidence was heard on Quadra Island on December 5, 2017; expert evidence was heard on Quadra Island on April 24–26, 2018; and, final submissions were heard on Quadra Island on October 18–19, 2018 and by teleconference on November 27, 2018.

[12] The Claim was bifurcated with the consent of the Parties into validity and compensation stages. These Reasons for Decision address the validity of the Claim.

III. THE WE WAI KAI NATION'S ORAL HISTORY

[13] Mr. Daniel Billy, a councillor of the We Wai Kai Band, gave the history of the Band and his people's connection to Drew Harbour and Rebecca Spit.

[14] Mr. Billy was born in 1934, and grew up at the We Wai Kai village on the Cape Mudge Reserve on the southwest shore of Quadra Island.

[15] The southern end of Quadra Island is a fairly narrow projection of land, extending to its

most southerly point at Cape Mudge. The We Wai Kai (Cape Mudge) village site is three kilometers north of the Cape. Drew Harbour is on the opposite (east) side of the southerly projection of Quadra Island, eight kilometers north of the village.

[16] Mr. Billy's evidence was that he was instructed in the oral history of the Band by Chief Billy Assu, a long-time Chief of the We Wai Kai Band, and his maternal grandfather, Tom Price. Chief Billy Assu was 83 years old when Mr. Billy was 13. He and his grandfather showed Mr. Billy important traditional sites when he was a teenager, including travel by boat to the original village sites occupied by the We Wai Kai Band before they moved to Cape Mudge. These traditional sites were to the north of Quadra Island. He mentioned sites as far north as Jackson Bay, at the south end of Johnstone Strait, approximately 70 kilometers northwest of Cape Mudge.

[17] Mr. Billy told of a period of warfare with northern Coast Salish people, during the course of which the We Wai Kai Band displaced the Comox people from the southern end of Quadra Island.

[18] He was also told that during this long period of warfare with the Coast Salish people that the We Wai Kai Band had occupied a village site on Rebecca Spit, the narrow projection of land extending northward on the east side of Drew Harbour. Rebecca Spit shelters Drew Harbour from the open water to the east and southeast. He was told there were a number of houses at the north end of the Spit, and further down towards the narrows, where a trench had been dug for warriors to occupy, providing a place where they could see and engage anyone advancing on the village site from the south. He said the houses were simply made from split cedar and could be easily taken down and that the location was one in the process of moving south, ending with occupation of the Cape Mudge village site.

[19] Mr. Billy said that when the people moved to the south end of Quadra Island, Drew Harbour and Rebecca Spit were areas used to provide seafood and waterfowl for the people living at the new site. Shellfish, oysters, sea urchins, octopus and seaweed were gathered in the bay near the creek that flows into the southwest portion of Drew Harbour, and along the inside of Rebecca Spit and at some points on the outside shore. Chum salmon spawned in the creek and could be caught inside and outside of the Spit; and a fish trap for spawning herring was located on the outside shore, at the base of the Spit. Salal berries, medicine plants, water fowl and firewood were also

available on the Spit.

[20] Mr. Billy said he participated in gathering food in the Drew Harbour area from the time he was about 10 years old and that the Spit was a favourite spot for families and young people because it provided a good place to swim, picnic and camp, but that later the seafood became polluted with sewage. When he first visited the Spit, it had been logged off. He said it was awful when logged but that the trees were growing back at the time he first remembered being there and were approximately 20 feet in height.

[21] Mr. Billy remembered the narrow area at the base of the Spit before the road into the provincial park that presently occupies the Spit raised the elevation of the narrow neck of land, and said that waves would wash across the narrow piece of land during big storms. Notwithstanding this fact, the Spit had always been spoken of as being one with Quadra Island.

IV. BACKGROUND

A. History of Reserve Creation in the North Vancouver Island Area

[22] British Columbia joined Confederation in 1871. At the time First Nations people accounted for more than one-half of the total population of the new Province and they were almost exclusively the population of the more remote areas such as the northern end of Vancouver Island. The land north of present-day Campbell River was not generally suited for agriculture and in contrast to other areas of the Province there was much less interest by settlers in taking up land. Many of the original Crown grants in the area were taken to provide access to timber for the burgeoning lumber industry.

[23] The Indigenous people of the area lived off of the rich marine resources, hunted deer, elk and waterfowl, and participated in commercial fisheries and supplied furs including seal skins and sea otter pelts.

[24] Although there were some reserves set aside by the colonial governments prior to British Columbia joining Confederation, in most part, reserve creation began with the articles of Confederation. Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10, 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. [Common Book of Documents (CBD), Vol 1, Tab 59]

[25] Following Confederation, allocation of lands to be conveyed by the provincial government to the Dominion did not proceed smoothly. The provincial government did not recognize First Nations' traditional use and occupation of the lands they inhabited as creating a legal interest in the land and provincial government officials objected to similar sized allotments of land to those set aside when creating reserves in the Prairie provinces. Ultimately, an agreement was reached in 1875, to structure a commission, the Joint Indian Reserve Commission (JIRC), and to set aside reserve lands on the following terms:

> 1st. [T]hat the adjustment of the question be referred to three Commissioners, one to be appointed by the Dominion Government, one by this Government and the third to be jointly named by the two Governments.
>
> 2nd. [T]hat the Commissioners shall meet as soon after their appointment as possible at Victoria, and make arrangements to visit with all convenient speed, in such order as may be found desirable each Indian Nation (meaning 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 give and determine for each nation separately the number, extent, and locality of the Reserve or Reserves to be allowed to it.
>
> 3rd. That in determining the extent of the Reserves to be granted, no basis of acreage be fixed, but that each nation of Indians be dealt with separately.
>
> 4th. That the Commissioners shall be guided generally by the spirit of the British Columbia terms of Union which contemplates a liberal policy being pursued towards the Indians, and in the case of each 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.
>
> 5th. That each reserve shall be held in trust for the use and benefit of the Nation to which it has been allotted, and in the event of any material increase or decrease hereafter of the Members of a Nation occupying a Reserve, such Reserve shall be enlarged or diminished as the case may be, so that it shall bear a fair proportion to the members of the Nation occupying it. The extra land acquired for any reserve shall be allotted from Crown lands, and any land taken off a reserve shall revert to the Province.
>
> 6th. That as soon as the Reserve or Reserves for any Indian Nation shall have been fixed or determined by the Commissioners, the existing Reserves belonging

> to such nation so far as they are not in whole or in part included in such new Reserve or Reserves as determined by the Commissioners, shall be surrendered by the Dominion to the local Government so soon as may be convenient on the latter paying to the former for the benefit of the Indians such compensation for any clearings or improvements made on any Reserve so surrendered by the Dominion, and accepted by the Province as may be thought reasonable by the Commissioners aforesaid. [Copy of a Report of: Committee of the Honourable The Executive Council. Approved by His Excellency the Lieutenant Governor on the 6th Day of January 1876; CBD, Vol 2, Tab 127]

[26] The two governments nominated Commissioners, and they in turn nominated a third Commissioner, Gilbert Sproat. This three-person Commission operated until 1878, when it was recommended by the Province and agreed to by the Dominion that Sproat would continue as the sole Commissioner responsible for effecting the terms of reference (CBD, Vol 2, Tabs 138–39; CBD, Vol 3, Tabs 156–57).

[27] The JIRC initially concentrated on setting up reserves in areas where land had been taken up by settlers or where settler populations were increasing resulting in a pressing need to allocate sufficient land for reserve purposes (CBD, Vol 2, Tabs 138–39).

[28] Notwithstanding the references to 'liberality' in the allocation of First Nations' reserves, and what appears to have been an attempt under the 1875 agreement to give almost full authority to the JIRC, the provincial commitment to a system of pre-emptions and sale of Crown lands to members of the public that qualified for these land transfers under the *Land Act*, 1884, became a challenge to the Commission's attempts to set aside reserve lands. Provincial alienation of lands traditionally used by First Nations, delay in dealing with reserve approvals, and refusal to grant water rights needed to make interior reserves productive, were major points of complaint voiced by Sproat (CBD, Vol 3, Tabs 162, 166, 178, 186, 191, 193).

[29] Although Sproat and later, Peter O'Reilly, after Sproat resigned, were joint appointees of the two governments, the Dominion became solely responsible for the expenses of the Commission, generally directed the activities of the Commissioner and routinely accepted his recommendations (CBD, Vol 3, Tabs 160, 191). The Province took a more oppositional stance and provincial acceptance of reserves allocated by the Commissioner became far from routine (CBD, Vol 3, Tabs 191–92).

[30] Pre-emption was a system allowing an eligible applicant to record an intention to take up

unsurveyed, unoccupied and unreserved Crown land (not exceeding 160 acres in coastal areas, 320 acres in the interior). The applicant was required to take up residency on the land and to make sufficient improvements to qualify for a Certificate of Improvement. Thereafter, the Province on receipt of a fee was empowered to issue a Crown grant of the land.

[31] Purchase of unsurveyed, unoccupied and unreserved Crown land began with an application to purchase the land, followed by submission of a survey and on payment of the stipulated price, receipt of the Crown grant.

[32] At the time of Confederation, Crown grants of unsurveyed Crown lands were available under the pre-emption system, often resulting in a less than orderly system of land allocation and conflicting Crown grants. Legislation after Confederation began to put reliance in surveys as part of the Crown grant process, although even then it was difficult for the provincial government to link together surveys in one area with those in others because there was no province-wide grid or other means of collating the area surveys (*Land Act*, SBC 1875, No 5 [*Land Act*, 1875]; CBD, Vol 2, Tab 104; Brent Taylor—Hearing Transcript, April 25, 2018, at 14, 16; David Bazett—Hearing Transcript, April 25, 2018, at 159, 168). After 1879, publication of a prospective purchaser's intention to apply to purchase unsurveyed land was required by posting a notice in the weekly Government Gazette (*Gazette*) for two months before filing the application (section 6 of the *Land Amendment Act, 1879*, SBC 1879, c 21 [*Land Amendment Act*, 1879]; CBD, Vol 3, Tab 180; section 30 of the *Land Act*, 1884). Indigenous people were only allowed to take up land if given special dispensation (section 3 of the *Land Act*, 1884) and did not have the ability to participate politically. They did not have the right to vote in provincial elections until 1960.

[33] The provincial official responsible for the allocation of Crown lands was the Chief Commissioner of Lands and Works (CCLW), a member of the provincial Cabinet.

[34] Gilbert Sproat continued as the sole JIRC Commissioner until he resigned in March 1880 (CBD, Vol 4, Tab 245; references to the Commission after installation of a single Commissioner will be to the "IRC"). Prior to his resignation, he had set out reserves throughout much of the Province and prepared Minutes of Decision in respect of reserves he proposed should be set aside on northern Vancouver Island, the Discovery Islands and the Mainland Inlet areas immediately to the east. Among these, proposed reserves listed for the We Wai Kai Nation included the following:

We-wai-a-kay Sub group

…

Sutil Channel

No. 9 A reserve in the North West corner of Open Bay, Sutil Channel to be bounded as follows

From the right bank of mouth of stream westerly along shore 15 Chains more or less to base of hills
Thence north about 10 Chains
Thence true East to base of hills
Thence following base of hills in a southerly direction to shore
Thence westerly following shore to starting point

Sutil Channel

No. 10 A Reserve consisting of about 5 acres to include the fishing station in the north west corner of Hyacinthe Bay Sutil Channel to be laid off adjoining stream as most convenient for survey

No. 11. Also two small Islands shown on Admiralty Chart situated together near south shore of Hyacinthe Bay about half a mile north westerly from Heriot Island

Drew Harbor

No. 12 A Reserve at the head of Drew Harbor, Sutil Channel to be bounded as follows

From a spot on the shore at the head of Drew Harbor about 10 Chains north west from the stream shown on the Chart -
Thence true west 10 Chains
Thence true south 40 Chains or thereabouts
Thence true east to the seashore
Thence northerly along seashore to a spot true east from starting point
Thence true west to shore of Drew Harbor, thence following the shoreline of Drew Harbor (crossing the stream) to starting point

13 Oct 1879 sg G.M[.]S[.]

…

Campbell River

…

Discovery Passage

No. 18 A Reserve on Valdes Island and on the east side of Discovery Passage about 2 miles from Cape Mudge to be bounded as follows

> From a spot on the east side of Discovery Passage about 10 Chains south from the Indian graveyard which is south of the village -
> Thence true east 20 Chains
> Thence true north 80 Chains
> Thence true west to sea shore
> Thence southerly along shore to starting point, the Indian graves the village & clearances & cultivation to be included
>
> Cape Mudge
>
> No. 19 A Reserve at Cape Mudge to be bounded as follows
>
> From a spot on sea shore near extreme point of Cape Mudge about 10 Chains east from the small stream as shown on Chart,
> Thence true north 20 Chains
> Thence true west to seashore in Discovery Passage
> Thence following seashore to starting point, the Indian graves, houses, clearances & cultivation to be included
>
> …
>
> 11 Oct 1879
>
> sg G.M.S[.]
>
> [CBD, Vol 3, Tab 217]

[35] These were among the last reserves proposed by Sproat before his resignation. A report from I. W. Powell, Indian Superintendent for the Province to the Superintendent General of Indian Affairs, dated November 15, 1880, found that some of the allotments would likely require readjustment before being accepted as reserves and later Department of Indian Affairs' documents note the proposed reserves were rejected by the CCLW as being "improviden[t]" (CBD, Vol 4, Tab 249; CBD, Vol 7, Tab 488).

