**FILE NO.:** SCT-7006-12
**CITATION:** 2020 SCTC 1
**DATE:** 20200130

# SPECIFIC CLAIMS TRIBUNAL

# TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

**BETWEEN:**

ʔAKISQ̓NUK FIRST NATION

Claimant

Darwin Hanna, Caroline Roberts and Kirk Gehl, for the Claimant

**– and –**

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

Deborah McIntosh, Shelan Miller and Michael Mladen, for the Respondent

**HEARD:** June 12–14, 2018, January 29–31, 2019 and February 1, 2019

## REASONS FOR DECISION

**Honourable William Grist**

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

**Cases Cited:**

*Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 2; *Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3; *Canada v Akisq'nuk First Nation*, 2017 FCA 175; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 DLR (4th) 239; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Lake Babine Nation v Her Majesty the Queen in Right of Canada*, 2015 SCTC 5; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 6.

**Statutes and Regulations Cited:**

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

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

*Land Act, SBC 1884*, c 16, ss 7, 8.

**Authors Cited:**

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

Cole Harris, *Making Native Space, Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, 2002).

**Headnote:**

*Aboriginal law – Specific Claim – Reserve Creation – Fiduciary Duty*

The Claimant alleges that the Respondent breached its fiduciary duty to the ʔAkisq̓nuk First Nation (Band) in its role in the creation of Kootenay Indian Reserve No. 3 (IR No. 3 or Reserve), originally known as the Columbia Lake Indian Reserve No. 3.

The first issue focuses on the original Minutes of Decision by Indian Reserve Commissioner Peter O'Reilly in 1884 setting out the intended reserve and changes made to the perimeter of the reserve during the survey of IR No. 3 in 1886 (Survey Lands: areas a and b).

The second issue relates to a recommendation made in 1915 by the McKenna-McBride Commission (the federal-provincial commission established to settle reserve allocation in British Columbia), to add 2,960 acres to IR No. 3 (Additional Lands). The Province objected to this recommendation and other recommendations of the McKenna-McBride Commission, and the impasse resulted in the establishment of the Ditchburn-Clark review in 1920, charged with reviewing the recommendations of the earlier inquiry. The Province remained opposed to the addition of the 2,960 acres to the Reserve, and ultimately the Dominion acceded to the provincial position. The 2,960 acres were not included in IR No. 3.

The Claimant argues, and Canada agrees, that the First Nation had a cognizable interest in the Survey Lands and the Additional Lands, and that Canada had a fiduciary duty to the Claimant in its role as representative for the Band in the reserve creation process.

The Tribunal held that Canada's duty to the Band with respect to creation of IR No. 3 was to take into account and have regard for the Band's "cognizable interest" in the land based on the Band's historical connection, present occupation and needs.

In *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*], the Supreme Court of Canada recognized the duty as comprising 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" (para 94). In this case, the Crown's admission that fiduciary duties existed from the outset in respect of creation of the Columbia Lake Reserve references the *Wewaykum* obligations to the Band. The measure of diligence was indicated in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern*

*Development)*, [1995] 4 SCR 344: "…that of a man of ordinary prudence in managing his own affairs" (para 104 citing *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302 at 315).

The Tribunal held that the survey set by the surveyor G. M. Skinner failed to comply with Canada's fiduciary duty to the Band. There was no justification for Skinner to exercise his discretion in modifying O'Reilly's Minutes of Decision to the Band's detriment. Skinner's stated purpose of excluding rocky useless land, only relevant to the top portion of area a, did not result in an improvement in the Reserve allocation, but rather worked to exclude significant useful land and to make land available for alienation in a sensitive area of the Reserve. Skinner excluded area b by simple inadvertence, and Canada had a fiduciary duty to correct this error. Canada's submission that in total, with the southern addition, the changes were beneficial does not act to redeem the loss of the areas excluded. Land was added to the south of the Reserve because it had already been put to use as a garden area, and not in compensation for areas a and b which were removed from the area designated in the Minutes of Decision.

In 1912, the McKenna-McBride Commission's terms of reference were established "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia". In 1916, it recommended the addition of 2,960 acres of land to IR No. 3, which would have extended the eastern boundary of the Reserve further into the upland areas.

The provincial government did not approve the recommendations in the Commission's Report.

In 1920, a second joint federal-provincial review commission, known as the Ditchburn-Clark review, was established to review and make a final determination on the recommendations made by the McKenna-McBride Commission with respect to reserves for First Nations in the Province. The provincial representative on the Ditchburn-Clark review was opposed to the proposed addition of 2,960 acres to IR No. 3. Canada pressed British Columbia on the issue but ultimately agreed to abandon the recommended additional lands for the Kootenay reserves, including the 2,960 acre addition to IR No. 3, on the Province's assurance that a grazing commonage (not an Indian reserve) would be provided for the Shuswap and Columbia Lake Indians in order to secure a resolution of the dispute.

The provincial government subsequently failed to set aside land for the grazing commonage.

The McKenna-McBride process was intended to settle reserve lands, and was accompanied by assurances by the Dominion that Indigenous consent would be a condition of settlement. The Ditchburn-Clark review proceeded without involvement of the bands and the Dominion accepted the Province's proposal abandoning the recommended additional lands for the Kootenay bands without disclosure to, or consultation with, the Indigenous peoples affected. Further, the assurance of the grazing commonage lapsed without further comment than a letter asking Thomas P. Mackenzie, the Grazing Commissioner, not to forget his obligation.

The Tribunal held that this management by Canada of the review of reserves recommended by the McKenna-McBride Commission and by the Ditchburn-Clark review was in breach of its fiduciary obligation 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" (*Wewaykum* at para 94). This breach was more egregious in the case of the Kootenay bands who suffered the most pronounced loss through Canada's decision not to insist on inclusion of the recommended additional lands. At the very least, Canada should have insisted on allocation of the grazing commonage, or if this could not have been assured, abandoned the prospect of settlement on provincial terms as having no mitigating value.

Further, the Claimant argues that the failure to settle the Additional Lands issue should have prompted Canada to employ the dispute resolution process set out in Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*]. The *Terms of Union* were adopted by the provincial and Dominion governments on British Columbia joining Confederation in 1871. Article 13 of the *Terms of Union* stipulated that any "disagreement between the two Governments respecting the quantity of…tracts of land" to be granted for Indian reserves should be referred to the Secretary of State for the Colonies for resolution.

The Respondent says that the decision not to pursue a reference to the Secretary of State for the Colonies was reasonable, and that a positive result for British Columbia First Nations was unlikely.

The Tribunal finds that an opportunity for a reference to the Secretary of State for the Colonies was lost through Canada's management of the issue.

Any questions regarding the potential contribution of British Columbia to Canada's breach of fiduciary duty or contingencies that need to be taken into account, can be dealt with at the compensation phase of this proceeding, after full argument from the Parties.

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## I. THE CLAIM

[1] The Claim brought by the ʔAkisq̓nuk First Nation (Claimant or Band) alleges two breaches by Canada in the course of reserve creation resulting in Kootenay Indian Reserve No. 3 (IR No. 3 or Reserve) originally known as the Columbia Lake Indian Reserve No. 3. The first focuses on the original Minutes of Decision, by Indian Reserve Commissioner Peter O'Reilly in 1884 (Amended Common Book of Documents (ACBD), Vol 2, Tab 119; Amended Agreed Statement of Facts (AASOF) at para 35), and changes to the perimeter of the Reserve, made during the survey of IR No. 3, by G.M. Skinner in 1886 (ACBD, Vol 2, Tab 153; AASOF at para 43).

[2] The second issue relates to the recommendation by a federal–provincial commission, the McKenna-McBride Commission in 1915, that an additional 2,960 acres of land be added to IR No. 3 (AASOF at para 69). The changes stipulated by this Commission were not ratified by the Province, and the subsequent impasse resulted in the establishment of the Ditchburn-Clark review in 1920, charged with reviewing the recommendations of the earlier inquiry (AASOF at para 81).

[3] Again, there was a failure to reach an overall consensus and the Commissioners, Ditchburn for Canada and Clark for the Province, came to separate conclusions as to whether the land should be added to the Reserve. Ditchburn would have ratified the allotment; Clark objected to additions to the Reserve and proposed that the Provincial Grazing Commissioner should allot Additional Lands to be exclusively used by First Nations in the area to graze their stock, an allotment that would not constitute an allotment of further reserve lands.

[4] Ultimately, the Dominion acceded to the provincial position and the 2,960 acre parcel of land was not included in the ultimate provincial transfer of the reserve lands to Canada in 1938. Notwithstanding the Province's proposal that further grazing land be offered by the Grazing Commissioner, the Province never made the land available.

[5] The Claimant's position in respect of the Additional Lands disallowed by the ultimate endorsement of the Province's position, was that Canada failed in its obligation of loyalty to the Band and breached its duty to inform the Band of its intention to abandon support for inclusion of the Additional Lands in the Reserve, and then to consult with the Band before agreeing to the

exclusion (Third Amended Declaration of Claim at paras 97, 103, 107 (a) and (m)). Further, Canada had a duty to refer the question of allocation of the Additional Lands to the Secretary of State for the Colonies and did not do so (Third Amended Declaration of Claim at paras 102, 107(n)).

[6] The first issue (the Survey issue), relating to the Minutes of Decision and subsequent survey, is quite separate in time and context from the second (the Additional Lands issue). It deals with the actions of O'Reilly and Skinner in the years 1884 to 1887, and the modifications rendered by the 1886 survey of the Reserve. The Minutes of Decision and the survey were ultimately received and approved by the Provincial Chief Commissioner of Lands and Works, but the survey setting out the formal boundaries of the Reserve left out two areas totaling 960 acres intended to be included in the Reserve in O'Reilly's Minutes of Decision (AASOF at paras 48, 52).

[7] The second issue (the Additional Lands issue), relates to the 1920 Ditchburn-Clark review, which references the disagreement between the governments dating back to Confederation and which was not finally resolved until 1938. The Survey Lands issue nonetheless touches on this narrative. If the survey had better reflected a lake-to-the-mountains reserve or at least not changed the allocation of the Reserve from that indicated in the Minutes of Decision, this may have alleviated the need for further grazing land. Of the proposed 2,960 acre addition to the Reserve contemplated by the McKenna-McBride Commission, 360 acres would have already been included in the Reserve if not lost through the Skinner survey, but of more significance was the fact that the survey changes left out an area of useable land subsequently made available for purchases and pre-emptions, just to the east of the centre of the Reserve. It resulted in settlers holding lands which would have been surrounded by the expanded reserve recommended by the McKenna-McBride Commission, an objectionable result in the Province's view and put forward as a ground for rejection of the recommended addition to IR No. 3.

## II. PROCEDURAL HISTORY

### A. Specific Claims Branch

[8] The Claimant filed this Claim with the Specific Claims Branch of the Department of Indian Affairs and Northern Development in March 1999.

[9] On February 21, 2011, the Minister declined to accept this Claim for negotiation.