[36] Sproat's resignation meant that no further work was done allocating reserves until he was replaced by the appointment of Peter O'Reilly, a County Court Judge commissioned to serve as the next Indian Reserve Commissioner for the Province (CBD, Vol 4, Tab 245—mistakenly referring to Peter O'Reilly as Patrick).

[37] O'Reilly's instructions received from the Deputy Superintendent General of Indian Affairs were essentially those stipulated for Sproat and the JIRC, and included the following:

> 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 therefore interfere as little as possible with any tribal arrangements being especially 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. X 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. [emphasis in original; CBD, Vol 4, Tab 247]

[38] It is consistent in these instructions that the purpose was to meet the 'habits, wants and pursuits' of the people being assigned reserves. The word 'wants,' in this context, has two dictionary definitions, both likely appropriate here: 1) desires, and 2) needs (*The Canadian Oxford English Dictionary*, 2d ed, *sub verbo* "want").

[39] O'Reilly began setting aside reserves in the spring of 1881. He spent several years setting out reserves in other areas of the Province. His work did not bring him back to the northern coastal areas of Vancouver Island until the fall of 1886.

[40] Subsequent to Sproat's resignation and before O'Reilly again visited the area, land began to be taken up by individuals applying for title under the *Land Act*. The first of these applications in the Drew Harbour area was an application to purchase 160 acres of land made by Thomas Earle. Earle's intention in this regard was first published in *The British Columbia Gazette* (*BC Gazette*) on June 1, 1882 (CBD, Vol 4, Tab 277). The land was surveyed on August 9, 1882, by surveyor George Drabble (CBD, Vol 4, Tab 285). The survey identified a parcel of land extending to the north and west from a corner post set on the west bank of the creek flowing onto the southwest shore of Drew Harbour. The land surveyed by Drabble overlapped a portion of the land described by Sproat in his Minutes of Decision in respect of the reserve he referred to as No. 12 Drew Harbour. The south boundary of the lot surveyed by Drabble extended due west from the corner post set on the west bank of the stream flowing into Drew Harbour, overlapping the north boundary of the Reserve indicated by Sproat, who would have drawn the north boundary of the Reserve from a point along the shore, 10 chains to the northwest of the stake set by Drabble (1 chain=66feet; 80

chains=1 mile; 10 sq chains=1acre) (Respondent's expert report by David Charles Bazett (Bazett Report) filed on April 15, 2016, Appendix C, Figure 1-b).

[41] Drabble's survey was the first in the Drew Harbour area and later surveys referenced his survey in orienting other plots of land in the vicinity. He did not show a reserve in the area and a reserve at Drew Harbour had yet to be approved. Ultimately, the survey was accepted by the CCLW, and the parcel was assigned a lot number, Lot 7, being the seventh lot created in the Sayward District of the Provincial Registration System. Notice of the survey was gazetted on September 21, 1883 (CBD, Vol 5, Tab 315). The purchase price was paid and the Crown grant was issued on January 30, 1884 (CBD, Vol 5, Tab 335).

[42] On December 7, 1883, intentions to apply to purchase two further parcels of land were published in the *BC Gazette* (CBD, Vol 5, Tab 320). James Miller, a logging camp owner, indicated his intention to purchase a property north of that surveyed by Earle; and a second property to the south of Earle's intended purchase. This second parcel of 320 acres included a large portion of the land Sproat intended to be set aside as Reserve No. 12, Drew Harbour.

[43] A third *BC Gazette* notice was published by James Miller on July 17, 1884. This third notice indicated Miller intended to apply to purchase, "forty acres of land, more or less, on Valdez Island, known as Rebecca Spit". The *BC Gazette*'s description of the boundary of the parcel was as follows:

> …commencing at north-east corner of Indian Reserve, Drew's Harbour; thence northerly, along the east shore line to end of said Spit; thence westerly around the point to Drew Harbour; thence southerly along the shore line of Drew Harbour, to the Indian Reserve; thence along the north line of Indian Reserve, to point of commencement. [CBD, Vol 5, Tab 359]

[44] The reserve proposed by Sproat was the only Indian reserve that would have met the description referred to by Miller in his *BC Gazette* notice. When the land he intended to apply to purchase was surveyed, the southern boundary did not extend to the "north line of Indian Reserve". If plotted, the north line of the Sproat reserve would have been some distance (approximately 10 chains or 170 meters) south of the line constituting the southern border indicated in the survey (Bazett Report, Appendix C, Figure 1-e).

[45] The Rebecca Spit parcel was surveyed for Mr. Miller on August 28, 1884, by E. Priest

(CBD, Vol 5, Tabs 369–70). Priest began his survey by tying into the post at the southeast corner of Earle's property as a known point, tying to this point by a line traversing across the south shoreline of Drew Harbour, which he identified as being part of an Indian reserve. This would have been a reference to Sproat's intended reserve. He then fixed the southwest and southeast points of the south boundary of the intended Rebecca Spit property, setting posts in place near the shoreline of Drew Harbour to the west, and Sutil Channel to the east, and blazing bearing trees near the posts. He then proceeded to traverse between stations and outline the natural boundary of Rebecca Spit north of the posts. The survey plan he subsequently prepared indicated the parcel (later labelled Lot 33) as consisting of 54 acres (Agreed Statement of Facts (ASOF) at para 22).

[46] The first of Miller's intended purchases, the parcel to the north of Earle's Lot 7, went ahead in respect of what amounted to roughly the easterly one-half of the property he originally outlined in his *BC Gazette* notice. The purchase price was paid on November 15, 1884, and the property was assigned lot number 24 (CBD, Vol 5, Tabs 389–90, 399, 400). The second intended purchase, being the 320 acres that would have included most of the reserve described by Sproat, did not proceed. There is no evidence a survey was ever prepared for this parcel or that matters proceeded beyond the first *BC Gazette* publications.

[47] Further, Mr. Miller did not proceed with his intended purchase of Rebecca Spit. However, on October 26, 1886, a *BC Gazette* notice was published indicating that W. P. Sayward, a mill owner from Victoria, intended to apply to purchase Rebecca Spit, Valdes Island. This notice did not identify the proximity of the intended purchase to the intended reserve as indicated in the Miller *BC Gazette* notice. Sayward's new notice of intention to purchase described the property from a southwest starting point, outlining the property from "a stake on the east shore of Drew's Harbour, near the head", likely referring to the southwest post set by Priest, whose survey, prepared in 1884 for Miller, became the survey Sayward later submitted to the CCLW. The full text of the notice was as follows:

> NOTICE
>
> IS HEREBY GIVEN that I intend to apply to the Hon. Chief Commissioner of Lands and Works for permission to purchase Rebecca Spit, Valdez Island, described as follows:—Commencing at a stake on the east shore of Drew's Harbour, near the head, thence east to the east shore of Rebecca Spit; thence northerly along the shore line to the north end of said Spit; thence westerly around

> north end of Spit to Drew's Harbour; thence southerly along the shore line to point of commencement. WM. P. SAYWARD.
>
> *Victoria, Oct. 26th*, 1886. [CBD, Vol 6, Tab 476]

[48] Sayward applied for the purchase on January 6, 1887 (CBD, Vol 7, Tab 494). Sayward included a sketch of the land he intended to purchase on the back of his application. It is a rough hand drawn document but indicates the whole Spit, including the entire lower portion. Notice of the (Priest) survey was published in the *BC Gazette*, on January 27, 1887 (CBD, Vol 7, Tabs 501–02); and the Crown grant of Lot 33 to Sayward was issued a year later on February 10, 1888 (CBD, Vol 7, Tab 540).

[49] Miller and Sayward were individuals involved in the logging industry. Miller operated a camp at the bottom of Drew Harbour. Sayward was a mill owner in Victoria with extensive timber holdings. From early local histories entered in evidence, logging at Drew Harbour began with oxen skidding logs to the water and later utilized a short railway transporting logs from the area extending to the south end of Quadra Island near Cape Mudge (CBD, Vol 1, Tab 7). The protected anchorage at Drew Harbour would have been the area used to boom the logs transported to the site.

B. O'Reilly's Minutes of Decision, 1886

[50] O'Reilly turned his attention to setting aside reserves in the traditional areas occupied by northern Vancouver Island First Nations people in the fall of 1886 (ASOF at para 24; CBD, Vol 7, Tab 488). He and a surveyor, Ashdown Green, travelled by steamer to the north end of Vancouver Island and then travelled back down the Inland Passage, visiting areas along the waterway (CBD, Vol 6, Tab 468). After setting aside a considerable number of reserves, their last stops were to set aside reserves for the Kwakwala speaking people who were associated with traditional areas and use of marine resources between Vancouver Island and the Mainland north of Cape Mudge. These people were identified in Department of Indian Affairs' documentation as Laich-Kwil-Tach (also Euclataw, or Yuculta) people (CBD, Vol 6, Tab 468). As indicated in the oral history given by Mr. Billy, and as indicated in the biography of Chief Billy Assu, the subgroup We Wai Kai occupied village sites north of Quadra Island and moved to the southern end of the Island dispossessing the then resident northern Coast Salish people during a violent conflict some time about the time of first contact (Hearing Transcript, December 5, 2017, at 64–66; CBD, Vol

13, Tab 927). Later, the 1860–1864 Admiralty Charts record the southernmost village on Quadra Island (on the present site of the village of Cape Mudge) as being a Yuculta village (CBD, Vol 1, Tab 48) confirming that the We Wai Kai were in possession of the southern end of the Island from before this point in time.

[51] O'Reilly's instructions as revealed in the 1886 Annual Report of the Department of Indian Affairs were that in light of the fact that Sproat's reserves were rejected by the provincial government, that he should "revise" the work of Sproat in the allotments he intended and which were thought to be too generous by the Province, to avoid further complications with approvals (CBD, Vol 7, Tab 488).

[52] Visiting the areas along the east side of Quadra Island, O'Reilly and Green set aside similar reserves to those intended by Sproat at Village Bay and Open Bay, but O'Reilly declined to set aside a reserve at Hyacinthe Bay (CBD, Vol 6, Tabs 454–55). He arrived at Drew Harbour at 2:00 p.m. on October 7, 1886. He recorded the weather in his diary as, "1/2 Gale from SE" (CBD, Vol 6, Tabs 454–55). He then recorded: "Made reserve close to Logging Camp. Miller claim." The next entry in the diary recorded that the steamer left the next morning at 5:45 a.m.

[53] Sundown, on October 7, 1886, was at about 5:43 p.m. (Claimant's Expert Report by Brent Taylor of Polaris Land Surveying Inc. (Polaris Report) filed on January 20, 2017, at 20; Brent Taylor—Hearing Transcript, April 24, 2018, at 69, 114). Between the time of their arrival at 2:00 p.m. and when the light would have been too poor to continue, O'Reilly and Green came ashore and located the southeast corner of Earle's Lot 7. They then traversed across the bottom of Drew Harbour, noting the abandoned logging camp and evidence of an Indian house, to the base of Rebecca Spit. At this point, Green set a traverse line that extended across the base of the Spit to the Sutil Channel shore, measuring offsets to the natural boundary, the mean high tide mark at the edge of the beach, and recorded his work as field notes. At one point, he gave a bearing for an offset to the north, to what he identified as a "passage". This was accompanied by a rough sketch that looks somewhat like a bent finger describing the neck of land north to the "passage" (CBD, Vol 6, Tab 465). The offset did not record a distance to the "passage" and Green went on to set a further traverse to the south, along the Sutil Channel shore, to mark the outline of the shore in that direction. He did not note either of the posts set by Priest two years before (Brent Taylor—Hearing

Transcript, April 25, 2018, at 5; David Bazett—Hearing Transcript, April 25, 2018 at 123–28).