### B. Previous Decisions of the Specific Claims Tribunal and the Federal Court of Appeal

[10] This Claim was first filed with the Specific Claims Tribunal (Tribunal) on March 14, 2013.

[11] On February 4, 2016, the Tribunal Chairperson Justice Slade issued an interlocutory decision dismissing the Respondent's objection to the Tribunal taking judicial notice of several published historical texts (*Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 2).

[12] On February 5, 2016, Justice Slade issued a Tribunal decision finding the ʔAkisq̓nuk Claim valid (*Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3).

[13] The Respondent applied to the Federal Court of Appeal for judicial review of both the Tribunal's interlocutory decision and its decision on the merits of the Claim.

[14] On September 1, 2017, the Federal Court of Appeal issued a decision allowing both applications for judicial review, setting aside both the interlocutory decision and the decision on the merits of the Tribunal, and directing that the Claim be returned to the Tribunal to be re-determined "by a differently constituted panel" (*Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 70).

[15] The decisions of Justice Slade took judicial notice of facts presented in three historical texts which reviewed the history of reserve creation in British Columbia and a 1927 report of a joint special commission established by the two governments, British Columbia and Canada, to supplement evidence called by the Parties in determining that Canada did not act prudently and failed to exercise its duty to the ʔAkisq̓nuk First Nation in its decision not to refer the issue of allotment of Kootenay reserves, following the failure of the federal-provincial review commission, the Ditchburn-Clark Commission, to the British Secretary of State for the Colonies, an avenue of review stipulated in *Terms of Union* adopted by the two governments on British Columbia joining Confederation in 1871.

[16] The potential referral "in case of disagreement between the two Governments respecting the quantity of such tracts of land" to be granted as reserves by conveyance from the Province to the Dominion, was stipulated in Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*].

### 1. The Federal Court of Appeal Ruling

[17] The Federal Court of Appeal held that although Justice Slade gave notice of the material he thought necessary to provide contextual information relating to the relations between the two governments over the 68 years from the Confederation of British Columbia and the newly formed Dominion, until land for reserves was finally transferred from the Province to Canada in 1938, he did not give sufficient notice of the facts he intended to judicially note from the material and the issues these judicially noted facts pertained to (*Canada v Akisq'nuk First Nation*, 2017 FCA 175 at paras 57, 69). The Federal Court of Appeal set aside both the Tribunal's interlocutory decision and the decision on the merits.

[18] Dawson J.A. concluded at paragraph 70 of the Federal Court of Appeal decision:

> I have concluded that Canada did not have a meaningful opportunity to present its case fully and fairly. There is no basis on which I can conclude that had Canada known the case it was required to meet it was impossible for it to have put further information before the Tribunal to answer the Tribunal's concerns. It follows that I would allow the applications for judicial review, set aside the interlocutory and final decisions of the Tribunal and direct that the claim be returned to the Tribunal to be re-determined by a differently constituted panel.

### C. The New Claim

[19] On November 14, 2017, the Claimant filed an Amended Declaration of Claim with the Tribunal. The Claim was assigned to me for re-determination.

[20] On January 11, 2018, the Respondent filed an Amended Response with the Tribunal.

[21] On June 5, 2018, the Claimant filed a Further Amended Declaration of Claim with the Tribunal.

[22] On June 11, 2018, the Tribunal issued a Notice to the Shuswap Indian Band and to ʔaq̓am, pursuant to section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], indicating that a decision on this Claim may significantly affect their interests. The Tribunal did

not receive a response to the Notice.

[23] On July 17, 2018, the Respondent filed a Further Amended Response with the Tribunal.

[24] On November 19, 2018, the Claimant filed a Third Amended Declaration of Claim with the Tribunal.

[25] On June 12, 13 and 14, 2018, the Tribunal held an oral history evidence hearing and site visit at the ʔAkisq̓nuk First Nation.

[26] On January 29, 30, and 31 and February 1, 2019, the Tribunal held an oral submissions hearing at the ʔAkisq̓nuk First Nation.

[27] By Order of this Tribunal, dated January 9, 2014, the issues of validity and compensation in this Claim were bifurcated.

## III. PRELIMINARY ISSUES RELATING TO THE REHEARING

[28] The decision of Justice Slade found for the Claimant with respect to both the Survey Lands and the Additional Lands. Justice Slade found that Canada had breached its duty to the Band in not proposing to refer the Additional Lands issue to the Secretary of State for the Colonies. None of the material introduced to give context to the issues that arose in regard to the Additional Lands had any application in respect of the Survey Lands issue. Further, this material was filed with this Tribunal and admitted as authoritative as secondary source documents, and available to this Tribunal in considering the rehearing of the Additional Lands issue. These circumstances were discussed with counsel in Case Management Conferences preceding the ultimate hearing in an attempt to present a more compact proceeding, and a further matter was raised relating to whether some degree of authoritative weight should be given to findings made by Justice Slade in general, and in light of the fact that portions of his decision were commented upon in the Supreme Court of Canada decision in *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 DLR (4th) 239 [*Williams Lake SCC*].

[29] Canada took the position that the order of the Federal Court of Appeal was clear and that all issues were to be re-litigated. Canada argued that no reliance should be placed on any of the

findings of Justice Slade.

[30] The Claimant argued that this second hearing now gave Canada the opportunity to respond to the decision made by Justice Slade, and unless the Respondent was successful in convincing the Tribunal otherwise, the original Tribunal decision should be adopted along with any and all findings made in that decision.

[31] The last position perhaps better describes the typical onus on an appellant on appeal of a previous decision, and is not the procedure indicated in the Federal Court of Appeal order. In respect of whether consideration is to be given to the findings made by Justice Slade, where any of these can be said to have been approved by the Supreme Court of Canada's decision, they should have the weight appropriate to the Supreme Court's adoption of the statements. As it has turned out I have found no need to refer to these portions of the previous judgment. The findings of this Tribunal have been established by the facts found by this Tribunal on this rehearing, the appropriate law, and the weight of the arguments presented by the Parties.

[32] The evidence heard at this hearing also included further evidence from an expert witness, Dr. Dorothy Kennedy. She presented a written report entitled *Referrals to the Secretary of State for the Colonies 1867 - 1924 — September 21, 2018* (Kennedy Report), was subject to cross-examination, and gave opinion on the likely outcome should a referral under Article 13 of the *Terms of Union* have been made by one or both governments at any relevant point in time following the McKenna-McBride recommendation that the Additional Lands be included in IR No. 3.

[33] The first issue in time, however, is the Survey Lands issue and it will be dealt with first.

## IV. HISTORICAL OVERVIEW—RESERVE CREATION

[34] On the Confederation of British Columbia into the Dominion of Canada in 1871, essentially all of the land in the Province that had not devolved to private interests was to be held and administered by the Province. Article 13 of the *Terms of Union* provided that lands for Indian reserves were to be transferred to, and managed by, Canada. Specifically, Article 13 provided:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union. To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies. [ACBD, Vol 1, Tab 32]

[35] In 1876, the task of allocating reserves was assigned by the provincial and federal governments to the Joint Indian Reserve Commission (JIRC), a Commission originally comprised of a provincial appointee, federal appointee, and a third chosen by the first two. Gilbert Sproat was originally the third appointee (AASOF at para 15). To save on cost and procedure Sproat, in 1877, was to continue as the sole Commissioner of the Indian Reserve Commission (IRC) (AASOF at para 15). Sproat resigned in 1880 (AASOF at para 18) and was replaced in 1880, by Peter O'Reilly, a County Court judge jointly appointed by the two governments (ACBD, Vol 2, Tab 84).

[36] The agreement establishing the JIRC set out as follows:

> 1st. That 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. That 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 by nation all Indian tribes speaking the same language) in British Columbia, and after full enquiry on the spot into all matters affecting the question, to fix and determine for each nation separately; the number, extent, and locality of the reserve or reserves to be allowed to it.
>
> 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 and 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 so 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 a Committee of the Honourable The Executive Council, approved by His Excellency the Lieutenant-Governor on the 6th Day of January, 1876; ACBD, Vol 1, Tab 46]

[37] On his appointment O'Reilly took up the process of visiting areas where reserves needed to be set aside. In some cases, he dealt with reserves that Sproat had set out, but which had not received provincial approval. In other respects, he was to prioritize areas where reserves needed to be established to avoid conflict with individuals potentially taking up land by pre-emption or purchase under the provincial *Land Act*, and to deal with areas where grievances of the Indigenous population were most pronounced.

[38] The procedure for setting aside land for reserves began with O'Reilly visiting an area where, in accord with paragraph 4 of the JIRC agreement, he was to consult with Indigenous people to determine their habits, wants and pursuits. Order in Council PC 1334 appointing Commissioner O'Reilly indicated that he was to "ascert[ain] accurately the requirements of the Indian Bands [in British Columbia]…and all[ot] suitable lands to them for tillage and grazing purposes" (ACBD, Vol 2, Tab 83; AASOF at para 20). He then applied what he had learned and his assessment of the locations of special significance to the Band and their reasonable needs for land to sustain themselves. His determination was to be an on-the-spot allocation recorded in Minutes of Decision, describing the Reserve. The decision was most often accompanied by a sketch, sometimes prepared after what amounted to a rudimentary survey of the site, tying the boundaries of the Reserve to known points available from previous surveys, prominent features of the terrain and whatever maps or charts that may have been available.

[39] The Minutes of Decision and sketch would then be submitted to the Chief Commissioner of Lands and Works (CCLW), generally a member of the provincial Cabinet who was responsible for administering the provincial survey and land records systems, as well as the allotment of land by pre-emption or purchase, under the *Land Act*.

[40] If approved by the CCLW, the reserve would be surveyed by a surveyor sent out by the Federal Indian Affairs Office in Victoria. There was often a delay of one or two years for this to occur. If the survey were accepted by the CCLW, the matter would have proceeded to the furthest extent of security of tenure available to the band under this often fractious process, until reserves were finally conveyed to the Dominion, in 1938. This state of less than complete compliance with Article 13 of the *Terms of Union* created what at law were deemed to be provisional reserves, as determined in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*], a status which the Supreme Court of Canada found determined a lesser fiduciary role for Canada in the management of British Columbia reserves than the preserve and protect requirements required of Canada in administering reserve land allotted to bands in accordance with the *Indian Act* (*Wewaykum* at para 104). Notwithstanding this, bands were, "entirely dependent on the Crown to see the reserve-creation process through to completion" (*Wewaykum* at para 89) and the fiduciary obligation in respect of provisional reserve lands was described as a duty "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regarded as the best interest of the beneficiaries" (*Wewaykum* at para 97). Further, in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [*Blueberry River*], the standard of care stipulated was that of a "man of ordinary prudence in managing his own affairs" (*Blueberry River* at para 104, citing *Fales v Canada Permanent Trust Co.*, [1977] 2 SCR 302 at 315).

## V. ORAL HISTORY

[41] Oral history was given by Chief Alfred Joseph, Lucille Shovar, Emilia Danyluck and Beatrice Stevens.