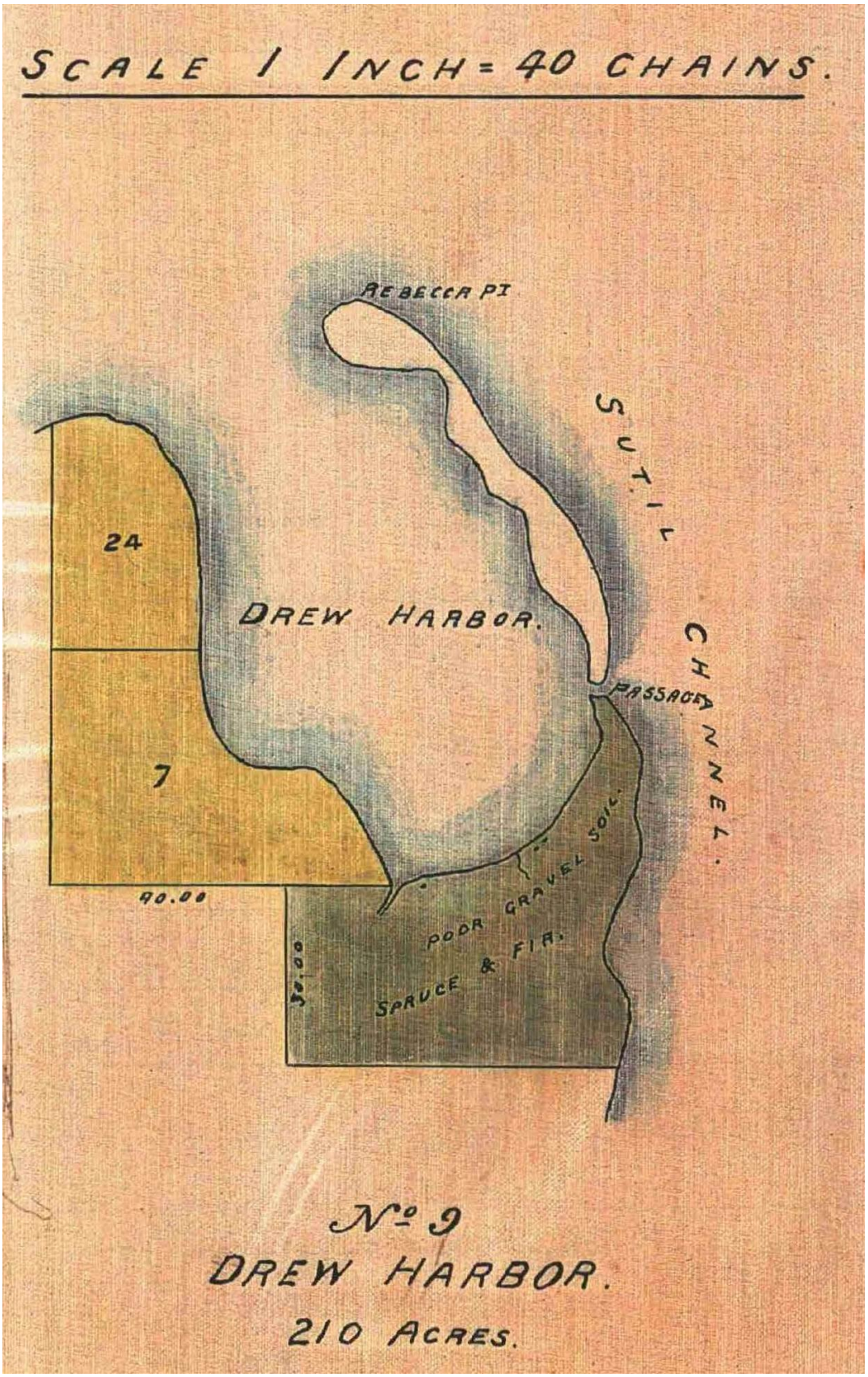
[54] The survey work did not set the rectilinear boundaries from the Sutil Channel shore inland to the southwest corner of the intended reserve, and from this point north to a point directly to the west of the point of origin, and from there back to the point of origin (the south east corner of Lot 7). These boundaries were set the next day by O'Reilly in his Minutes of Decision. The description of Reserve No. 9 in the Minutes of Decision, traced the boundaries in a counter-clockwise direction from the point of origin, while the traverses laid out marking the natural boundaries recorded by Green in his field notes, proceeded in the opposite direction, clockwise. The Minutes of Decision read:

> No. 9.
>
> A reserve of 210 acres situated on Drew Harbor, Valdes Island.
>
> Commencing at the south-eastern comer post of section seven, Sayward District, and running west along the southern boundary of the said section seven to a point forty chains east of the south-west corner thereof; thence south thirty chains, thence east to the sea coast; and thence following the shore in a northerly, and westerly direction to the place of commencement. [CBD, Vol 6, Tab 468; see also Tabs 461–64]

[55] After leaving Drew Harbour, O'Reilly and Green set out a reserve on the west side of Quadra Island, starting at the cape. This was numbered We Wai Kai Reserve No. 10. O'Reilly's October 8, 1886, diary entry records (CBD, Vol 6, Tabs 454–55): "Arrived Cape Mudge at 8. Marked out reserve including both those defined by Sproat." Sproat had set out two reserves he numbered No. 18 and No. 19, one that included the Cape; and the second, further up the west shore of the Island, that included the village site. The reserve set out by O'Reilly included both of these (CBD, Vol 6, Tab 455).

[56] O'Reilly intended to meet with the people occupying the area on Discovery Passage at Campbell River, the We Wai Kum, but found they were away from their village and he proceeded back to his home base in Victoria (CBD, Vol 6, Tab 468).

[57] Green drew a sketch to accompany the Minutes of Decision describing the Reserve to be set aside at Drew Harbour (CBD, Vol 6, Tab 465). The sketch is reproduced below and shows the Reserve shaded in a darker colour, extending north to an area marked "passage", with the more northerly projection of land to Rebecca Point indicated as an Island (CBD, Vol 6, Tab 429):


SCALE 1 INCH = 40 CHAINS.
REBECCA PI
SUTIL CHANNEL.
24
DREW HARBOR.
PASSAGE
7
40.00
POOR GRAVEL SOIL.
SPRUCE & FIR.
30.00
No 9
DREW HARBOR.
210 ACRES.

C. The Further History of Creation of the Drew Harbour Indian Reserve

[58] To summarize the chronology of alienation of land in the vicinity of Drew Harbour, the relevant timeline is as follows:

Date	Description
October 13, 1879	Sproat's Minutes of Decision setting a reserve at Drew Harbour (CBD, Vol 3, Tab 222)
June 1, 1882	Earle's publication in the *BC Gazette* of an application to purchase what became Lot 7. This was followed by Drabble's August 9, 1882, survey locating the property to be purchased. The survey overlapped the northwest corner of the Reserve intended by Sproat. Notice of the survey was published in the *BC Gazette* September 21, 1883, and the Crown grant was issued January 30, 1884. (CBD, Vol 4, Tabs 277, 285; CBD, Vol 5, Tabs 315, 335)
December 7, 1883	Miller's publication in the *BC Gazette* of an intention to purchase two lots, one that became Lot 27, north of Earle's Lot 7, and a second at the base of Drew Harbour, 320 acres of land that would have almost completely overlapped the remainder of the Reserve indicated by Sproat (CBD, Vol 5, Tab 320). This was not surveyed and the application did not proceed.
July 17, 1884	Miller publishes his intention to purchase, "forty acres of land, more or less…known as Rebecca Spit", a parcel located north of "the north line of Indian Reserve". The parcel is surveyed by E. Priest on August 28, 1884, who set two posts indicating the boundary of the Rebecca Spit property with what he described as the "Indian Reserve" to the south. He assessed the acreage of the Rebecca Spit property [later Lot 33] as being 54 acres. Miller did not submit Priest's survey and the application did not proceed. (CBD, Vol 5, Tabs 359, 369–70; ASOF at para 22)
October 7, 1886	O'Reilly and Green set Reserve No. 9 at Drew Harbour, locating the Reserve by tying to the post indicating the south east corner of Earle's Lot 7 to fix the line of the Reserve. The boundary of the Reserve east of the south east corner of Lot 7 proceeded along the shore of the bottom of Drew Harbour and up the inside of the Spit, to a point marked as a "passage" and from the "passage", down the west shore of Sutil Channel (CBD, Vol 6, Tab 465). This projection of the Reserve to the "passage" extended north of the posts set by Priest and comprised approximately 20 acres of land that later became the southern part of Lot 33.
November 4, 1886	Sayward publishes his intention to purchase Rebecca Spit, giving a description indicating the property north of a line drawn west to the shore of Sutil Channel, "[c]ommencing at a stake on the east shore of Drew's

	Harbour, near the head" (CBD, Vol 6, Tab 476). The stake is a likely reference to the western post of the two set by Priest. Two months of publications of this notice were required under the *Land Act*, the last publication appears to have been made on December 30, 1886 (CBD, Vol 7, Tab 486).

[59] Picking up at this point in time, O'Reilly's Minutes of Decision, except in the case of a provisional reserve at Fort Rupert, were approved by W. Smithe, the then Premier of the Province, who also served as the CCLW, shortly after O'Reilly's return to Victoria, on November 5, 1886 (CBD, Vol 6, Tab 478; ASOF at para 33).

[60] Sayward's first publication of a notice he intended to purchase most of Rebecca Spit (ultimately Lot 33) was dated November 4, 1886 (CBD, Vol 6, Tab 476; ASOF at para 32). His application to purchase was filed January 6, 1887 (CBD, Vol 7, Tab 494; ASOF at para 34). He then submitted Priest's survey done for Miller in 1884 and publication in the *BC Gazette* of receipt of this survey by the office of the CCLW occurred on January 27, 1887 (CBD, Vol 7, Tab 501); the Crown grant was issued to Sayward on February 10, 1888 (CBD, Vol 7, Tab 540; ASOF at para 36).

[61] Although Green's plotting of parts of the Reserve was done in a similar fashion as he would have done if completing a full survey of the parcel, his notes could not have been used to create a full survey (CBD, Vol 6, Tab 432). They were incomplete and could not have been used to assure a complete enclosure of the parcel; and in some respects, the offset distances may have been estimated and not measured, and in the case of the note referring to the "passage", the direction was noted but no distance was recorded. The notes were designed to give a less than complete indication of the property, useful in describing the Reserve in the Minutes of Decision and in instructing a surveyor, who would later conduct a more complete survey and prepare a proper survey plan.

D. Skinner's Survey

[62] The full survey of the land in this case was made by E. M. Skinner, on July 28, 1888, five months after Sayward had received his Crown grant of Lot 33 (CBD, Vol 8, Tab 571; ASOF at para 38). It had been O'Reilly's intention to have Skinner survey the Reserve the year before, but he was not able to travel to the site before the weather gave out at the end of the season (CBD, Vol

7, Tabs 509, 531). When the survey was ultimately completed the next year, it did not include approximately 20 acres at the base of the Spit set out as part of the Reserve by O'Reilly, but which by then was overlaid by the Sayward Crown grant.

[63] The instructions given to Skinner in conducting the survey would likely have been to the same effect as those recorded in instructing Mr. Mohun and Captain Jemmett, who were also surveyors who prepared a number of other reserve surveys. In a May 11, 1882, letter sent by O'Reilly to these two surveyors, he instructs:

> In surveying the different reserves made by me for the Indians during the past summer you will please understand, that should you discover any error in which the sketches, or minutes do not agree with the land obviously intended to be given to the Indians, the spirit and not the letter of the same is to be taken. Also that should any claim for which a legal title exists which have been encroached upon in error, you will be careful to exempt it from the intended reserve as defined in the minutes.
>
> Should you find it necessary to alter any course or distance, you will please report the same to me as soon as convenient, stating your reasons for such alteration, and enclosing plan of the proposed deviation.
>
> Wherever practicable the reserves must be connected with each other, and also with the official surveys where found feasible.
>
> The minutes of decision with sketches of each reservation have been deposited in the Office of the Superintendent Powell; any copies of pre-emption records, and tracings of Official Surveys [illegible] which may be in my office are at your disposal should you wish to refer to them. [CBD, Vol 4, Tab 274]

[64] The instructions indicate:

1. Some discretion in interpreting the intention in setting aside the reserve should the Minutes of Decision and sketch contain an error.

2. If the Minutes of Decision should indicate an encroachment on a legal title the surveyor was to exclude the land from the intended reserve he was surveying.

3. The surveyor was to report any change of the course or distance indicated in the Minutes of Decision, with reasons for the change and a plan of the deviation.

[65] In preparation for the surveys conducted by Skinner in 1888, he would have likely received instructions similar to those he received April 29, 1886, in respect of surveys he conducted in the interior of the Province:

> Before leaving Victoria you will supply yourself with copies of all Minutes of Decision, and tracings of the various plots of land to be surveyed by you,… also copies of Crown grants and applications to pre-empt or purchase lands in the vicinity of the reserves, all of which should be shown on the plans.
>
> Any information that I possess in my office with regard to these, can be had on application.
>
> ...
>
> P. O'Reilly, IRC
>
> [CBD, Vol 6, Tab 437]

[66] "Crown grants and applications to pre-empt or purchase lands in the vicinity of the reserves", would have been available at the office of the CCLW and inspection of these a usual undertaking for a surveyor setting out to create a new survey. Although it is not recorded that he took this step, this usual practice and the fact that the survey he prepared in fact avoided conflict with Lot 33, makes it clear that Skinner knew of the new Crown grant (Polaris Report at 38; Bazett Report at 21). Further, the change in the survey from that indicated in the Minutes of Decision and sketch was not mentioned in Skinner's later correspondence with O'Reilly (the change he made to create Reserve No. 10 extended the east boundary to include a garden, and the change he made at Philip's Arm extending the reserve north to include "all the Village" was reported; CBD, Vol 8, Tab 573). In my view, this indicates that Skinner knew that the Crown grant had issued for Lot 33 and that Lot 33 overlaid the northeast corner of the Reserve indicated in the Minutes of Decision and sketch. Having learned this before he set out, he appears to have received instructions to avoid the conflict, and so the encroachment was not a circumstance discovered in the field which would have required a detailed report. Lastly, a notation in his duplicate Field Book showed '33' adjoining the northeast boundary he set for Reserve No. 9. The original Field Book is not available to confirm this but it is again highly suggestive that he had prior knowledge of Lot 33 and was instructed not to overlay the new Crown grant, prompting him to note its location in his (duplicate) Field Book (CBD, Vol 8, Tab 575).

[67] Some of the expert survey opinion evidence considers whether Skinner may have not discovered the conflict until he came upon the posts set by Priest and stopped his survey at this boundary, and perhaps thought the change from the Minutes of Decision was unimportant. In my view, the recognition of the conflict and receipt of instructions to avoid Lot 33 is a much more plausible explanation; and is also in accord with the surveyors' evidence of the preparations Skinner would have made prior to the survey.

[68] In summary, the preponderance of evidence establishes Skinner knew of the overlap of Lot 33 onto the northern portion of the Reserve and was instructed to modify the northern boundary of the reserve to conform to the southern boundary of Lot 33.