[42] These four witnesses were all Elders in the community. They had all grown up on the Reserve apart from the time away when they were sent to residential school. They each gave

evidence of what they had learned from their Elders; family members and others, who had long histories of living on the Reserve.

[43] Chief Joseph told of taking some college training before returning to the Reserve in the early 1970s. He took a special interest in learning of his Elders previous way of living and the history they gave of how the Reserve was determined. He also identified the family groups that lived on the Reserve from early times and the areas they utilized.

[44] Chief Joseph told of what he had learned of the negotiation resulting in the location of the Reserve. He said that, initially, the people wanted an expansive area amounting to all the land in sight from two vantage points, one near Windermere Lake and the second one near Fairmont. This was rejected as being “too much” (Hearing Transcript, June 12, 2018, at 64). The second proposal was both sides of the valley, from Windermere Creek on the north to Fairmont, on the south. This also was rejected and he said it was then determined that the Band was to receive the east side of the valley, from the lake and the Columbia River, to the eastern mountains, from Windermere Creek in the north to Tatley Creek in the south.

[45] Chief Joseph said the people expected this area to be included in the Reserve by the surveyor, who was being sent out to deal with the Reserve boundaries but when he came most of the people were away. While they were gone, the Reserve was surveyed into its present shape.

[46] Chief Joseph said his Elders considered the Reserve was, “shaped funny and…a lot smaller than [was] agreed upon” (Hearing Transcript, June 13, 2018, at 32).

[47] The three other witnesses also commented on the odd shape of the Reserve; and the fact that their Elders could not understand why Reserve areas were fenced off from adjacent lands as they were; and why areas, such as Lyttle Lake, were outside the Reserve, when the Reserve was supposed to extend to the mountains.

[48] Ms. Danyluck’s evidence on the point was as follows (Hearing Transcript, June 13, 2018, at 148): “The shape of the reserve, there were times that we thought parts of it were ours until we found out that they had taken it back. So that’s why our reserve is such an odd shape, you know. And the preemptions pretty well took over a lot of the better parts of the lands here.”

[49] Each of the witnesses gave evidence dating from when they were young, of their families having numerous cattle and horses and providing food from gardens, all requiring diversion of water to grow hay and vegetables. They said that the families on the Reserve from early times were able to free-range the large numbers of horses and cattle, and that reliance on stock raising was very important before their time, but fell off considerably before they were born and during their early years.

[50] They also gave evidence of Band members' reliance on hunting and trapping to help them with food and some income, using trails ranging back over the eastern mountains into the Kootenay River drainage and south on the west side of the valley. Chief Joseph also identified peaks just to the east of the Reserve that had significance in the creation stories of his people.

## VI. THE O'REILLY MINUTES OF DECISION

[51] Commissioner O'Reilly travelled to the Kootenays in August 1884 (AASOF at para 29). Travel from Victoria in 1884, was first to Tacoma, Washington, then to Portland, Oregon, and by the Northern Pacific Railway to Sand Point (ultimately, Idaho). From there, he travelled to the Kootenays likely by horseback. The area was remote, with few settlers, but in an area where more were expected.

[52] O'Reilly's report, published in the 1884 Annual Report of the Department of Indian Affairs, set out his visit to the Indigenous people living in the Upper Kootenay Valley:

> On the 5th August I arrived at, the Lower Columbia Lake, the place of residence of another portion of the Kootenay tribe, and of whom "Moyeas" is the chief. Here, again, I was met by requests for a greater area of land than I considered necessary, although their demands were not so excessive as those of the other portions of the tribe, and I found them more amenable to reason. They also had a greater claim to favorable consideration, as they had evidently done their best to fence and cultivate such portions of the land as could be irrigated, and had erected comfortable houses for themselves, which they showed me with commendable pride. Having ridden over the land with the chief, and examined the crops and improvements, I decided to allot to them a tract of land embracing 8,320 acres, as shown on rough plan and minutes of decision. Of this, about 100 acres is cultivable, the remainder is broken, rolling and gravelly, lightly timbered with pine and fir, and more or less rocky as it approaches the base of the mountains. About 800 acres is grassy swamp on the bank of the river, covered by the water at its lowest stages. The Indians prize this, as affording feed for their cattle in winter.
>
> The abandoned pre-emption claims of Thomas Jones, Edward Chancey and Sophie Morischo are included in this reservation. The two former were cancelled

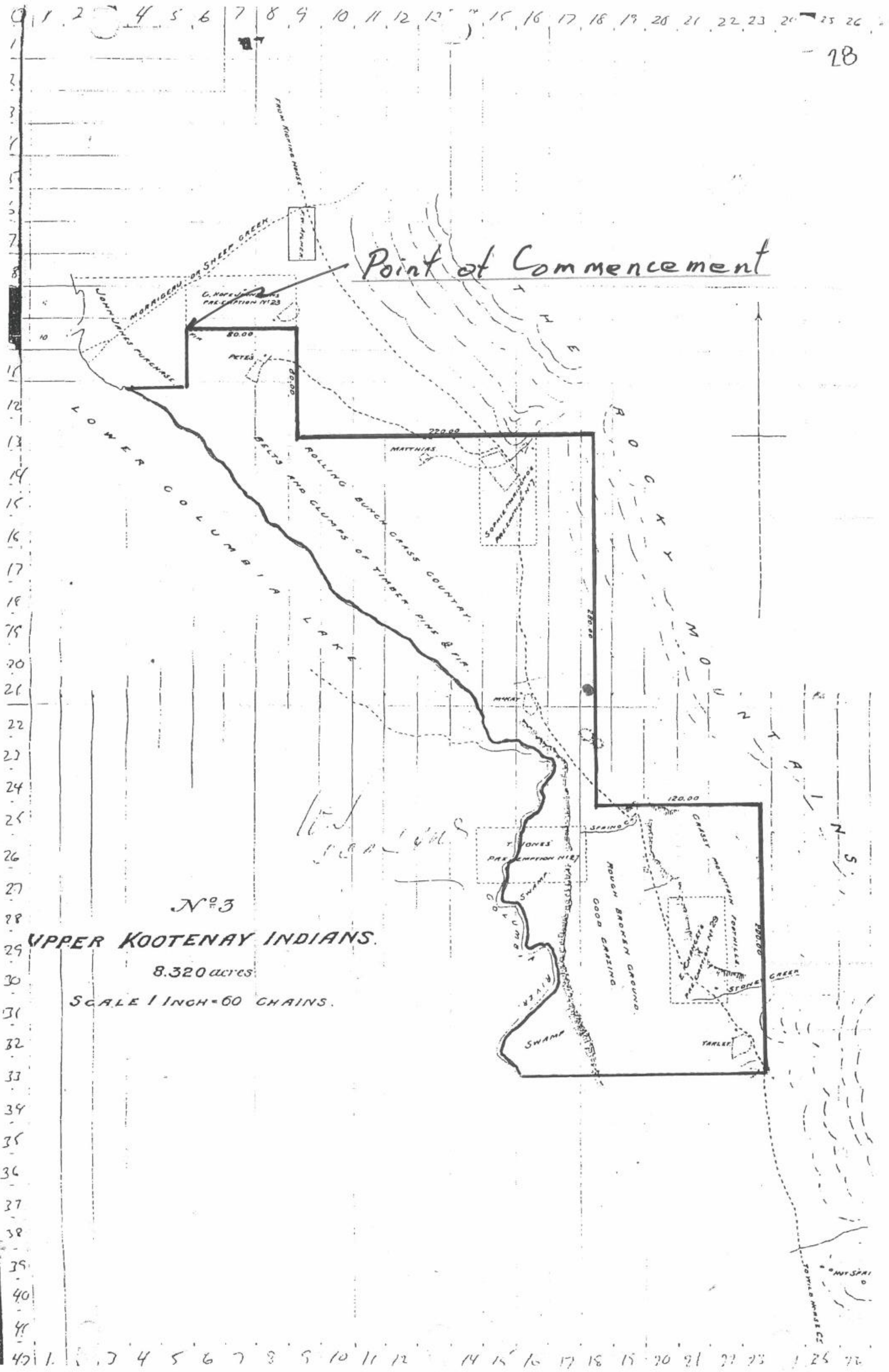
> in the Land Office at Kootenay, and Mrs. Morischo, who is now living in American territory, left the country some years ago, when she sold her improvements consisting of houses, fencing, &c., to the Indians.
>
> A limited quantity of swamp hay can be cut on the abandoned claim of Mr. Jones.
>
> Until recently, these Indians subsisted almost entirely on the products of their annual hunt on the eastern slope of the Rocky Mountains, and on the salmon which formerly were abundant in the Columbia River. These sources of supply being exhausted and game not very plentiful in their own country, they now depend chiefly on their cattle, horses, and gardens, supplemented by what they can earn as herders, packers, or laborers. Considering that until the last few years they had seen nothing of farming operations, some of their little patches are very creditable to them. Wheat, peas and potatoes are their favorite crops; the former being packed to the Mission on St. Mary's River, where there is a small flour mill.
>
> A considerable trade is carried on with the Stoney Indians, who cross the mountains to buy horses in exchange for rifles, ammunition and furs.
>
> The Indians of the Upper Kootenay number 281 and possess 2,511 horses, and 618 cattle. [ACBD, Vol 2, Tab 129]

[53] On August 9, 1884, he issued his Minutes of Decision for the Reserve he intended to set aside on the east side of the Lower Columbia Lake (now Windermere Lake):

> Minutes of Decision
>
> Upper Kootenay Indians
>
> No. 3
>
> A Reserve of eight thousand, three hundred, and twenty (8,320) acres (approx.) situated between the lower Columbia Lake, and the Rocky Mountains. Kootenay district.
>
> Commencing at the Southwestern corner of Mr. J. Hope Johnstons preemption No. 23, and running East eighty (80) chains; thence South eighty (80) chains; thence East two hundred, and twenty (220) chains; thence South two hundred, and eighty (280) chains; thence East one hundred and twenty (120) chains; thence South two hundred (200) chains; thence West to the Columbia river; thence following the right bank of the said river, and the lower Columbia Lake to the Southwesterly corner post of John Jones' purchased claim, and thence along the southern, and eastern boundaries of the said claim to the point of commencement.
>
> All water flowing through the reservation is assigned to the use of the Indians.
>
> Kootenay 136.
> August 9th 1884 [ACBD, Vol 2, Tab 119]

[54] The Minutes of Decision was accompanied by a sketch of the Reserve, superimposed on a map of the area showing the lake, the Columbia River, various creeks and the Rocky Mountain range, trails and the locations of pre-emptions and purchases, along with the home sites of

various Indigenous families. The sketch O’Reilly prepared is shown on the following page (with the Reserve outlined with darker lines). I have marked O’Reilly’s point of commencement, where he began his clockwise description of the Reserve boundaries (ACBD, Vol 2, Tab 120):



28
Point of Commencement
No 3
UPPER KOOTENAY INDIANS.
8.320 acres
SCALE 1 INCH = 60 CHAINS.
THE ROCKY MOUNTAINS
LOWER COLUMBIA LAKE
ROLLING BUNCH GRASS COUNTRY
BELTS AND CLUMPS OF TIMBER PINE & FIR
ROUGH BROKEN GROUND.
GOOD GRAZING.
SWAMP
COLUMBIA RIVER
STONEY CREEK
SPRING CR.
120.00
220.00
80.00
MATTHIAS
PETE'S
TARLEY

[55] As can be seen from the sketch, the east side of the Reserve presents a stepped configuration. This resulted from the survey system stipulated in the provincial *Land Act*, SBC 1884, c 16 [*Land Act*, 1884]. Sections 7 and 8 of the *Land Act*, 1884, required these boundaries to be oriented either north-south or east-west, except where the boundary could be set along a natural boundary. More specifically, section 7 provides as follows:

> **7.** Every piece of such unoccupied, unsurveyed, and unreserved land as aforesaid, sought to be pre-empted under the provisions of this Act, shall, save as hereinafter is provided, be of a rectangular or square shape, and 160 acres shall either measure 40 chains by 40 chains (equal to 880 yards by 880 yards), or 20 chains by 80 chains (equal to 440 yards by 1760 yards), and 320 acres shall measure 40 chains by 80 chains (equal to 880 yards by 1760 yards.) All lines shall be run true north and south, and true east and west.