V. THE CLAIMANT'S CASE

[69] The Claimant argues:

1. That all of Rebecca Spit was to be part of the intended Reserve set out in O'Reilly's Minutes of Decision and that the land was lost to the Band as a result of Canada's failure to take appropriate steps to safeguard the intended Reserve from alienation by conflicting Crown grants of land under the *Land Act*. For the reasons that follow I find that the scope of the claimed loss on proper construction of the Minutes of Decision should be restricted to the loss of 20 acres intended for the Reserve by O'Reilly in his October 8, 1886 Minutes of Decision.

2. That there was a cognizable interest to include all of Rebecca Spit in the Drew Harbour Indian Reserve which should have resulted in its inclusion in the Reserve in any event. I will address this argument under heading VIII below.

3. Canada acted improvidently in failing to recognize and contest the *Land Act* application that resulted in the loss of the 20 acres at the base of the Spit. This will be addressed in under heading IX below.

VI. THE CLAIM FOR THE FULL SPIT

A. Was Rebecca Spit Properly Defined as a Spit?

[70] The first issue raised by the Parties relates to construction of Commissioner O'Reilly's Minutes of Decision, relating to the creation of the Drew Harbour Indian Reserve. The description of the boundaries of the proposed Reserve was as follows:

> No. 9
>
> A Reserve of two hundred, and ten (210) acres, situated on Drew Harbor, Valdes Island.

> Commencing at the Southeastern corner post of Section seven (7) Sayward district, and running West along the southern boundary of the said Section seven (7) to a point forty (40) chains East of the Southwest corner thereof; thence South thirty (30) chains; thence East to the seacoast, and thence following the shore in a northerly and westerly direction to the place of commencement. [emphasis in original; ASOF at para 27]

[71] The submission on behalf of the Band is that strict compliance with this description leads to inclusion of all of Rebecca Spit as part of the intended Reserve. The assertion is that the natural boundary of the Spit, the high water mark distinguishing the shore from the upland areas, is not interrupted by a break or "passage" and the sequential description of the perimeter in the Minutes of Decision requires inclusion of the entire Spit.

[72] Reference is made to the definition of the high water mark utilized by surveyors of the time; the definition essentially unchanged to modern times. The natural boundary is identified as the point where:

> *In non-tidal waters,* [*the ordinary high water mark*] *is located where the presence and action of the water in normal conditions prevent the growth of terrestrial vegetation or mark the soil distinctively. In general terms, this is the back of the beach. In tidal waters, it is the line of mean high tide separating the upland parcel from the beach (or inter-tidal strip). The generally accepted surveying practice is that it is represented by a line of debris.* [emphasis in original; Polaris Report at 9, citing the National Standards for the Survey of Canada Lands, v. 1.0]

[73] The term "natural boundary" is defined in the British Columbia *Land Act*, RSBC 1996, c 245, and essentially codifies the definition of the term as it existed in common law. The definition is as follows:

> **"natural boundary"** means the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself; [emphasis in original; see also the Polaris Report at 9]

[74] This boundary is not necessarily above water during times marked by highest tides, storm surges or significant wave action, or a combination of two or more of these features. The boundary determined in any particular case requires judgment and the subjective elements indicated in the definitions can result in variations from one surveyor to another in establishing the boundary.

[75] Rebecca Spit shows on the original references, British Naval Charts dating from 1860–

1864, as the name suggests, as a spit, a narrow body of land extending into a body of water, but contiguous to and not separated from the main body of the land (e.g. CBD, Vol 1, Tabs 48, 50).

[76] When O'Reilly and Green examined the area on October 8, 1886, they described a breach in the extension of land described in the British Naval Charts as Rebecca Spit, at the first narrow portion of the Spit, identifying it as a "passage" (CBD, Vol 6, Tab 465). This resulted in the land to the north of this "passage" appearing on the sketch prepared by Green as an island, which extended to the north, to the northernmost extension of the natural boundary, which Green designated as "Rebecca Point".

[77] Other surveyors working in the area did not find a natural boundary at this first narrows. George Drabble submitted survey notes and a plan of Lot 7, in relation to a purchase by Thomas Earle, of land on the opposite, or westerly shore of Drew Harbour on August 9, 1882 (CBD, Vol 4, Tab 285). He showed Rebecca Spit as being a contiguous piece of land, much as it was depicted in the Admiralty Charts. Further, and perhaps of greater significance, is the survey conducted by E. Priest, for J. Miller, of almost all of Rebecca Spit on August 28, 1884 (CBD, Vol 5, Tab 369). This survey shows no break in the natural boundary at the first narrow point at the base of the Spit.

[78] Ultimately, Skinner prepared the survey that outlined the Reserve and it was accepted by the CCLW on May 18, 1889 (CBD, Vol 9, Tab 607). This survey again identifies Rebecca Spit as a spit, and not an island (CBD, Vol 8, Tab 574).

[79] Later surveys conducted in 1949 and 1976, continued to identify a spit but at some point in time material was added to the narrows to support a driveway, which today extends into the provincial park (CBD, Vol 13, Tabs 889, 921).

[80] The point attracted some controversy with each of the expert surveyors called by the Parties commenting on the issue. Brent Taylor, for the Claimant, thought it likely that the area amounted to a continuation in the extension of land known as Rebecca Spit and Green was in error in determining there was a break in the natural boundary (Polaris Report at 26). David Bazett, for the Respondent, thought the narrow point of geography may have amounted to a break in the natural boundary at the relevant time, and given the latitude implicit in the subjective determination of where the high water mark was located, Green's depiction could not be said to be in error (Bazett

Report at 31–32).

[81] In my view, the land extending north along the east side of Drew Harbour was best described as a spit. I say this for the following reasons:

1. It was originally identified as such on the Admiralty Charts. It is true these were prepared for the purposes of navigation, but the Royal Navy spent significant time and effort in determining the characteristics of Drew Harbour. The Harbour presented a protected anchorage and useful shelter from weather from the southeast. The chart-makers would have been interested in distinguishing a spit from what might appear to be an island in inclement weather and during high tides.

2. O'Reilly and Green had limited time and viewed the site shortly after high tide on a day marked by strong southeast winds that would have caused significant wave action. The diary record of their attendance on October 7, 1886, indicates they arrived at Drew Harbour at 2:00 o'clock in the afternoon. Sundown that day would have been at about 5:43 p.m. The diary further records that they left Drew Harbour at 5:45 a.m., the next morning (CBD, Vol 6, Tabs 454–55).

3. In the determining the approximate boundaries of the Reserve, Green, who was a surveyor, set out a number of transit lines and measured or estimated offsets to the natural boundary presented by the shoreline at various points along the inside and outside of the base of Rebecca Spit; and his survey notes, at one point, show a bearing to where he identified the "passage", but the notes do not provide the distance between the "passage" and his transit line (CBD, Vol 6, Tab 432). Accordingly, he may not have actually travelled to the point he identified as a "passage", to closely examine the features of the land at that point. Further, even if there was a break in the natural boundary separating the land to the north, it could not have constituted a "passage" in the sense of a navigable width of water.

4. The transit lines and offsets were not intended to be sufficient to constitute a survey of the land, but rather were to be useful in providing a sufficient description in the Minutes of Decision to indicate the land intended for the Reserve and a later

reference in giving instructions for the survey to be submitted to the CCLW. In these circumstances, Green may have been mistaken in characterizing the nature of the Spit.

5. The Drabble survey was not intended to mark out the parameters of Rebecca Spit (CBD, Vol 4, Tab 285). It was concerned with land on the western shore of Drew Harbour and Rebecca Spit is shown as a feature of the surrounding landscape. The land Drabble was surveying, however, was in fairly close proximity to the base of the Spit, and he might well have seen a break in the natural boundary at the "passage" if there had been one. The survey by Elijah Priest is a much more definitive piece of evidence. Mr. Priest conducted a complete survey of the Spit, including the relevant narrow neck of land and found that the natural boundaries described a spit, rather than an island (CBD, Vol 5, Tabs 369–70).

6. The survey done by Skinner in 1888 did not endorse the designation of a break in the natural boundary at the narrow point of land and he showed a contiguous stretch of land, rather than to adopt the designation of a passage (CBD, Vol 8, Tab 571).

B. Construction of O'Reilly's Minutes of Decision

[82] Notwithstanding that the extension of land is best described as a spit, does this determine the question of what O'Reilly intended by his Minutes of Decision, the full Spit or a north boundary at the narrow point he described as a passage?

[83] The description of the boundary of the intended Reserve in the Minutes of Decision sets out in a counter-clockwise order of description the natural boundary along the shoreline, first from the point where the south boundary meets Sutil Channel, to the point where the shore leads back to the point of commencement, the southeast corner point of Lot 7. The Minutes reads in the last portion of the counter-clockwise description, "…thence east to the sea coast; and thence following the shore in a northerly, and westerly direction to the place of commencement" (CBD, Vol 6, Tab 468; see also Tabs 461–64). The Band argues that if the Spit is a contiguous piece of land extending to Rebecca Point, this portion of the description includes all of the Spit as part of the intended Reserve.

[84] I find this interpretation to be without foundation. The description was constructed on the mistaken belief there was an intervening "passage" and the length of the Spit was not intended for inclusion in the Reserve. This is consistent with Sproat's concept of the Reserve, which did not include the length of Rebecca Spit. It also is consistent with the sketch of the Reserve prepared by Green to better indicate the parameters of the Reserve (CBD, Vol 6, Tab 465). This drawing was not intended to be as accurate as a survey document but neither was it created as a free-hand impression of the area. It was prepared based on the transits and measurements recorded by Green and intended to better illustrate the Minutes of Decision and to instruct the surveyor who would ultimately prepare the Reserve survey. The sketch clearly shows the Reserve extending north only to the area mistakenly thought to be a "passage" and not to the point of the Spit. With an intervening "passage" the rest of the land to the north would become an island, as shown on Green's sketch, but the sketch does not include this supposed island as part of the Reserve. Further, if the entire Spit were to be included, the description in the Minutes of Decision would be deficient in describing the stretch of travel to the south along the inside of the Spit, as was included in Miller's original 1884 and Sayward's 1886 description of the land in each of their gazetted intentions to apply to purchase (CBD, Vol 5, Tab 359; CBD, Vol 6, Tab 476).

[85] I conclude that the description in the Minutes only intended to designate the land to the south of the "passage". The portion of the Reserve indicated in the Minutes of Decision at the base of Rebecca Spit, which was not included in the 1888 Skinner survey, consisted of approximately 20 acres.

VII. THE LOSS OF 20 ACRES TO LOT 33

[86] The Claimant argued that Canada acted improvidently in failing to recognize and contest the *Land Act* application that resulted in the loss of the 20 acres described as part of the Reserve in the Minutes of Decision. The Claimant says that, unless Canada took measures to safeguard lands set aside, the relationship with the Province was such that land was in jeopardy of alienation by *Land Act* transfers at least until the survey of the Reserve had been accepted and approved, and that approval of the Minutes of Decision by the CCLW provided insufficient security that the Province would protect the intended Reserve. Further, the Claimant says that Canada did nothing to contest the loss of the 20 acres after Sayward's Crown grant had issued.

A. The *British Columbia Land Act,* 1875–1884

[87] The *Land Act*, 1875, was enacted by the newly formed Province of British Columbia setting out a revised system of allowing qualified applicants to acquire title to unsurveyed, unoccupied and unreserved Crown land.

[88] As touched upon at paragraph 32 above, under the *Land Act*, 1875, title to available Crown lands could be acquired by pre-emption, a system requiring an application to the CCLW. The applicant would be required to set corner posts indicating the land the applicant wanted to pre-empt, to take occupancy of the land and to complete improvements towards a "Certificate of Improvement". If this was obtained, the CCLW on further application was empowered to make a Crown grant of the fee simple to the applicant. The pre-empted land could become surveyed land, a further element adding to security of tenure, on provision of an acceptable survey and publication of a notice of the survey in the *BC Gazette*. The *Land Act* provided that others claiming an interest in the surveyed land could contest the allocation indicated in the survey (*Land Act*, 1884, section 16). If the survey was accepted, any conflicting interest to what was indicated on the survey could be difficult to sustain.

[89] Title to available, as yet unsurveyed, Crown land could also be acquired under the *Land Act*, 1875, through an application to purchase the land. The applicant was required to submit an acceptable survey and on acceptance of the survey and payment of the required fee the Crown grant could issue (CBD, Vol 2, Tab 104; sections 62 and 66 of the *Land Act*, 1875). This process also required publication of a *Gazette* notice of the survey.

[90] Both forms of acquisition of unsurveyed Crown land were restricted to unoccupied and unreserved land. The application form in each instance required a declaration that this was the case and that no portion of the land was an Indian Settlement (*Land Act*, 1884, Schedule Form No. 2).

[91] Following the 1875 statute, there were various revisions to the process. By 1882, the year of the first relevant application to purchase land on Valdes (Quadra) Island, an application to purchase unsurveyed Crown land also required publication of *Gazette* notices over a two month period of an individual's intention to apply to purchase the Crown land. Once the notices were published, the application could proceed (*Land Act*, 1875, section 62 as amended by section 6 of the *Land Amendment Act*, 1879).

[92] It seems clear that the process requiring *Gazette* publication was specifically instituted to allow others with an interest in the property subject to the application to purchase to have their interest recognized and to take steps to contest any conflict inherent in the survey record of the intended new parcel. The first publications of the purchaser's intention to apply to purchase included a description of the land, but the description was often rudimentary and details of the land intended were often difficult to place with any confidence. A better understanding might come from inspection of the sketch accompanying the application at the CCLW office, but the best available detail would come on presentation of the proposed survey. The deposit of the survey was to be the subject of a further *Gazette* notice. The process required some diligence to assure the application did not present a conflict.