[56] Section 8 provides as follows:

> **8.** Where such land is in whole or in part bounded by any lake, or river, or by any pre-empted or surveyed land, such lake, river, pre-empted or surveyed land, may be adopted as the boundary of such land; and it shall be sufficient for the applicant to show to the Chief Commissioner that the form of the land conforms, as nearly as circumstances permit, to the provisions of this Act; but all other boundary lines, except as mentioned in this section, shall be run true north and south, and true east and west.

[57] The west side of the Reserve followed the available natural boundaries presented by the east banks of the Columbia River and Lower Columbia Lake (now Windermere Lake), but the north, east and southern borders were set in straight lines in accordance with the directions in the *Land Act*, 1884.

[58] In a case such as presented by IR No. 3, where both the lake and the Rocky Mountain range lie roughly along a northwest to southeast axis, an attempt to capture the land between the lakeshore and the mountain slopes using the system prescribed for rectilinear boundaries under the *Land Act*, 1884, creates a stepped effect, as seen in the sketch. In his discussion with the Indigenous people he consulted, I think it unlikely he discussed the strictures of the survey system, rather, he would have explained, as said in the oral history, and in the first sentence of the Minutes of Decision, that he intended they would have a reserve, "situated between the lower Columbia Lake and the Rocky Mountains" (ACBD, Vol 2, Tab 119), between the two creeks at either end of the reserve, similar to what he described in his 1884 Annual Report. There he describes the land allotted beyond the cultivated fields as follows, "the remainder is broken,

rolling and gravelly, lightly timbered with pine and fir, and more or less rocky as it approaches the base of the mountains" (ACBD, Vol 2, Tab 129).

[59] The Minutes of Decision set by O'Reilly was sent, along with others he had determined, to William Smithe, CCLW, and at the time, Premier of the Province (ACBD, Vol 2, Tab 123). This was followed, on November 21, 1884, by a letter from Smithe commenting that the area proposed to be reserved seemed large. He asked for information on the number of families in the various areas of the Kootenay District, the stock they owned and the areas they had enclosed and cultivated (ACBD, Vol 2, Tab 124).

[60] O'Reilly responded in his letter of November 25, 1884, with the following information:

| | |
|---|---|
| Heads of families | 121 |
| Total Population | 442 |
| Horses | 2551 |
| Cattle | 620 |
| Acreage enclosed & cultivated | 95 acres |

[ACBD, Vol 2, Tab 125]

[61] He also commented: "it must be borne in mind that by far the larger portion of the land embraced in the proposed reserves is utterly worthless for agriculture, and very inferior for grazing purposes being stony, rough, and broken and covered with stunted valueless trees."

[62] Smithe was not satisfied with the accumulated district populations and asked for the populations in the vicinity of the individual reserves. He then went on to give a three-page exposition setting out the provincial position dating back to the *Terms of Union*, requiring that reserves be limited to 20 acres per family. He acknowledged that when the JIRC was empowered to deal with the matter the Commissioners were given liberty to give more or less, "as the reasonable requirements or necessities of the case might demand" (Letter from Smithe dated November 29, 1884; ACBD, Vol 2, Tab 126). He then continued: "How very different was the view of the Commissioners [as] the areas they set apart as reserves with such reckless extravagance in all parts of the Country amply demonstrate."

[63] Smithe commented that O'Reilly had "overestimated the requirements of the Indians and underestimated 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".

[64] Smithe noted that the allotment made by O'Reilly amounted to about 440 acres for a family of five. Smithe continued:

> No one, I think, will venture to say that Indians are capable of utilizing as much land as white men, and our Land Act only contemplates providing a homestead of 320 acres to a white family...
>
> I am firmly of opinion that so long as Indians are so slightly advanced in the ways and customs of civilization, it will be impossible for them to utilize tracts of land more than sufficient for white men; and when they shall become more advanced and able to cultivate and make productive larger areas. The true policy would be to keep them no longer in tutelage but to enfranchise them, and enable them to take land in the same way, to the same extent, and under the same conditions of settlement and improvement as other citizens do.

[65] The December 10, 1884 letter of reply from O'Reilly stated:

> …I regret to state that I am unable to give you such precise information as you require, for the reason that the habit of the Kootenay Indians have in the past been migratory, moving from place to place, at different seasons of the year, as suited their pursuits and requirements.
>
> You may not be aware, that prior to my visit to Kootenay, no reservations had been defined, and but very little land occupied by white settlers; the Indians claimed to be, and virtually were, in possession of the whole district, cultivating such portions as they pleased, and pastoring their cattle, and horses in the most favored spots. It was therefore my duty as Indian Reserve Commissioner to define what land was necessary for them, having regard to their habits, wants, and pursuits, and to deal liberally with them; and I may here remark that I had the utmost difficulty in persuading the Kootenays to agree to the boundaries fixed on by me, and which they look upon as meagre in the extreme, compared with the millions of acres set apart by the United States Government for American Indians, a few miles south of the line. Moreover I think it important for provincial and international reasons, that Indians living on the frontier should have no reasonable ground of complaint and in this view, I feel sure you will concur. [ACBD, Vol 2, Tab 127]

[66] O'Reilly continued:

> With the number of cattle owned by the Kootenays, upon which they must in future depend in large measure for food, the buffalo east of the mountains being now almost extinct. The amount of cultivable land within the reserve is extremely limited, and is found only in small patches, whereas a large area is of little or no value. Had I included within the reserve all of the scattered patches of land cultivated by the Indians on the banks of the Kootenay River, the acreage would have been largely in excess of the return forwarded to you in my letter of the 25th of November.

[67] This appears to be the end of the correspondence between the two on this matter; and on September 2, 1885, an official in the CCLW's office wrote to inform that Smithe had accepted the Indian Reserves in the Kootenay District (ACBD, Vol 2, Tab 142).

[68] This perhaps overly long exposition of this material helps to give context to the reserve creation process in the Kootenays. The Indigenous population had traditionally occupied extensive areas of the southeast corner of British Columbia, travelling to various places to sustain themselves on the natural resources of the area, including across the Rocky Mountains to the eastern foothills to participate in buffalo hunts. The viability of their means of sustenance was challenged by the near extinction of the buffalo and failing salmon runs on the Columbia River, and their traditional use of their territory restrained by the increased exercise of sovereignty by the new governments and the onset of settlers.

[69] The Respondent has admitted that the Claimant used both the Survey Lands and the Additional Lands for a variety of purposes, including hunting, trapping, fishing, transportation, irrigation, harvesting plants for food and medicine, and grazing livestock, including horses. The Respondent acknowledges that the Claimant had a cognizable interest in the Survey Lands and the Additional Lands based on their historic use of these lands (Respondent's Memorandum of Fact and Law (MOFL) at paras 82, 93; AASOF at para 8).

[70] Furthermore, the correspondence reviewed above gives light to the Aboriginal interests O'Reilly was attempting to deal with in allotting IR No. 3 and other reserves in the Kootenay District. O'Reilly's instructions from the Deputy Superintendent General of Indian Affairs stated in part as follows:

> 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…interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearing, burial places and fishing stations occupied by them and to which they may be specially attached. …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 part 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. [ACBD, Vol 2, Tab 84; AASOF at para 22]

[71] The reference to the First Nation's "habits, wants and pursuits" is common to the JIRC, and later the-IRC instructions. It is notable that 'want' has two relevant dictionary definitions: one references a desire; the second implies a need (*The Canadian Oxford English Dictionary*, 2nd ed, *sub verbo* "want"). Both definitions are likely appropriate here.

[72] In the context of the Kootenay reserves, O'Reilly's objective was to set aside from the land utilized by the ʔAkisq̓nuk sufficient usable land for the Indigenous people to survive the change from their past means of sustaining themselves, to their then pursuits of stock raising and sustenance agriculture. His attempts were met with opposition from 1) the Indigenous people who had from prehistory occupied the expanse of territory that had become areas of the United States, Alberta, and the southeast corner of British Columbia; and, 2) from the provincial government who, despite Smithe's comments on enfranchisement was not about to give Indigenous people the same rights as settlers. Further, the Province had no interest in giving credit for Indigenous claims for land based on traditional use, was interested in favouring allotment of land to present day and future settlers, and was going to closely monitor the JIRC, and later the IRC allocations notwithstanding earlier assurances their allocations would be favourably received, and the fact that O'Reilly was a joint appointment of the two governments.

[73] Smithe's endorsement of enfranchisement made no mention that Indigenous people could not freely participate in the public right to allocations under the *Land Act* for land or water rights and did not have the right to vote until 1960. Further, reserves were allotments of large tracts of land for band use, often "utterly worthless for agriculture" (ACBD, Vol 2, Tab 126), rather than more productive land individually selected by an applicant under the 360-acre per applicant provision available through the *Land Act* for pre-emption or purchase.

## VII. SKINNER'S SURVEY

[74] The specific instructions to G. M. Skinner when commissioned to prepare the Columbia Lake Indian Reserve No. 3 are not in evidence, but it is clear from what Skinner did in modifying the directions in the Minutes of Decision that he had a discretion to deviate from the Minutes of Decision if there was a good reason to do so.

[75] In conducting his survey Skinner reported two deviations from the Minutes of Decision, the first of which also resulted in a seemingly inadvertent deviation from the intended boundaries.

[76] In the first deviation from the Minutes of Decision, Skinner set his Station 3 at O'Reilly's point of commencement, at the southwest corner of G. H. Johnston's pre-emption No. 23; set his Station 4, 80 chains east to Station 3 (a chain was a measure the equivalent of 66 feet, 80 chains to a mile, 10 square chains = 1 acre); from there to Station 5, 80 chains south. Following O'Reilly's instructions, he was then to proceed 220 chains east to set the next station, but instead he stopped at 200 chains to set Station 6, before proceeding with the next direction, to go 280 chains south. The result was that he did not include a rectangular area of land running north-south, 20 chains wide by 280 chains long. This rectangle comprises 560 acres as is shown in area a on Exhibit 1, shown below at page 33.