[93] In the Claimant's submissions, in this case Canada did not take appropriate notice of the *Gazette* publications, resulting in the intervening Crown grant to Sayward and loss of the 20 acres intended for the Reserve by O'Reilly.

B. The Case for Canada

[94] The case for the Respondent is as follows:

1. The *Gazette* notice system made it unrealistic to expect Canada to recognize conflicts between intended reserve lands and Crown grants under the *Land Act*. Canada notes that by the 1880s, the provincial government had resiled from the practice of reserving areas under section 60 of the *Land Act*, 1875, from alienation by pre-emption or purchase in areas where the JIRC was active in setting reserves, removing this method of safeguarding intended reserve lands.

2. Further, through its policies and in administering the *Land Act*, the provincial government presented significant obstacles rendering it unrealistic to expect protection of intended reserve lands. An 1879 resolution of the provincial legislature is cited as illustrating that the Province refused to acknowledge reserves until surveys had been prepared, accepted by the CCLW and in accordance with the 1879 resolution, publication of the receipt of the survey made in the *Gazette*.

3. The *Land Act*, 1884, the operative statute in respect of the Lot 33 Crown grant, gave the applicant the right to proceed to receipt of the grant once the application was received and the initial payment made in respect of the purchase price, making it beyond challenge by the federal Crown from the point the application was filed.

4. The We Wai Kai must have known of the survey posts set indicating the Reserve boundary and the loss of the portion of Rebecca Spit that became part of Lot 33, and acquiesced in accepting the Reserve set aside by the Skinner survey.

5. While Canada does not take issue with there having been a cognizable interest in establishing a Reserve at Drew Harbour, it does not accept that this extended to inclusion of the length of the Spit.

C. Land Reserved Under Section 60, *Land Act*, 1875

[95] Section 60 of the *Land Act*, 1875, provided:

> *Reserves*.
>
> 60. The Lieutenant-Governor in Council shall, at any time, by notice, signed by the Chief Commissioner of Lands and Works, and published in the British Columbia Gazette, reserve any lands not lawfully held by record, pre-emption, purchase, lease, or Crown Grant, for the purpose of conveying the same to the Dominion Government, in trust, for the use and benefit of the Indians, or for railway purposes, as mentioned in Article 11 of the Terms of Union, or for such other purposes as may be deemed advisable.

[96] The declaration of a reserve under this section gave it a designation which protected it from alienation.

[97] 'Reserved' status under the section first refers to land to be conveyed "to the Dominion Government in trust, for the use and benefit of the Indians". There were no instances in evidence, however, of this section being used for that purpose. There was evidence of the JIRC Commissioners requesting, by way of a September 8, 1876 letter, that in areas under consideration for settlement of Indian reserves under the JIRC process, "no pre-emption claims shall be recorded or land sales made within the limits in question; and especially that meanwhile there shall be no interference with the localities now occupied as Indian villages" (CBD, Vol 2, Tab 130). This request was in relation to an area of land in and around the Sechelt Peninsula. The request was favourably received by the then CCLW, who assured, that "the lands referred to have been reserved

as requested" (CBD, Vol 2, Tab 131). This was followed by a notice in the *BC Gazette* that the relevant land "is hereby reserved until further notice" (CBD, Vol 2, Tab 132).

[98] The "reserve" in this case, was thus temporary and to prevent alienation of land until the JIRC could settle reserves in the area and so appears to have been enacted under the "other purposes" authority indicated in section 60 of the *Land Act*, 1875. This process of temporary Gazetted reserves seems to have ended about 1876. Further *BC Gazette* notices of a similar nature were published on October 7, 1876 (CBD, Vol 2, Tab 134), in respect of land further to the north of the area indicated in the September 16, 1876, publication, but further efforts to safeguard against alienation while reserves were being set took the form of letters requesting that the CCLW assist by assuring applications did not conflict while the process was ongoing. This procedure was evidenced by a letter dated March 19, 1878, from the CCLW to the Superintendent of Indian Affairs for British Columbia agreeing to such a request to safeguard lands at Knights Inlet and on the Nimpkish River, areas on or between Vancouver Island and the Mainland, north of Campbell River (CBD, Vol 3, Tab 158). This would have been at the beginning of Sproat's tenure as sole Commissioner and referenced areas he visited before he continued on his way to set the reserves on Quadra Island in 1879–1880. Late in 1878, Sproat visited areas in the interior of the mainland of British Columbia. Here he found it difficult to set aside areas long utilized by First Nations and needed to accommodate village sites and sufficient arable or pasture land to allow them to sustain themselves, and to gain any co-operation from the CCLW.

[99] The conflicts were presented by settlers that had taken up land needed for these purposes, sometimes by transfers made by the Province while he was on site trying to set appropriate reserves, and through what appeared to be suspect declarations by those receiving the land transfers. The conflicts in the Similkameen and Osoyoos areas of the Province were prominent because of the transfers of land already made to settlers and the continued movement of settlers into these areas and a refusal by provincial officials to recognize First Nations as having rights in respect of the land being taken up (e.g. CBD, Vol 3, Tab 172). In a letter to the Superintendent General of Indian Affairs (Ottawa), Sproat voiced complaints of delays in the CCLW's approval of reserves, leaving these allocations without the necessary acknowledgement by the provincial Crown to proceed to reserve status and further protection from alienation through pre-emption or purchase, and that the provincial government had already granted and was likely to continue to

allow settlers access to water to the exclusion of the First Nations, limiting the agricultural potential of the land set aside (CBD, Vol 3, Tab 191; see also Tab 192). Further, rather than protecting land from alienation in the area, the Province was actively transferring land in areas where he was then active in setting aside reserves.

[100] There is no record of a temporary reserve being declared for these areas while Sproat was active there and the CCLW appears to have been particularly adverse to Sproat's efforts in these regions (e.g. CBD, Vol 3, Tab 213).

[101] Sproat set a number of reserves in the Fraser Valley in the summer of 1879 and in the fall turned his attention to reserves from the northern end of Vancouver Island south to the area near Campbell River (CBD, Vol 3, Tab 228).

[102] While in the field that fall, Sproat wrote to the CCLW asking for a similar accommodation to that spoken of in the March 19, 1878 letter, asking, "[p]ending the results of the investigation which I am actively making, I respectfully mention that it would appear to be very undesirable that lands not ascertained to be Indian lands, or required as such, should be alienated by the provincial government in this quarter, particularly at Nimkish, Salmon River, Beaver Cove, or around Fort Rupert, and at Campbell River" (CBD, Vol 3, Tab 228).

[103] The investigation he spoke of included, as indicated in his report of October 11, 1879, from Cape Mudge, that he would be consulting with four subgroups of the "'Laich-Kwil–Tach,' commonly called the 'Euclataws'", including the "We-wai-a-kay" (CBD, Vol 3, Tab 228).

[104] In a later letter on November 11, 1879, he advised:

> Many of these Indians, including the principal chiefs, having been absent at a "pat-latch", I could not complete my work amongst them, but I considerably advanced it, and examined a portion of their district.
>
> There are two principal places affording good land, such as these people should have a share of, if anything is ever to be made of them, which places are at Campbell River, just inside Cape Mudge, and at Salmon River, further to the north. [CBD, Vol 3, Tab 228]

[105] The reserves set by Sproat in the Campbell River—Cape Mudge area—were set on October 13, 1879; apparently, after he had learned what he could of the First Nations' views as to what reserves should be set aside (CBD, Vol 3, Tabs 217, 221).

[106] There is no evidence of a *Gazette* notice following Sproat's letter requesting that land not be alienated during the process, nor is there evidence of a reply to his letter. The statutory authority for a temporary reserve remained in place; and in fact, continued in the *Land Act*, 1884, as section 56 of that statute but it must have been a cumbersome process and likely replaced by the less formal letter asking for forbearance. Although it can't be said with complete conviction, these letters appear to have been of some use, especially if recognized by the CCLW.

[107] Sproat's intended reserves in the North Island area, including his intended Reserve at Drew Harbour, did not find approval with the CCLW and on his retirement in March 1880, reserve creation in the area lapsed until O'Reilly and Green took it up again in 1886.

[108] The use of section 60 of the *Land Act*, 1875, later section 56 of the *Land Act*, 1884, for creation of a temporary reserve, does not seem to have been requested during O'Reilly's term. Rather, as in Sproat's letter relating to areas near and to the north of Campbell River, O'Reilly at times corresponded with the CCLW for forbearance from alienation of provincial land while he was setting reserves in a particular area. The temporary reserve system appears to have been abandoned well before Sproat resigned and was not in operation during any time relevant to the creation of the Drew Harbour Indian Reserve.

D. 1879 Resolution of the Provincial Legislature

[109] The Crown submits at paragraph 272 of the Respondent's Written Submissions filed on August 1, 2018, that the legislature passed a resolution in 1879, stating that land set apart as an Indian reserve should be published in the *Gazette* if the reserve had been surveyed and a copy of the survey received by the Lands and Works Department. The argument seems to be that until the survey was done and receipt of notice of the survey was published, the Minutes of Decision establishing a reserve, even if approved by the CCLW, had no status. The resolution was as follows:

> That this House is of opinion that a full description of the lands to be set apart as Indian Reserves, the surveys of which have been completed and copies received by the Lands and Works Department, *Victoria* from the Commissioners or Commissioner authorized to perform such work, should be published as soon as possible in the Government Gazette, and that from henceforth the Government should cause a full description of any lands intended to be set apart as Indian Reserves to be published in the Government Gazette immediately copies of the surveys have been received by the Lands and Works Department, *Victoria*.

> [February 5, 1879 BC Legislature Resolution moved by Vernon, seconded by Smithe; emphasis in original; CBD, Vol 3, Tab 184]

[110] The resolution is shown as moved and seconded, but disposition of the motion is not set out. However, if passed as resolved, I note the following:

1. The section only requires publication of a description of a completed survey received by the Lands and Works Department setting out an Indian Reserve, a requirement that would have been much the same as required in respect of any survey received by the CCLW from a party intending to take up provincial land. It does not speak to the status of Minutes of Decision approved by the CCLW.

2. The resolution expresses an opinion, but does not put forward an amendment to the legislation, nor was the *Land Act* amended to require publication of receipt of an Indian reserve survey at any time relevant to this case.

E. Did a Right to Receive a Crown Grant Vest prior to Final Payment?

[111] The Crown also submits, at paragraph 261 of the Respondent's Written Submissions, that applicants for purchase of unsurveyed Crown lands acquired a legal right under the *Land Act*, 1884, to complete the purchase once the applicant published his intention and made the application, complete with a 10% deposit of the sale price, or at the latest on completing and filing an acceptable survey. Canada says this right was voidable only if challenged by an adverse claimant demonstrating the land was in fact occupied within the meaning of section 30; or on non-payment of the balance of the purchase price, after a stipulated length of time.

[112] Canada does not cite any authority for this proposition; and it appears contrary to the wording of section 30 of the *Land Act*, 1884, which expressly states that, "but no right or title can be acquired to any such land until after such land shall have been surveyed, and such survey shall have been accepted by the Chief Commissioner of Lands and Works or Surveyor-General, and payment in full made for said land" (emphasis added). This, in my view, makes it clear that no right or title passed until full payment, contrary to the assertion that a voidable right was acquired at an earlier stage.

1. Was It Possible for Canada to Safeguard the Reserve Allocation?

[113] On the facts of this case, Sayward's interest in Lot 33 was not acquired until full payment on February 3, 1888 (CBD, Vol 8, Tab 547). The Crown grant followed a week later on February 10, 1888 (CBD, Vol 8, Tab 542).

[114] In Canada's submissions, Canada did not breach its fiduciary duty to the Band to prevent or subsequently deal with the allocation of the southern 20-acre parcel of what became Lot 33. Canada says it was not reasonable for its representatives to monitor the *Gazette* notices published by prospective applicants under the *Land Act*; and once Sayward had perfected his application by filing an acceptable survey and the balance of the purchase price, the Crown grant was not subject to any useful challenge. Consideration of this submission requires an understanding of the *Land Act* and the application process, and an examination of cases presenting a conflict with reserve allocation.

[115] Once a publication in the *Gazette* became the means of publishing an intention to apply to purchase land under the *Land Act*, successive Chief Commissioners expected that third parties faced with a challenge to their interest in a prospective Crown grant to take an active part in responding to the initial *Gazette* notices of the pending application, and to assure they were not affected by the survey prepared in anticipation of the issuance of the grant. Providing an opportunity to object to the notice of intention to apply for a grant of unsurveyed Crown land was obviously the intention of instituting the requirement for two months of *Gazette* notices. An example of this policy is expressed in a memo from W. S. Gore, an official in the office of the CCLW, in respect of a complaint of land being taken up by an individual named Booth:

> The object of publishing a notice of intention to apply to purchase land is to notify any person who may consider he has a prior claim to make the same known.
>
> No protest to these applications was made by the Indian Department on behalf of their Wards.
>
> No intimation had been received from the Indian Department that they claimed any part of the lands at or prior to the conveyance to Mr Booth.
>
> My recollection is that Mr Stephens reported that the Indians had quite abandoned the site.
>
> The Lands & Works Department cannot guard the interests of the Indians until after the Indian Department have clearly defined the exact position of their Reserves. [CBD, Vol 9, Tab 621]

[116] A series of exchanges concerning conflicting applications to take up Crown lands and

allocations of reserves by Minutes of Decision issued by the former Commissioners to O'Reilly occurred in 1884. William Smithe was the Premier and the CCLW, and in exchanges with the Superintendent of Indian Affairs for the Province of British Columbia, I. W. Powell, he made it clear that applications under the *Land Act* would be processed without regard to Minutes of Decision, unless a protest was made by the federal department.

[117] In the case of a fishing station reserve at Eagle River on Shuswap Lake, a reserve was set by the three-person JIRC in September 1877; on March 3, 1883, an application to purchase land including the reserve was made by Mr. George Byrnes. The application proceeded and a Crown grant issued on December 7, 1883. After Powell protested, Smithe observed, that "[n]o protest was made by the Indian Department or others against granting the application...[o]bjections made by the Indian Department prior to the granting of such applications will receive every consideration" (CBD, Vol 5, Tab 342). Superintendent Powell stated in reply, "…unless all applications for land in the Province were made through this Office, accompanied by sketches of their location...it would be quite impracticable for me to detect the circumstances that any application to purchase, as advertised in the public papers, included an Indian Reserve" (CBD, Vol 5, Tab 348).

[118] The dispute lapsed into argument focused on whether the Minutes of Decision included a sketch locating the reserve and whether Byrnes knew the land was occupied by the band when he made his application (CBD, Vol 6, Tab 421).

[119] It appears that the Crown grant was not modified to except the reserve; and on July 5, 1884 Superintendent Powell notified, "this Department will not recognize Mr Byrnes' title to the piece of land which has been illegally patented to him owing to the mistake of the Lands and Works Department, as the Indians would appear to have priority of claim to said land" (CBD, Vol 5, Tab 357).

[120] There is no record of any further exchange and it seems likely Byrnes retained his grant, including the fishing station. A new reserve appears to have then been created to compensate (CBD, Vol 11, Tab 744).

[121] A somewhat similar dispute arose near Osoyoos. Crown land was sold to a Mr. Haynes. The land included all of the land set aside for the Osoyoos Band by the JIRC, in November 1877.

This prompted a complaint by Superintendent Powell, in November 1884, pointing out the serious position this rendered for the band and noting that the long delays in formalizing Minutes of Decision's and the issuing of ensuing land transfers "is very unfortunate, as tending to unsettle the minds of the Indians in the good faith of the Government…and after these lands have been duly pointed out...by the Commission as a permanent reservations" (CBD, Vol 5, Tab 388).

[122] In his reply, Smithe took up the case for Haynes. Smithe noted Haynes first applied in 1875 and had survey work done in 1876 and 1877 (CBD, Vol 6, Tab 403; see also Tab 421). The JIRC visited and issued their Minutes of Decision in 1877, before the Crown grant in 1878. Smithe, again, pointed out that there was no protest to the Haynes survey published in the *Gazette,* in April 1878, and commented that Haynes had spent time and money and, "got a Crown Grant in perfectly regular manner".

[123] Smithe noted an error in the Minutes of Decision description stemming from misinterpretation of Roman numerals for 50 and 51, as 5 and 6; and uncertainty because the Commissioners did not include a sketch (CBD, Vol 6, Tabs 403, 408). These disputes continued without resolution and prompted O'Reilly to revisit, to try and make an alternate reserve allocation.

[124] Despite the provincial government's original assurances that the JIRC, and later the single Commissioner, should have allocations accepted in the ordinary course, Smithe took up a more strident role. He commented in a November 1884 letter to O'Reilly that the previous Commissioners had set apart reserves "with such reckless extravagance in all parts of the country" (CBD, Vol 5, Tab 397). He noted O'Reilly as having displayed a "much fairer, and more accurate appreciation of the duties", but goes on to complain that reserves in the Kootenays, and in other correspondence, in the Okanagan:

> …you have overestimated the requirements of the Indians, and under-estimated those of the whites who, if not there now, are more than likely in the near future, to be found there, anxiously looking for land to settle upon.

In reference to reserves set at Okanagan Lake, his language was even more accusatory:

> [Regarding a proposed reserve of 29,000+ acres and a "commonage" reserve of 24,000+ acres at the head of Okanagan Lake] When my attention was called to this immense area of land lying in a wild, waste condition, without any attempt being made to improve it, by cultivation or otherwise, so as to make it productive and of benefit to the community at large, I felt that an almost criminal wrong had been

> done in withdrawing from settlement so large a tract of fertile land. A wrong, particularly apparent at this time, when there is such a demand for land by white settlers, who are entering the country in search of homes. [CBD, Vol 6, Tab 407]

[125] Smithe began to require censuses of bands for whom reserves were to be set aside and required justification for the extent of these interior reserves, which because of the nature of the land and the requirements needed for the First Nations to sustain themselves, primarily by raising stock, horses and cattle, meant that much larger reserves were required (e.g. CBD, Vol 6, Tabs 401–02).

[126] The two cases referred to above did not result in successful challenges to the Crown grant; however, federal challenges were successful in other cases.

[127] In 1881, a reserve on the Nass River was defined by Minutes of Decision issued by O'Reilly. The reserve was approved by the CCLW of the day in May 1882, and the survey completed in May 1886. After the CCLW's approval but before the survey, a "Mr. Warren" applied to purchase 160 acres of which 84 acres encroached on the reserve, part of which constituted an Indian graveyard (CBD, Vol 9, Tab 661).

[128] In June 1891, O'Reilly brought the matter to the attention of the CCLW, F. G. Vernon, who took it up with the applicant (CBD, Vol 9, Tab 661). Warren agreed that the 84 acres should be relinquished and had the subsequent purchaser of the land reconvey the title to this portion to the provincial Crown (CBD, Vol 9, Tab 663).

[129] This narrative makes it clear that the CCLW required a complaint before determining whether an objection to a Crown grant would be considered, and that Canada would be held to close observance of this stricture.

2. Further Conflicts over Lands Allocated as Reserves

[130] A further dispute arose near Shuswap Lake, in October 1884. S. Moffatt, Deputy Superintendent of Indian Affairs for British Columbia, wrote to the CCLW on October 1, 1884, informing that a "Charles E. Williams" had prepared a survey of land intending to purchase a parcel including a meadow set aside for the Little Shuswap Lake Band by the JIRC, on August 14, 1877 (CBD, Vol 5, Tab 380). Moffatt asked that no Crown grant be issued.

[131] A reply from the office of the CCLW on February 14, 1885, informed that an application to purchase land had been received from C. E. Williams with a deposit, that the land had been surveyed, and that Mr. Williams had stated that the land forms no part of an Indian Reserve (CBD, Vol 5, Tab 381—mistakenly dated October 1, 1884, in the index). The official at the CCLW office asked if the Superintendent had any objection to issuance of the Crown grant; and if so, to state the grounds of the objection.

[132] The matter was taken up by Superintendent I. W. Powell, who stated in his February 16, 1885 letter, "…I have very great objection to the issuance of a Crown Grant to Mr. C.E. Williams…", that the land had been allotted as a reserve by the JIRC in 1877, was of great value to the band, and had been surveyed by a surveyor of his department, which had definitively included the meadow into the reserve (CBD, Vol 6, Tab 415—mistakenly dated January 2, 1885, in the index).

[133] The matter was taken up by the CCLW, Mr. Smithe, who on February 28, 1885, wrote that it, "would be an act of injustice towards Mr. Williams to give the whole of this meadow to the Indians" (CBD, Vol 6, Tab 416—mistakenly dated January 2, 1885 in the index). He then remarked that the survey prepared for the Superintendent, "cannot receive my approval", and went on to suggest that the Indians be given 20 acres in the northeast corner of the block of land surveyed for Mr. Williams.

[134] The next was from Powell, who stressed that what Smithe proposed was not in accord with the decision of the JIRC, whose award was to be final and intended to set aside the whole of the meadow, estimated to be 20 acres, and not a 20-acre block in the northeast corner of Williams' proposed Crown grant, an allocation that would only include a part of the meadow (CBD, Vol 6, Tab 422). Powell contested the statement by Williams that his proposed grant formed no part of an Indian reserve and objected to using the Williams' survey to set aside Indian reserve lands.

[135] The matter stalled at this point, and the next letter referencing the dispute was a letter by O'Reilly to the successor to Smithe as the CCLW, again, F. G. Vernon, after Smithe's death in March 1887. The letter forwards the survey prepared for the Indian Department rejected by Smithe, setting out the reserves for the Little Shuswap Lake Band, including the reserve enclosing the disputed 20-acre meadow. The letter recites that the application to purchase by Mr. Williams, "has

since been cancelled by you, and therefore, no reason to the contrary now existing…I beg you will approve of the Reserves" (CBD, Vol 9, Tab 677). The reserves were approved on October 28, 1891 (CBD, Vol 9, Tab 679).

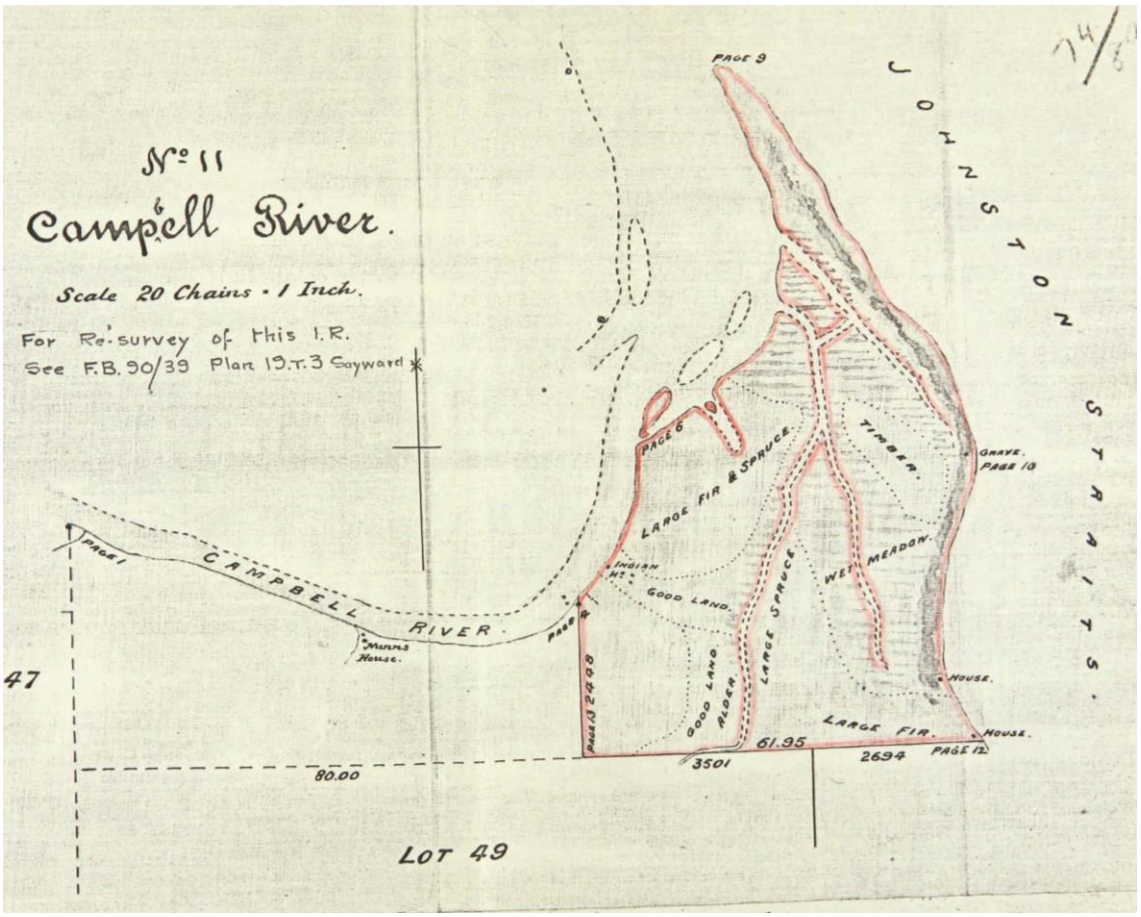
[136] There were continued disputes relating to areas in the Okanagan, the Similkameen, and the Kootenays, relating to sales of lands intended for reserves during Smithe's term as the CCLW, forcing O'Reilly to attend the areas to set aside substitute reserve areas, very likely resulting in poorer allocations than the original reserves intended for the area bands (e.g. CBD, Vol 10, Tab 728; CBD, Vol 11, Tabs 743–44, 768). In coastal areas results in settling disputed claims to land were more favourable for First Nations people, likely in part because the First Nations needed much smaller tracts of land to sustain their means of sustenance, which depended more on access to marine resources than, say, grazing land; and fewer parcels of land being taken up by settlers.

[137] An example, proximate in time and area, relates to a dispute between settlers by the name of Nunn and a family of Laich-Kwil-Tach heritage, headed by a man known as Capt. John Quacksister, who occupied a reserve originally set by Sproat at the mouth of the Campbell River. The Nunns occupied a pre-emption to the east of the area occupied by Quacksister and his family, and the dispute focused on use of the land between the locations occupied by the two families. The Nunns wrote a letter of complaint to the CCLW in December 1887 (CBD, Vol 7, Tab 529). This was followed by a letter from Superintendent Powell to the CCLW, F. G. Vernon, on December 20, 1887, asking that he withhold consent to applications to purchase land at Campbell River until the Reserve Commissioner, O'Reilly, could visit the location (CBD, Vol 7, Tab 530). Powell enclosed a *Gazette* notice of an intention to purchase a remnant of land by John and Frederick Nunn, land lying between the Nunns' already established pre-emption and the Indian reserve.