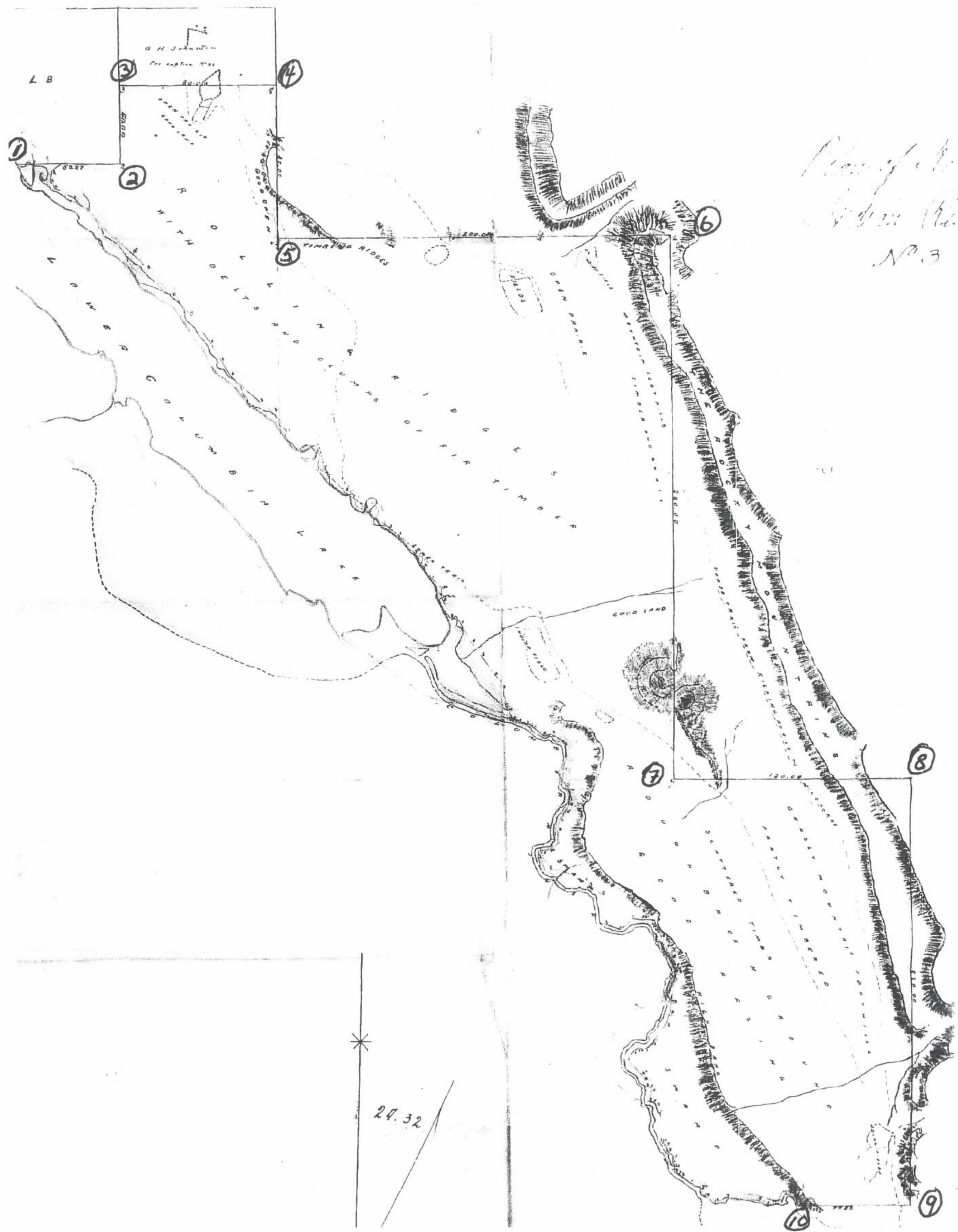
[77] Continuing with his survey he travelled the 280 chains south to set Station 7, then went east 120 chains as directed by O'Reilly to set Station 8, but did not compensate on this leg for the 20 chains he didn't cover on the previous eastward jog before turning south. This left out a second rectangular area. If the southern boundary was set as prescribed by O'Reilly, the rectangle would have comprised 400 acres (shown as area b on Exhibit 1 found below at page 33). If calculated to the actual southern boundary set by Skinner, it would have amounted to 440 acres. Although Skinner reported that he had not gone the full 220 chains to the east to Station 6, he did not report that he did not adjust for this when he set the second part of the eastern boundary. The loss of usable land was more significant in the southern portion of area b near Tatley Creek, a source of water for irrigation.

[78] The second reported deviation from the Minutes of Decision followed when Skinner turned south. He went 20 chains further than the 200 chains directed by O'Reilly to set Station 9 before turning west to set the southern boundary, in order to avoid setting the boundary across a cultivated area. This resulted in a southern addition to the Reserve.

[79] Skinner's report of May 12, 1887, with respect to the first variation was "finding that the line between Stations 5 and 6 would run up the mountains and include some worthless land, I turned south at two hundred chains, instead of turning at two hundred and twenty as directed in

your instructions" (ACBD, Vol 3, Tab 239).

[80] Tracing Skinner's progress on the sketch he prepared, shown on the following page (with his stations emphasized because of the light original; ACBD, Vol 2 , Tab 153 at page 52), the intersection with the rocky terrain can be seen at his Station 6, and looking at the topographical map, Exhibit 1, (reproduced below at page 33) had he gone a further 20 chains east, about one-third of the 560-acre parcel (area a on Exhibit 1 that would have been included in the Reserve, would have been in fairly steep terrain. But at the same time, because the line between Stations 6 and 7 was set north-south rather than better paralleling the ridge, about two-thirds of area a, being of more moderate terrain, was not included in the Reserve. Again, looking at Exhibit 1, Station 6 was set at a height of land near the 1,200 metre contour. The line he set then descended to about the 880 meter contour, a fairly short distance (scaled at about 30 chains) to the east of the edge of the bench land above the river, which sits at about the 840 metre contour. This left only a narrow expanse of bench land at this midpoint in the Reserve.



L B
1
2
3
4
5
6
7
8
9
10
G. H. Johnston
TIMBERED RIDGES
ROLLING RIDGES WITH BELTS AND CLUMPS OF FIR TIMBER
LOWER COLUMBIA LAKE
GOOD LAND
No. 3
24.32

[81] The second modification reported by Skinner was in setting the south boundary. The south boundary extends to the west to meet into the natural boundary of a mud lake and the Columbia River, and the area added by the 20 chain extension of the eastern boundary is shown in the legend to Exhibit 1 as comprising 219 acres. This 219 acres includes an area labelled "swamp" and a bluff to the bench land above. Again very roughly, about one-half of the parcel, or 110 acres, would be in the upper area, partially shown as containing "Indian fields".

[82] The total acreage of IR No. 3 indicated by O'Reilly in his Minutes of Decision was 8,320 acres. Skinner calculated his survey as enclosing 8,456 acres. These calculations would have been difficult because the west boundary was set along the natural boundary of the lakes and river and the plan had to be sectioned into regular shapes to do the calculations (Skinner had to set about 100 stations along the shoreline, many of them in difficult swampy terrain to complete the survey). If compared it should be remembered that each assessment of acreage likely had a significant margin of error, especially in respect of O'Reilly's assessment. He described his outline of the Reserve as a rough sketch and he had much less detail to work from.

[83] It should also be noted that Skinner does not describe the two modifications as one being in compensation for the other. They appear to have been changes made independently for the separate reasons given.

[84] Skinner's report (May 12, 1887) was as follows:

> I have the honor to furnish you with the following report, and a sketch of the two changes made by me in surveying the Kootenay Indian Reserve No. 3 finding that the line between Stations 5 and 6 would run up the mountains and include some worthless land, I turned south at two hundred chains, instead of turning at two hundred and twenty as directed in your instruction from Station 8 to Station 9 was given by you as two hundred chains, but finding that that distance would on running the south line cross an Indian field, I extended the line twenty chains further south.
>
> The Indians on this reserve seemed on the whole satisfied that these changes were made and I trust they will meet with your approval. [ACBD, Vol 3, Tab 239]

[85] Skinner's report that "[t]he Indians on this reserve seemed on the whole satisfied that these changes were made" is somewhat ambiguous and not credible in its assurance. No doubt the family tilling the southern field would have appreciated the deviation to the south, but setting Station 6, 20 chains short of the Minutes of Decision direction and the loss of 560 acres, much

being of modest grade, the further loss of the 400-440 acre parcel, along with the necessary *Land Act* adherence to the setting of the rectilinear boundaries, would have been difficult to present in a positive light and would have been unlikely to have prompted an informed consent. There is no record of a significant effort being made in this regard and the oral history given in this Claim records that many of the people were away when Skinner did his survey and that from the time the Reserve was set to the present, people could not understand why the Reserve was created with these stepped eastern boundaries excluding areas of useable land when the early presentation was that the Reserve would be the east side of the valley, from Windermere Creek to Tatley Creek bounded on the west by the lake and on the east by the mountains.

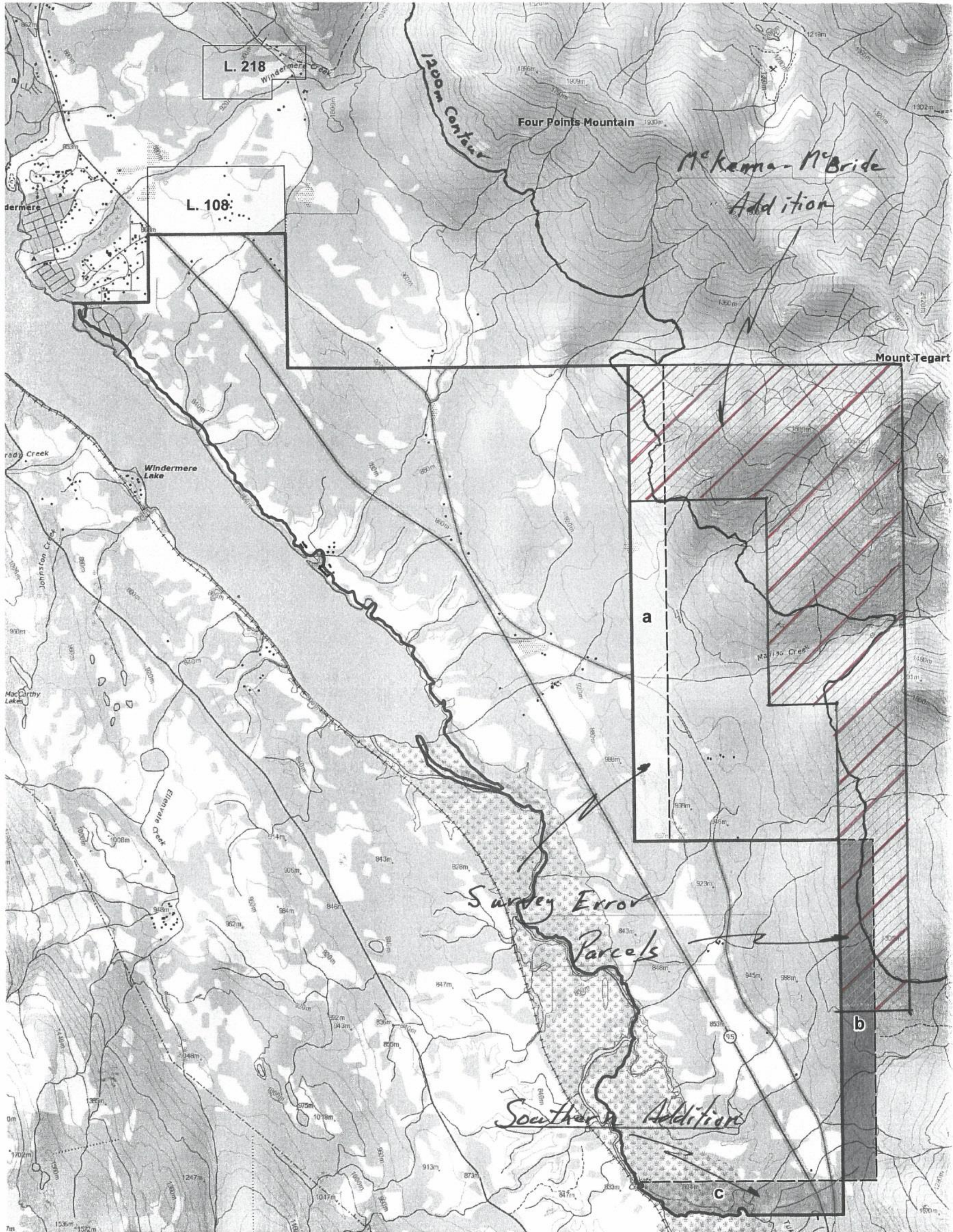
[86] The first deviation from the Minutes of Decision did not enhance the Reserve. The Band would have been better off if Skinner had simply followed the Minutes of Decision. But Skinner could have made improvements during the course of his survey. He could, for example, have set Station 6 as he did, turned south and at, say, 140 chains, then turned east 40 chains, followed by a turn south to complete the 140 chain balance of the eastern boundary, to better conform to the topography and better capture useable terrain, and included the same acreage described by O'Reilly for this portion of the Reserve. He should then, in any event, have reverted to the lines set by O'Reilly and avoided the loss of the 400-440 acre lower rectangle. This would perhaps have been the simplest improvement on what Skinner laid out but other configurations might also have been employed that better captured the topography. From the topographical map, Exhibit 1, and the site view the Tribunal made of the area, capturing the more useable terrain would have likely focused on land up to about the 1,200 metre topographical gradient, the same height of land at which Skinner turned to the south at Station 6.

[87] If conforming to the topography were the objective adopted, the survey would still have had to accommodate the rules of the survey system. The large right angles comprising the eastern boundary could have been broken down into a few more, smaller sized eastern right angle steps. These may have included more acreage than O'Reilly described, but the result would have stayed truer to the objective of extending the Reserve to the base of the mountains and better served O'Reilly's own description of his duty as an Indian Reserve Commissioner "to define what land was necessary for them, having regard to their habits, wants, and pursuits, and to deal liberally with them" (ACBD, Vol 2, Tab 127; AASOF at para 36). The advantage of such an

approach would have been to provide boundaries more in tune with the Band's lake-to-the-mountains expectation in respect of the Reserve, and would have removed the prospect of lands roughly in the centre of the Reserve being pre-empted or sold under the *Land Act*. Skinner would not have been able to exactly conform to any particular contour but if he had decided to stay truer to a boundary better conforming to a certain elevation, only a few more stations would have been set, and this extra work would have been done over terrain much easier to contend with than was the case in following the western natural boundary.

[88] On May 23, 1887, Commissioner O'Reilly forwarded Skinner's plans and tracings of the reserves allotted for the use of Indians in the Kootenay region, including IR No. 3, to the CCLW for British Columbia for his signature (AASOF at para 51). On June 10, 1887, the then Chief Commissioner, F. G. Vernon, and Commissioner O'Reilly signed the official *Plan of Kootenay Indian Reserve No. 3, Lower Columbia Lake, Kootenay District, British Columbia*, which incorporated Surveyor Skinner's boundary changes (AASOF at para 52).

[89] Exhibit 1, the topographical map showing the Reserve boundaries, and my notations indicating the "Survey Error Parcels" (areas a and b), as well as the "Southern Addition" (area c) the recommended addition to the Reserve identified by the McKenna-McBride Commission, and the 1,200 metre contour, is included below:

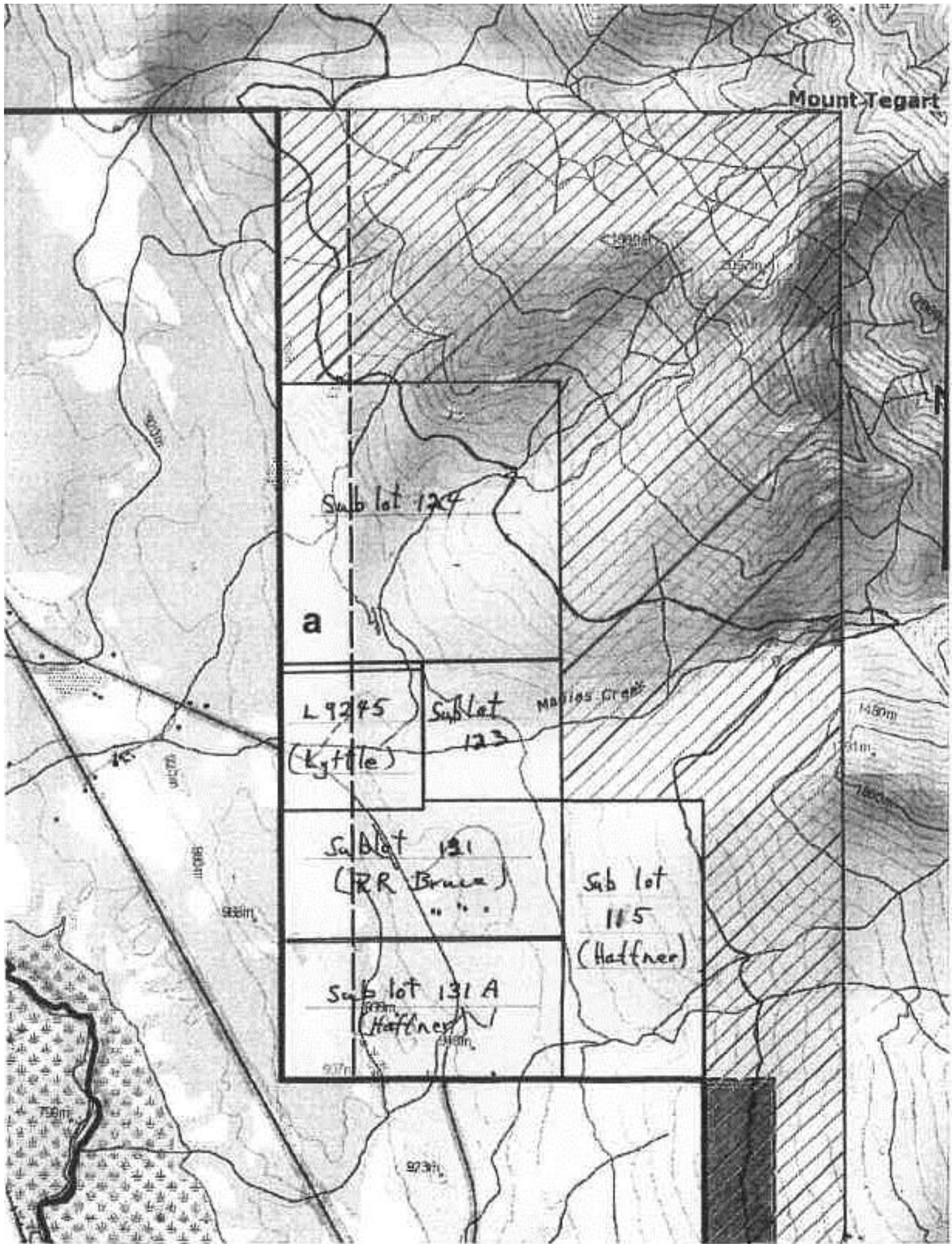

L. 218
Windermere Creek
1200m Contour
Four Points Mountain
McKenna-McBride Addition
L. 108
Windermere
Mount Tegart
Windermere Lake
Johnston Creek
MacCarthy Lake
Ellenvale Creek
Marion Creek
a
Survey Error Parcels
b
Southern Addition
c

## VIII. INDIAN AGENT GALBRAITH'S EVIDENCE

[90] The result of the survey was the subject of evidence given by Indian Agent Galbraith to the McKenna-McBride Commission on October 14, 1914. He described the need for land for the various bands in his district, which included IR No. 3:

> Now the Columbia-Kootenay, I look upon that as the best of the lot. The Indians there are very industrious and they seem to be getting along very well. The character of the soil is light but they have done better than any of the Indians in the Agency and seem to be getting along very well. They get on well with the white settlers but a mistake was made when the reserve was first laid out in that the boundary lines should then have been extended to the mountains and that land could then have been kept for all time as a forest reserve. But it is not likely that anyone will go behind them. I think there is only one settler that I know of who has a place there. Apart from that they have not very much to grieve about, only of course that they have to raise their hay there. They would have liked to have got some more of the bottomlands, but that would be impossible. [ACBD, Vol 4, Tab 365]

[91] Galbraith said that as a result of the mistake made in laying out the Reserve boundary lines, he knew of only one settler who had gone "behind them", likely an individual he later identified as Lyttle, who recorded his 160 acre pre-emption claim in 1898 and had it surveyed in 1908. But by 1910 more than the 160 acre Lyttle pre-emption had been surveyed. Individuals by the name of Haffner and Bruce had surveyed sub lots 131, 131A, and 115 totalling 960 acres and further surveys of sub lots 123 and 124 had been forwarded to the CCLW totalling an additional 800 acres, all totalling 1,920 acres. There is no evidence of the surveys of sub lots 123 and 124 being done for any particular individuals or that these were taken up by any individuals following the survey. They were not directly accessible from the Cranbrook to Golden Waggon Road (later a provincial highway), and it is likely that the Lyttle, Haffner, and Bruce parcels later became the source of the objection by the Province to the inclusion of the additional surrounding reserve lands recommended by the McKenna-McBride Commission. The following sketch details the sub lots surveyed by 1910 with the sub lots being transposed on Exhibit 1 from the survey sketches attached to the Field Notes of the surveys of the sub lots (ACBD, Vol 4, Tabs 351–55).