[138] Sproat's reserve allocation at Campbell River never received provincial approval and O'Reilly intended to set the reserve during his October 1886 visit, which resulted in Minutes of Decision setting aside the other Laich-Kwil-Tach reserves, including the reserves set on Quadra Island. He was not able to deal with the Campbell River reserves, as the people involved were away in the fall of 1886 (CBD, Vol 6, Tab 468). He intended to return the next year.

[139] The borders of the reserve set by Sproat are difficult to place because the point of origin he refers to is not shown on the sketches in evidence, but from his description the northern part of the

reserve was bounded on the east by Discovery Passage, to the point where it meets the mouth of the Campbell River. This part of the description reads: "[t]hence following in a northerly direction the seashore [of Discovery Passage] to [the] mouth of Campbell River, thence up right bank of said river to the first slough. Thence following right bank of said slough…" (CBD, Vol 3, Tab 217). I enclose a later sketch of the area drawn by Ashdown Green (CBD, Vol 8, Tab 558):



[140] This description includes the shore of Discovery Passage, to the tip of the right bank of the mouth of the river and includes a portion of the right bank of the Campbell River, but the description turns south at the first slough and continues down the slough to the lower part of the reserve.

[141] This meant that the continuation of the right bank of the Campbell River up river from the slough, was not included in Sproat's reserve and likely formed the remnant of land applied for by the Nunns, whose pre-emption was to the west on the right bank of the river where it bends from its west east orientation to continue north to its mouth at Discovery Passage.

[142] The matter was resolved when Ashdown Green was commissioned by both governments to set the reserve as O'Reilly was convalescing and away from the Province. Green visited the area in May 1888, and included all of the right bank of the river to the boundary with the Nunns' pre-emption in the reserve, eliminating any question of a remnant (CBD, Vol 8, Tabs 558, 562).

[143] There are various other disputes relating to claims made to land set aside as reserves in the north coast and the northwest portion of Vancouver Island. One of these resulted in litigation. Canada filed suit in July 1893, in relation to a Crown grant of land taken up by individuals, Cornelius Booth and Thomas Pamphlet, at Grassy Point, Quatsino Sound, near the north end of Vancouver Island (CBD, Vol 10, Tabs 691, 730). The suit named William McNiffe and six others, then title-holders to the land around Clienna, an Indian settlement (CBD, Vol 10, Tabs 734, 739). The petition challenged the statements made by the applicants in their applications to purchase that no parts of the lands applied for formed part of an Indian reserve, and the relief asked for included that the Crown grant be set aside and declared null and void, as being granted improvidently and in error.

[144] The case settled, along with another that did not go to litigation, with the land being re-conveyed, subject to a right of reversion should the land be abandoned by the First Nation involved (CBD, Vol 10, Tab 731; CBD, Vol 11, Tabs 742, 753).

[145] Other cases resulting in recovery of reserve lands claimed by third parties include:

1. An application for a Crown grant by Devereux at Babine River; cancelled after objection that it included reserve lands (CBD, Vol 11, Tabs 779, 781–82, 784, 789).

2. An application for Crown grant by Martin for Birnie Island, denied as already declared a reserve (CBD, Vol 9, Tabs 628–29).

3. An application for Crown grant for Thetis Island that included Tent Island, Tent Island refused as already declared a reserve (CBD, Vol 7, Tabs 517, 523; CBD, Vol 8, Tab 555).

4. An application by Cunningham, Holmes, Cuthbert/Byrn, Dempster, and Stapleton for Crown grants on the Skeena River, which conflicted with the reserves set up for

> fishing stations for the Tsimshian First Nation, by O'Reilly, in September 1888 (CBD, Vol 8, Tab 545; CBD, Vol 9, Tab 601). The CCLW, F. G. Vernon, refused to approve the reserves (CBD, Vol 8, Tab 600), but when challenged, approved four of five and eventually, these sites, including a site at or near the site not approved by Vernon, were set aside as reserves. When the survey of the total of 24 reserves was forwarded on January 18, 1892, the plans included the four on the Skeena River (CBD, Vol 10, Tabs 684, 686). The plans were approved in January 26, 1892.

[146] The point of this perhaps overly long examination of disputed reserve sites is that, in a number of cases, Canada successfully challenged third-party allocations of land earlier designated as reserve sites, and in many cases safeguarded lands allocated as reserves, refuting the Respondent's position that there was no reasonable expectation of a successful challenge with respect to the 20 acres taken up as Lot 33, had application for the Lot 33 Crown grant been noted and an objection pursued.

VIII. FIDUCIARY LAW APPLICABLE TO THIS CLAIM

A. Overview of Fiduciary Law in Reserve Creation

[147] The Claimant was involved in one of the seminal cases on fiduciary law relating to Indigenous people in Canada, which concerned the same time period and addressed Canada's fiduciary duties in the process of reserve creation in British Columbia.

[148] *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*], concerned a dispute over reserve allocation between the two bands in the Campbell River area. Each band brought action against Canada for breach of its duty to the band in allocating the reserves in issue. The case established that the Crown's fiduciary obligations in regard to Indigenous land interests arose prior to the formal transfer of British Columbia reserves by Order in Council 1036 in 1938, during the protracted period of federal-provincial negotiation in which the present Claim is situated.

[149] In *Wewaykum*, reserves were allotted to each of We Wai Kai and Wei Wai Kum by Minutes of Decision in 1888. Both reserves were ultimately transferred from the Province to the federal

Crown in 1938, by Order in Council 1036. These were described as "provisional reserves" in the Supreme Court of Canada decision. Binnie J. discussed the Crown's duty in the context of such a reserve, set and administered as a reserve decades before the transfer:

> In the present case the reserve-creation process dragged on from about 1878 to 1928 [*sic*], a period of 50 years. From at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had. It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion. [para 89]

[150] Binnie J. took care to note that the fiduciary duty is not plenary and exists only in relation to "specific Indian interests" (*Wewaykum* at para 81). He elaborated by laying out the general approach for finding a *sui generis* fiduciary duty:

> It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.
>
> …
>
> …[a fiduciary relationship], however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below. [emphasis added; *Wewaykum* at paras 83, 85]

[151] The Supreme Court of Canada has subsequently laid out other criteria to ascertain the existence of a fiduciary duty (see *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at paras 49–50, [2013] 1 SCR 623), but the parties framed their arguments in terms of the approach established in *Wewaykum*. I agree that *Wewaykum* is the applicable law here. Thus here the first step in the fiduciary analysis is establishing the existence of such a duty over the land in question, by demonstrating that the claimant had a cognizable interest over which the Crown had discretionary control.

[152] The second step involves ascertaining the scope of the duty. As stated by Binnie J.:

> 1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity. [*Wewaykum* at para 86]

[153] Later Supreme Court of Canada and Tribunal jurisprudence have provided additional guidance on these two steps, identifying a cognizable interest and the content of the Crown's

fiduciary duty under different circumstances.

B. Cognizable Interest

[154] The ultimate focus in this case is on determining the nature and content of Canada's duty to the Band during the process of setting a reserve in the circumstances presented by the Drew Harbour Reserve, firstly by ascertaining the cognizable interest in the land claimed and secondly considering the duties incumbent on the Crown in establishing and preserving the land intended as a reserve. *Wewaykum* provides guidance. As here, the lands at issue in *Wewaykum* were not the traditional lands of the We Wai Kai and Wei Wai Kum people. It was nonetheless necessary for the IRC to set them aside as We Wai Kai and Wei Wai Kum reserves to reasonably provide for the bands' needs and fulfil the mandate expressed in Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10 and the JIRC-IRC terms of reference.

[155] Other cases that recognize a cognizable interest concern lands that were sites of historic occupation and special significance to the Indigenous group in question. In *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1, a 10.5 acre parcel was excluded from a reserve allotment because O'Reilly believed "it would prove a convenience to the public to have this land declared a public reserve" (para 29). The parcel was the site of an ancient village site of continued significance to the Kitselas people, and hosted dwellings that would have been visible to O'Reilly. Upholding the Tribunal's decision, Mainville J.A. of the Federal Court of Appeal found that:

> 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.
>
> In this case, the Judge found, as a matter of fact that: (1) the 10.5 acres excluded from Kitselas I.R. No. 1 included the site of an ancient village of the Kitselas known as Gitaus; (2) from the aboriginal perspective, this ancient village site had never been abandoned; (3) Indian dwellings were on the Gitaus site when

> Commissioner O'Reilly decided to exclude the land from the reserve; (4) there were no claims of White settlers over the excluded land; (5) the concerned land was not excluded in anticipation of the use of the land for public transportation purposes; and (6) had Commissioner O'Reilly recommended the inclusion of that land in the reserve, that recommendation would have subsequently been followed by both Canada and British Columbia.
>
> In the light of those findings of fact, I can find no error of law in the conclusion of the Judge that the Kitselas had a cognizable interest in the excluded land that gave rise to a fiduciary duty of loyalty, good faith, and full disclosure and of acting reasonably and with diligence in the best interest of the Kitselas in determining whether to include or to exclude that land from Kitselas I.R. No. 1. The land at issue was clearly delineated and identifiable, and the cognizable interest in that land was its historic and contemporary use and occupation as a settlement by the Kitselas themselves, a land interest specifically contemplated by Article 13 of the *British Columbia Terms of Union* and by the Crown instructions issued to implement that Article. [emphasis added; *Canada v Kitselas*, 2014 FCA 150 at paras 52–54, [2014] 4 CNLR 6]

[156] Similarly, in *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3, the land at issue was a village site at the foot of Williams Lake long occupied by the tribe as part of their traditional lands. Slade J. found that occupation of the village site would have been apparent to settlers and colonial authorities alike, and the Crown's role in the colonial pre-emptions of the land was a breach of its duty to the Indigenous occupants. Later, following Confederation, O'Reilly acknowledged the pre-Confederation loss of the village site, and allotted the band alternate lands in lieu of the village site.

[157] The Supreme Court of Canada upheld the Tribunal's decision that the long history of Indigenous occupation created a cognizable interest, and the majority endorsed the general approach of the Tribunal to these interests:

> 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. [emphasis added; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 80–81]

[158] Wagner J. also noted the differences in an interest in land based in historical occupation and more recent use, finding that the difference does not affect the existence of a fiduciary duty but may affect its content:

> As for the importance of the interest asserted, the Tribunal noted that it was an interest in the land from which the band had sustained itself, to which it had a "tangible, practical and cultural connection" and that formed part of its traditional territory: paras. 267, 317 and 342. The Tribunal compared these circumstances to those in *Wewaykum*, where the bands had no prior interest in the land in issue. Indeed, as relative newcomers, they had no greater interest than the settlers with whom they came into conflict: *Wewaykum*, at paras. 95-96. The Tribunal tailored the content of Canada's fiduciary duty to the strength of the band's interest in the Village Lands. This reflects a reasonable understanding of the relationship between the interest at stake and the content of the duty. It was open to the Tribunal to consider the differences between the band's interest in the Village Lands and other interests previously recognized by this Court at the stage of determining the duty's content. [emphasis added; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 83]

[159] The three decisions, *Wewaykum*, *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1, and *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3, make clear that a cognizable interest can arise from a needs-based allocation of the land, as well as through the band's historical connection to the land. Further, that recognition of the interests at stake gives content to the Crown's fiduciary duty.

[160] Here, the historical connection was not as significant as in *Kitselas* and *Williams Lake*. Recognition of the then-contemporary use and the need to secure the land as a future resource seems to have been the most significant factor motivating the Crown to set aside the Drew Harbour Reserve on behalf of the Band. The evidence shows that the Drew Harbour site was a place occupied by the We Wai Kai people while taking work in the logging camps at the south end of the Harbour. In an 1886 report to the Superintendent General for Indian Affairs, O'Reilly described the Reserve as "chiefly used by the Indians when working in the neighbo[u]ring logging camps" (CBD, Vol 7, Tab 489). There is no record of O'Reilly consulting with the We Wai Kai before he

arrived at the Cape Mudge village on October 8, 1886, however, and the initial decision that a reserve was needed at the site appears to have been made by Sproat, whose instructions were to first learn of the First Nations' habits, wants and pursuits. The approximate size and location of the reserve seem to have been set by Sproat, although there is no explicit evidence of his reasons for choosing the site. O'Reilly's role in revisiting the reserves set by Sproat was to revise Sproat's work and in this instance he seems to have accepted Sproat's decision that a reserve was required of roughly the size intended by Sproat, but with the addition of more shoreline at the base of the Spit, adding to what was available after Earl's purchase of Lot 7.

[161] O'Reilly describes the Reserve in his Minutes of Decision as consisting of 210 acres. As surveyed by Skinner, the area, excluding the 20 acres included in Lot 33, was calculated to be 240 acres. The size of the Reserve suggests that the cognizable interest was more extensive than accommodating a work camp. The oral history evidence given by Mr. Billy indicated the historical connection with the area; but more significantly in my view, set out that the area, both inside the Harbour and on the shore of Sutil Channel, was a significant resource for shellfish, chum salmon, spawning herring, and water fowl. Berries and medicine plants were also located there.

[162] Drew Harbour presented a plentiful, sheltered and pleasant place where the We Wai Kai harvested these food sources and was in fairly close proximity to the village site at Cape Mudge. The shoreline to the south and around Cape Mudge and north past the village to Quathiaski Cove did not offer other sheltered sites. These factors lead me to conclude that the site was chosen as a significant reserve site founded on cognizable Indigenous interests. Specifically, the site allowed Band members to take work in logging the surrounding area, and was in use and needed as a food and recreation source for the village.