Mount Tegart
Sub lot 124
a
L 9245
(Kyttle)
Sublot
123
Sublot 131
(RR Bruce)
Sub lot
115
(Haffner)
Sub lot 131 A
(Haffner)

### A. Arguments of the Parties regarding the Survey Lands

[92] The Parties take opposing positions on whether Canada failed to discharge its fiduciary obligation in respect of the Survey Lands.

#### 1. Claimant's Arguments

[93] The Claimant argues, and Canada agrees, that the First Nation had a cognizable interest in the Survey Lands, and that Canada had a fiduciary duty of "loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" (Claimant's MOFL at para 156; Respondent's MOFL at paras 82–83, citing *Wewaykum* at para 86).

[94] The Claimant's case does not press for one of the more advantageous survey options. The case presented focuses on the assertion that the survey resulting in the loss of areas a and b was an error, and that it worked to the detriment of the Band and contrary to the Band's cognizable interest in the land. The Claimant further argues that the Respondent had a duty to act with reasonable diligence to correct the errors in Skinner's survey, and that Canada breached its fiduciary duty by accepting Skinner's changes resulting in the loss of areas a and b, and by then forwarding the survey to the CCLW for provincial approval (Claimant's MOFL at paras 193–97, citing *Blueberry River*).

[95] The Claimant notes that the Respondent was aware of the changes Skinner made to the boundaries of the Reserve based on the correspondence from Surveyor Skinner to O'Reilly dated May 12, 1887. The Claimant also references Indian Agent Galbraith's testimony before the McKenna-McBride Commission indicating that "a mistake was made when the reserve was first laid out" (Claimant's MOFL at paras 195–96; ACBD, Vol 4, Tab 365; AASOF at para 65).

#### 2. Respondent's Arguments

[96] The Respondent admits that Canada's unilateral undertaking set out in Article 13 of the *Terms of Union* "was sufficient to engage the pre-reserve creation fiduciary obligations described by the SCC in Wewaykum" (Respondent's MOFL at para 83). The Respondent argues, however, that the Survey Lands never became part of a provisional reserve and there was no specific obligation to include them (Respondent's MOFL at para 81).

[97] This suggested an issue relating to whether a provisional reserve was in place from the time Smithe (the CCLW) approved O'Reilly's Minutes of Decision in 1885 (Claimant's MOFL at para 207). However, in my view, it is not necessary to determine when the provisional reserve first came into existence. I find the Claim determined by the question of whether Canada met its fiduciary duties in the reserve creation process.

[98] Having said this, it is also my view that the Claimant's argument that a provisional reserve was established by the CCLW's approval of the Minutes of Decision in 1885 is the stronger argument. The survey function was restricted to accurately representing the land to be reserved with some discretion to deviate from the Minutes of Decision if it did not appropriately define the land intended, but the reserve creation decision was founded on determining the Band's cognizable interest and in essence settled by the CCLW's approval. But again, this Claim is determined not by whether a provisional reserve was in existence, but rather by whether the Survey Lands, parcels a and b, were part of the land in which there was a cognizable interest and hence were properly included in the Minutes of Decision and should have been retained in the survey through the reserve creation process.

[99] Canada's argument is that Skinner did not act in error, and further, that he acted in good faith, changing the boundaries to align with what he viewed to be the best interests of the Claimant (Respondent's MOFL at para 87). Canada states that Skinner omitted lands that he viewed as worthless, but he also prevented the bisection of an Indian field at the south end of the Reserve, and added more bottomlands, which were more valuable to the Claimant than mountainous lands and so the survey changes were on balance of advantage to the Band.

### 3. Analysis—Survey Lands

#### a) Cognizable Interest

[100] The Parties agree that the Claimant had a cognizable interest with respect to the land in issue in both the Survey Lands and the Additional Lands.

[101] The interest in land "capable of being known or recognized" (*Lake Babine Nation v Her Majesty the Queen in Right of Canada*, 2015 SCTC 5 at para 172, quoting *Black's Law Dictionary*, 10th ed, *sub vero* "cognizable"), in this case begins with the history of the

Indigenous people's use of the land in the area of Lower Columbia (Windermere) Lake, a part of the Kootenay traditional territorial area occupied by ʔAkisq̓nuk people from before first contact, and where ʔAkisq̓nuk people had set up residences when the area was first visited by O'Reilly in 1885. O'Reilly's objective was to create a reserve having regard to the "habits, wants and pursuits" of the Band capable of sustaining the ʔAkisq̓nuk after the loss of much of their traditional lifestyle, largely through their adoption of stock raising and subsistence agriculture as the means of making their living.

[102] Other Tribunal decisions have recognized cognizable interests based on the historical context of the land in issue. In *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 [*Kitselas*], the land was an ancient village site. In *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3, it was the main village occupied by the area's Indigenous people, until they were displaced by Crown grants to settlers.

[103] In dismissing Canada's application for judicial review in *Kitselas*, Mainville J.A. of the Federal Court of Appeal found at paragraphs 52 to 54:

> 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 in original; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6 [*Kitselas FCA*]]

[104] By 1884, when O'Reilly travelled to the Kootenays, the Claimant's livelihood had evolved from more traditional pursuits to significant reliance on stock raising, requiring large open range areas to graze their horses and cattle. O'Reilly's subsequent correspondence with Smithe, the CCLW, made this very clear (vide paragraphs 60 to 67 above).

[105] The importance of this then-contemporary use and occupation of the land used to sustain the Indigenous people resident in the area was recognized by O'Reilly in his duty as the IRC Commissioner to "define what land was necessary for them, having regard to their habits, wants, and pursuits, and to deal liberally with them", and in the attempt to fulfil Canada's Article 13 undertaking to participate in assuming the trusteeship and management of the lands reserved for their (the Indians') use and benefit (ACBD, Vol 2, Tab 127). Canada's duty to the Band in this regard was to take into account and have regard for this 'cognizable interest' in the land based on the Band's historical connection, present occupation and needs.

[106] A finding of cognizable interest is not in issue here and the above comments may be more than is required. In acknowledging this interest, the Respondent has agreed that the Claimant used both the Survey Lands and the Additional Lands for a variety of purposes, including "hunting, trapping, fishing, transportation, irrigation, harvesting plants for food and medicine, and grazing livestock, including horses" (AASOF at para 8). The Respondent also acknowledges that its unilateral undertaking set out in Article 13 of the *Terms of Union* was sufficient to engage the pre-reserve creation fiduciary obligations described by the Supreme Court of Canada in *Wewaykum*. But the nature of the cognizable interest is important in giving context to these obligations and is deserving of comment.

[107] The comments of the Supreme Court of Canada in *Williams Lake SCC* in respect of cognizable interest were as follows, at paragraphs 80 and 81:

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

[108] Wagner J. in *Williams Lake SCC*, recognized that the strength of the band's interest in the land tailored the content of Canada's fiduciary duty at paragraph 83:

> 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. [italics in original; emphasis added]

[109] Similarly, in *Wewaykum*, the Supreme Court of Canada emphasized that fiduciary duties will be context specific in relation to the reserve creation process:

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

[110] In *Wewaykum,* the Supreme Court of Canada recognized the duty as comprising 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" (para 94). The Crown's admission that fiduciary duties existed from the outset in respect of creation of the Columbia Lake Reserve references the *Wewaykum* obligations to the Band. The measure of diligence was indicated in *Blueberry River*: "…that of a man of ordinary prudence in managing his own affairs" (para 104 citing, *Fales v Canada Permanent Trust Co.*, [1977] 2 SCR 302 at 315).

### B. Canada's Duty in the Context of the Survey Issue

[111] The mistake identified by Agent Galbraith, in his evidence before the McKenna-McBride Commission, was in not laying out of the eastern boundary of the Reserve, "to the mountains and that land could have been kept for all time as a forest reserve" (ACBD, Vol 4, Tab 365). The description of the land area as a forest reserve may suggest a forestry use, perhaps a more modern use of the land in 1914, or simply be a reference to the fact that timber was located in this area under consideration for addition to the Reserve as grazing land. Galbraith's later presentation to the Commission (vide paragraph 128 et seq.) was for a 3,000 acre extension to the Reserve as additional land for the Band's cattle and horses.

[112] If O'Reilly had adopted a more liberal role in setting the eastern boundary to better follow the contour of the land it would have had the following effects: 1) it would have better served the intention of securing useful grazing land using traditional lands extending to the mountains; 2) the eastern boundaries of the Reserve would have been set to include the "L" shaped area that became Crown granted lands; and, 3) the stated objection, that the McKenna-McBride addition to the Reserve would surround Crown granted lands, would not have had currency in the Ditchburn-Clark process of settling the McKenna-McBride additions. The then Crown granted lands would already have been included in the Reserve.

[113] If in conducting the survey Skinner had done nothing more than follow O'Reilly's Minutes of Decision in setting the eastern boundary, a further 960-1,000 acres of land would have been included in the Reserve as intended by O'Reilly. Further, a portion of the 1,120 acres surveyed and likely alienated at the time of the McKenna-McBride Commission, near the centre

of the Reserve, would not have been made available for pre-emption or purchase. The portion of usable land not accounted for by the instructions in the Minutes of Decision, although still of significant area, would have been further to the east of the Reserve and the less desirable characteristics of this land may have dissuaded applicants to take up the balance of the land under the *Land Act*. The land if not taken up would have remained, as most of the western slope of the mountain is today, Crown land.

[114] The result of following the Minutes of Decision on the land made available for Crown grants is shown on the blown up sketch from Exhibit 1. Area a overlays the western portions of the Lyttle, Bruce and Haffner properties. In the case of the first settler, Lyttle, it covers one-half of his pre-emption. In the case of Bruce, one-quarter of the land he surveyed; and in the case of Haffner, one-quarter of one of the two equally sized adjoining properties he surveyed.

[115] Would the Province's stated grounds that the allocation of the 2,960 acres was not reasonably necessary have sustained the Province's objection even if there was no issue of the surrounded lands? First, there would have been less land in issue. If 360 acres of the additional land had already been included in the Reserve by Skinner (1/3 of area a and ½ of area b), there would have been less to take issue with in extending the Reserve to the new simpler geometric form that seems to have been intended by the Commission configuration. Further, if a good portion of the Crown granted land had already been included in the Reserve by a more liberal allotment in the Minutes of Decision, or, at the least, there had been stricter adherence to the Minutes of Decision, there would have been a smaller portion of useful land to the east of the Reserve available for alienation under the *Land Act*, and this area may have been of lesser value to settlers on its own. In short, a smaller McKenna-McBride addition that did not enclose Crown granted land, may not have fuelled a dispute.