[163] Was the allocation first made by Sproat and later set out in the Minutes of Decision by O'Reilly inadequate for a failure to properly recognize the cognizable interests? This question is discussed at paragraphs 169–170, under the heading, "Was There a Duty to Secure the Full Length of the Spit?"

C. The Nature of Canada's Fiduciary Duty in Establishing the Drew Harbour Indian Reserve

[164] Once the cognizable interest has been established, the content of the duty should be tailored

to the circumstances (*Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Wewaykum*).

[165] In this case, O'Reilly was revising Sproat's allotment and recognized the need for a reserve similar to that described by Sproat. Once O'Reilly had determined his Minutes of Decision setting aside the needed land, this case becomes analogous to *Wewaykum* where the Crown's role and its duty to the band was examined after the provisional reserves had been established through a similar process of defining the reserve in Minutes of Decision and submitting the decision for approval by the CCLW. The bands were then dependent on the government to "see the reserve-creation process through to completion" (para 89). In accord with *Wewaykum*, this fiduciary duty to complete the process required that appropriate care be taken in acting for the band in securing the land. In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [*Blueberry River*], and *Wewaykum*, the Supreme Court of Canada identified the fiduciary obligation as one of "loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary" and "acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" (*Wewaykum* at paras 86, 94).

[166] Another decision of the Tribunal has examined the *Wewaykum* standard of conduct in the time period between when a reserve was provisionally allotted and when it was surveyed, albeit in different circumstances from the instant case. In *Lake Babine First Nation v Her Majesty the Queen in Right of Canada*, 2015 SCTC 5 [*Lake Babine*], the McKenna-McBride Commission sought to allot a reserve around the mouth of the Fulton River for the claimant. It issued a request to the Province to prevent the alienation of lands on both the north and south sides of the river, pending reserve allotments. Land on the north, which had evidence of actual use and occupation, was subject to a pre-existing application to purchase. The McKenna-McBride Commission issued Minutes of Decision setting a provisional reserve on the south side of the river in lieu of the land on the north. The application to purchase the land on the north bank was abandoned, and the surveyor subsequently was instructed to survey the land on the north side instead of the south. The claimant submitted that the Crown had breached its fiduciary duty in failing to allot reserve land on both the north and south sides of the river.

[167] Slade J. found that the claimant had no other cognizable interest in the south, and its use would not have been apparent to the Commissioners except to compensate for the northern site (*Lake Babine* at paras 170–71). He also found that, even if the claimant had a cognizable interest by virtue of the creation of a "provisional reserve" south of the river, the Crown had satisfied its fiduciary duty by acting in the best interests of the band in providing it with a reserve on the land on which it "had long established residences and access to the fishery" (*Lake Babine* at 46–47). The surveyor's deviation from the Minutes of Decision was instructed, deliberate and comported with the best interests of the band (*Lake Babine* at paras 76–79, 145–48, 188).

[168] In *Lake Babine*, Canada had a duty to the First Nation from the outset in acting for the band in the process of reserve creation taken on by the McKenna-McBride Commission. At the outset, the Commission recommended a provisional reserve on the south bank of the river, but this allocation was abandoned by the Crown when it was determined that the band's interests could be better served by the allocation of the north bank. Following this, the obligation was to exercise ordinary diligence to complete the process of securing the north bank reserve. Here the Band's interests in the Drew Harbour site remained unchanged from when the Minutes of Decision determined the boundaries of the Reserve and the Crown's duty was to preserve the Reserve outlined in the Minutes of Decision.

IX. CONCLUSIONS—THE FIDUCIARY ANALYSIS

A. Was There a Duty to Secure the Full Length of the Spit?

[169] Canada does not dispute that it owed a fiduciary duty to the We Wai Kai during the reserve creation process, but whether this included a duty to set aside the full length of the Spit remains in dispute. The question, once it is determined that O'Reilly did not intend to include the full Spit, is whether the boundaries of the Reserve he set by the Minutes of Decision sufficiently recognized the area in which the "habits, wants and pursuits" of the Claimant were identifiable.

[170] In my view, the Spit itself presented deficits in that it was exposed to weather, was without a convenient water source (Mr. Billy describes water being transported in deerskins from the creek at the base of the Harbour), and there is no evidence that the Reserve site as set in the Minutes of Decision was insufficient in providing areas of food resources needed by the Band. The interest specifically identified by O'Reilly was to provide an area from which band members could take

work in the logging camp. This was sufficiently met by the Reserve set. Lastly, I do not find the historical connection as a prior village site abandoned in the process of establishing occupancy at Cape Mudge a compelling feature. Accordingly, I reject the argument that the Reserve did not accommodate the full cognizable interest and find that the obligation to do so was met by the Minutes of Decision set by O'Reilly.

B. Protecting the Reserve Allocation

[171] Turning to the argument that Canada did not act with ordinary prudence to protect the allotment once made, the record of challenges to reserve sites suggests two particular courses of action that would have been prudent in preventing encroachments by Crown grants on intended reserves:

1. Notification to the CCLW that reserves in a certain area were being defined with a request that Crown grants not be issued until the decisions could be made known. At the earliest stages of the JIRC, this form of notification resulted in *Gazette* publications of temporary reserves covering tracts of land within which reserves were being set. Subsequently, as Sproat continued the process, letters of the sort described were common and assurances in reply were sometimes received. In the case of the trip undertaken by O'Reilly and Green to set reserves to the east of the northern portion of Vancouver Island, which resulted in the Laich-Kwil-Tach Reserves, there was no notification given to the CCLW, although, in a similar venture the year before to the north end of the Island, and in years following in respect of other areas, these letters were sent.

2. Monitoring the *Gazette* notices for the areas in which reserves were yet to be formalized by a survey. Following O'Reilly and Green setting aside the Reserve at Drew Harbour on October 8, 1886, and before the Reserve could be finalized by submission of Skinner's survey 19 months later, no notice appears to have been taken of the *Gazette* publications placed by Sayward of his intention to apply to purchase Rebecca Spit, including the southern portion which overlapped the allocation in O'Reilly's Minutes of Decision.

[172] It is difficult to be absolutely certain that the letters of notification would have had a

beneficial effect in causing the CCLW to hold off on the Crown grant to Sayward, until Skinner had an opportunity to survey the site of the original Minutes of Decision which would have included the lower portion of Rebecca Spit, but when this course was taken, there is no record of subsequent conflicts. The process would have taken little effort and the fact that these letters were employed in years following suggests they were a useful means of communicating with the CCLW to avoid these situations.

[173] Despite Powell's statement that the monitoring of the *Gazette* entries would have been too onerous a task for his department, the fact is the department did receive the *Gazette*; and when their attention was drawn to a particular notice, was able to identify a likely conflict through what had been published. The case of the Nunns' application to secure the 'remnant lands' is a case on point. In that case, the notice was forwarded to Powell's attention and he followed up with the appropriate action, but here, notwithstanding the clear risk of loss of reserve lands during the time necessary to complete the surveys, it appears that little effort was put into monitoring the publications.

[174] In this case, Sayward's notice of his intention to purchase clearly states his intention to purchase "Rebecca Spit, Valdez Island"; and the application itself includes a sketch showing the land he intended to acquire. The sketch is roughly drawn but it is clear it includes the base of the Spit below the narrows. Comparison with the Minutes of Decision, even with its mis-description of a passage would raise a definite concern that the purchase would conflict with what O'Reilly had set. Review of the Priest survey Sayward subsequently submitted would also, with little difficulty, have indicated there was an overlap between the application to purchase and the Minutes of Decision.

[175] Further, even on ultimately discovering that the base of the Spit had been granted to Sayward, consultation with Sayward and the CCLW might well have had a prospect of a transfer back to the Province of the 20-acre parcel in light of the pre-existing Minutes of Decision, approval of the Reserve by the CCLW in November 1886 prior to Sayward's application being received, and the fact that finalization of the Reserve needed only Skinner's pending survey. This is similar to the resolution in respect of the 84-acre encroachment by Warren on the Nass River and to the disposition later reached relating to the two Crown grants on Quatsino Sound, one of which was

pursued by litigation filed by Canada. As a last resort, Sayward may have agreed to a transfer subject to retaining the timber rights to the 20-acre parcel. This appears to have been the reconciliation reached when a reserve was set on Cowichan Lake on land already the subject of a timber lease (CBD, Vol 7, Tab 514). Instead the Crown grant went unchallenged and any prospect to retain the land was lost.

[176] Applying the duties declared part of the fiduciary relationship of Canada to First Nations people at this stage of reserve creation indicated in *Wewaykum*, I find that Canada had a duty to take reasonable care in the matter and to act reasonably in the Band's interest. Further, the extent of the measure of diligence indicated in *Blueberry River* is that expected of a person acting in such a matter on his own behalf. Here I think such an individual would have taken care to see that the land outlined in the Minutes of Decision was protected from alienation during the number of months necessary to present the survey for approval, and such an individual would have been able to identify the challenge presented by Sayward's application to purchase what ultimately became Lot 33.

[177] Because I have determined this question in the Claimant's favour, I need not consider the alleged further breaches of the failure to consult with the Band on the loss of the 20 acres, and failure to pursue a remedy through the McKenna-McBride Commission.

X. DEFENCES

[178] The Crown argues that notwithstanding any finding of breach of fiduciary duty, the Claimant acquiesced to the breach, forming a defence to the Claim. It alleges "conduct-based" acquiescence that does not fall within the *SCTA* provision barring the consideration of defences based on "the passage of time or delay" (section 19 of the *SCTA*; Respondent's Written Submissions at paras 402–03). It defines this doctrine as "the failure to assert 'rights' at or about the time of circumstances that required assertion and where the possible claimant had sufficient knowledge of the underlying facts" (Respondent's Written Submissions at para 403). Canada says the Claimant failed to complain when Band members saw Skinner's 1888 survey posts, and when the Spit was used by Sayward's successor in title as a residence and machine shop from 1908–1955. The Crown also notes that Chief Billy Assu's remarks at the opening of the provincial park in 1959, and Chief Harry Assu's 1989 book made no mention of a claim to further lands at the

Spit.

[179] It is not clear to me that the defence of acquiescence can exclude a passage of time or delay. The Supreme Court of Canada has distinguished between the various meanings of acquiescence in equity, with it either being used as a synonym for estoppel—"wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing"—a description that at least indirectly references delay—or as a component of laches, and thus involving delay (*M(K) v M(H)*, [1992] 3 SCR 6 at para 100 [*M(K) v M(H)*]). The Respondent only cites *Wewaykum* at paragraph 111 in support of its definition of acquiescence. *Wewaykum* was not a specific claim under the *SCTA*; it was subject to equitable defences such as acquiescence and laches. There the two bands recognized the ambiguous allocations of reserve lands early in their histories and were content with their early resolution of the issue, until it decades later again became a subject of dispute and litigation.

[180] Even if pleading the defence of "conduct-based" acquiescence were not barred by the Tribunal's statute, the defence has not been made out here on the very definition offered by the Respondent. There is no evidence that the Claimant had an appreciation of the facts underpinning their Claim at the time during which they allegedly acquiesced to it. There is no evidence in the record of any effort by Canada to acquaint the Claimant with the boundaries of their Reserve or the details of how they were set. Skinner's survey posts, without explanation or elaboration, would not furnish such knowledge.

[181] Moreover, the knowledge required for acquiescence is not only of the facts, but also that the facts give rise to a claim (*M(K) v M(H)* at para 101, citing *Re Howlett*, [1949] Ch 767). The claimant must know "that a legal claim is possible" (*M(K) v M(H)* at para 102). Prior to *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321, this likely would not have been thought possible. Indian rights in land were not recognized in British Columbia in the early 1900s. Bands could not retain lawyers for a period in the early 1900s. To expect the claimants to appreciate that they had rights to land not included in their reserve that somehow could be enforced is simply unreasonable.

[182] An awareness of rights may have been possible at the time Chief Harry Assu's book was published, in 1989. However, the publication of a history book hardly constitutes "circumstances that required assertion" of rights to land that were breached a century earlier.

[183] More broadly, the claimed acquiescence is inconsistent with Canada's assertions that no effort to safeguard the 20-acre parcel would have been of any use. The Respondent attempts to excuse its own failure to complain to the Province about Sayward's encroachment on O'Reilly's reserve boundaries at least in part because of the perceived futility of such an effort (see Respondent's Written Submissions, heading J, particularly at paras 296, 302; see also para 368 c), "it was futile to attempt to retain the Southern Rebecca Spit Parcel"). Yet the Crown apparently believes that the Claimant ought to have raised the matter with the Crown again and again, despite the obvious futility of doing so in a time in which Indian land rights were not recognized and the ability to seek redress was largely if not entirely curtailed. In essence, in alleging a defence of acquiescence, the Crown seeks to excuse its own failure by citing the Claimant's failure to do the same under more adverse circumstances. This is not equitable.

WILLIAM GRIST

Honourable William Grist

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20191105

File No.: SCT-7003-14

OTTAWA, ONTARIO November 5, 2019

PRESENT: Honourable William Grist

BETWEEN:

WE WAI KAI 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 WE WAI KAI NATION**
As represented by Allan Donovan and Kenji Tokawa
Donovan & Company

AND TO: **Counsel for the Respondent**
As represented by John Russell and Isabel Jackson
Department of Justice