### C. Conclusion

[116] Does the survey Skinner actually set fail to comply with Canada's fiduciary duty to the Band? In my view, it does. The Reserve was traditional land required for a significant purpose: to sustain the families who used the land for their livelihood by providing grazing land for their sizeable numbers of livestock. An ordinary person setting aside land, acting on their own behalf, would have accommodated this purpose with truer accommodation of the need. Skinner's stated

purpose of excluding rocky useless land, only relevant to the top portion of area a, did not result in an improvement in the Reserve allocation, but rather worked to exclude significant useful land and make land available for alienation in a sensitive area of the Reserve. Area b is the result of simple inadvertence (as in *Blueberry River* per McLachlin J. (as she then was) at para 94). No reason for its exclusion is given by Skinner, and again, it resulted in useful land being excluded from the Reserve.

[117] In *Blueberry River*, McLachlin J. (as she then was) stated that the Crown had "an ongoing fiduciary duty to act to correct error in the best interests of the Indians" (para 115). She stated further:

> Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other…
>
> In these circumstances, a fiduciary duty to correct the error lies.

[118] Similarly, in the present case, the Crown had the power to revert back to the original Minutes of Decision, or to adopt a better survey option once the changes were reported by Skinner.

[119] The Band was totally reliant on Canada through this process. These areas were lost as a result of Skinner exercising a discretion allowing him to modify the Minutes of Decision, but there was no justification for the discretion to be exercised to the Band's detriment. Canada's submission that in total, with the southern addition, the changes were beneficial does not in my view act to redeem the loss of the areas excluded. The additional southern portion was not in compensation, but added to the Reserve to accommodate the fact that it already had been put to use as a garden area.

[120] If Canada had been guided by the Claimant's cognizable interest in the land to the east of what became the eastern boundary of the Reserve, areas a and b would not have been excluded. I see the cut off portions a and b as being an unjustified omission in setting out the land indicated in the Minutes of Decision which itself did not fully recognize the Band's cognizable interest in including a more expansive eastern area in the Reserve. At the least, the areas Skinner cut off should have remained in the survey and the survey without these areas should not have been put

forward in the reserve creation process.

[121] I agree with the Claimant's position and find its Claim that areas a and b were improperly excluded to be valid under paragraph 14(1)(c) of the *SCTA*.

## IX. THE MCKENNA-MCBRIDE COMMISSION

[122] The continuing unsettled process of reserve creation resulted in a federal-provincial agreement (McKenna-McBride Agreement) signed September 24, 1912. The preamble to the terms of agreement were as follows:

> WHEREAS it is desirable to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia, therefore the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia:
>
> > 1. A Commission shall be appointed as follows: Two Commissioners shall be named by the Dominion and two by the Province. The four Commissioners so named shall select a fifth Commissioner, who shall be the Chairman of the Board.
> >
> > 2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:
> >
> > (a) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.
> >
> > (b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.
> >
> > 3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.
> >
> > 4. The lands which the Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the Province at public auction.

> 5. The net proceeds of all such sales shall be divided equally between the Province and the Dominion, and all moneys received by the Dominion under this Clause shall be held or used by the Dominion for the benefit of the Indians of British Columbia.
>
> 6. All expenses in connection with the Commission shall be shared by the Province and Dominion in equal proportions.
>
> 7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians, including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians, subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial boundaries of the Province which have been conveyed to the Dominion as aforesaid for such tribe or band, and not sold or disposed of as hereinbefore mentioned, or any unexpended funds being the proceeds of any Indian Reserve in the Province of British Columbia, shall be conveyed or repaid to the Province.
>
> 8. Until the final report of the Commission is made, the Province shall withhold from 1)pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that ally lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for any Dominion or Provincial or Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect. [ACBD, Vol 4, Tab 356]

[123] Both the Province and the Dominion passed Orders in Council, agreeing:

> …to consider favourably the reports whether final or interim, of the Commission, with a view to give effect as far as reasonably may be to the Acts, proceedings and recommendations of the Commission and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the Agreement in accordance with its true intent and purpose. [ACBD, Vol 4, Tab 420]

[124] The Commission established, the Royal Commission on Indian Affairs, consisted of five commissioners, who travelled throughout the Province for three years, taking evidence and compiling a report, dated June 30, 1916.

[125] This Commission, designed to settle differences between the two governments in an

attempt to bring the process of reserve creation stipulated in Article 13 of the *Terms of Union* to an end, was not undertaken at the request of the bands or other Indigenous groups. The Indigenous organization of the day, the Allied Tribes of British Columbia (Allied Tribes), was not in favour of re-examination of reserves as contemplated by the terms of agreement of the McKenna-McBride Commission, and pressed for recognition of Aboriginal title, which, if successful, would have opened up greater entitlement to British Columbia lands. Their objections to the process were met with Canada's assurances that recommendations of the Commission would be disclosed to them and not implemented without their consent (Cole Harris, *Making Native Space, Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, 2002), at 229 [Harris]). Paragraph 2(a) of the McKenna-McBride Agreement expressly stipulates that reductions in reserve acreages would require "the consent of the Indians, as required by the Indian Act", explicitly setting out such an assurance.

[126] On September 21, 1914, the Commission took evidence from Chief Arbel and Ignatius Eaglehead, both of whom resided on the Lower Columbia Lake IR No. 3. Ignatius Eaglehead was asked about grazing land for his stock. He was asked:

> Q. How much of the reserve is good for grazing – half, a quarter or three-quarters?
> A. I would have some good range land but on account of my lines running sigzag it has cut off some good grazing land on the east side between the boundary of the reserve and the mountain. [ACBD, Vol 4, Tab 364]

[127] At a later point, he was asked:

> Q. How many head of cattle have the Indians of the Band altogether?
> A. Four hundred head.
> Q. How many horses?
> A. A thousand head.
> Q. Do these cattle and horses graze within the reserve or do they go outside the reserve?
> A. They go outside.
> Q. Do they get their grazing mostly outside of the reserve?
> A. Yes, they get most of their grazing outside of the reserve.
> Q. Where abouts outside – across the river?
> A. They range over the country between Canal Flats, Dutch Creek, up the lower Columbia lake and the Columbia river and also on Armstrong's range.
> Q. If the Indians had to keep their horses and cattle within the reserve how many would they be able to keep?
> A. It would be just a few apiece.
> Q. About how many cattle do they sell in a year?
> A. I don't know. Each man sells his own.

> Q. Speaking from your own knowledge, do they sell many horses?
> A. I used to sell many a long time ago but now it is almost gone and that is the reason why I want to get some land so that I can increase my stock.
> …
> Q. How many Indians are there in this Band – men, women and children?
> A. You can find that from the Indian Agent, but I can say there are 43 persons with farms.
> Q. What is the principal source of living?
> A. The principal way of the Indians making their living was by hunting.
> Q. And how is it now?
> A. At that time when I was making my living by hunting I did not use much of my stock, so in that case I think that every kind of game was helping me to increase my stock in that way. Now at the present time since there is only my stock where I can make my living on they are decreasing very fast now.
> Q. And as you have to make your living on your stock now, they are decreasing rapidly are they?
> A. Yes.

[128] Agent Galbraith's evidence to the Commission on October 14, 1914, identifying the mistake in not extending the Reserve to the mountains was followed by a sketch he submitted at the Commission's request on December 9, 1914, marking out an area he thought could possibly be provided for the ʔAkisq̓nuk as additional land for their cattle and horses (ACBD, Vol 4, Tab 368). On February 12, 1915, he gave a further report:

> The only available land I find near [I.R. 3] is north of Lots 122, 115 & 124 and is partially covered with very small timber and is not fit for cultivation. If 3000 acres can be found near there, I would recommend it be added to the reserve. [AASOF at para 67]

[129] This resulted in the Commission recommendation on March 29, 1915, that 2,960 acres be added in the areas spoken of by Agent Galbraith. By December 7, 1915, the 2,960 acre parcel was confirmed as vacant and available lands by the Province and noted on maps as a "new reserve".

[130] The final report of the McKenna-McBride Commission dated June 30, 1916, finalized the recommendation of an addition of 2,960 acres of land, extending the eastern boundary further into the upland areas. The new eastern boundary of the Reserve would have eliminated the central stepped section and would have created a more regular, essentially triangular shape to the Reserve, but would have surrounded plots of land either already alienated or subject to being sold by the Province. Exhibit 1, the topographical map of the Reserve, shows the area intended as an addition to the Reserve, a cross-hatched area to the east of the Reserve boundaries.

[131] Notwithstanding the Order in Council directing that the report be considered favourably, "with a view to give effect as far as reasonably may be, to the Acts, proceedings and recommendations of the Commission" (ACBD, Vol 4, Tab 420), the provincial government did not approve of the Commission report and reserve settlement entered a further unsettled period of disagreement between the governments.

[132] Ultimately, after a strong letter of complaint by Arthur Meighen, the Federal Minister of the Interior, to T. D. Pattullo, the Provincial Minister of Lands, Pattullo proposed, in April 1920, that a Review Commission consisting of a representative of each government with the objective, again, being to come to an amicable conclusion, this time to be based on a review of the McKenna-McBride recommendations. This became the Ditchburn-Clark review. Ditchburn was the Chief Inspector of Indian Agencies for British Columbia and Clark was the provincial official responsible for providing lands for returned soldiers who had served in the First World War. Again, this did not come at the request of the Indigenous people affected by the McKenna-McBride recommendations, which included some additions to reserves and new reserves, but also contentious cut offs and cancellations of reserves already allotted.

[133] Although the Commission's report was complete by July 1916, the contents were not revealed to the Allied Tribes until 1919 (Harris at 249). The Allied Tribes remained opposed to the process of reviewing reserves and particularly objected to lands being cut off and cancellations of reserves as a result of the Commission's recommendations. Ditchburn found Clark to be reluctant to make provision of any additional reserve lands. In a February 23, 1923, letter to D. C. Scott, the Deputy Superintendent General of Indian Affairs in Ottawa, he commented:

> I would have greatly preferred if the Provincial Government had appointed somebody with broader views on Indian matters than Major Clark has. While he is a very decent fellow, still he is inclined to be very cheese paring where a few acres of land are concerned. For instance: if a ten acre fishing station is recommended, he will want to know if five acres would not do, and so forth. [ACBD, Vol 4, Tab 410]

[134] Ultimately, the two representatives were able to come to agreement on most of the provisions of the McKenna-McBride recommendations. They failed to agree, however, on additional reserve land being allocated in the Kootenay District.

[135] In Clark's report to the Minister of Lands, he indicated that he disagreed with Ditchburn in respect of the 2,960 acres to be added to IR No. 3 as "not reasonably required by the Indians" and "interfering seriously with the white settlement. Completely encircles Crown granted lands". In Ditchburn's report to Scott, he described the disagreement with Clark in very similar terms (ACBD, Vol 4, Tab 416): "New Reserve No. 3A of 2960 acres for the Lower Columbia Lake Indians was disallowed [by Clark] as not reasonably required by the Indians and seriously militat[es] against the white development. The proposed new reserve completely encircled Crown-granted lands." Ditchburn also reported that there was no agreement on the 1,940 acres recommended for addition to the Shuswap Reserve, north of Invermere. He continued:

> The decisions with regard to these new reserves were taken by Major Clark on the recommendation of the Grazing Commissioner [Thomas P. Mackenzie]. Objection was taken by myself on the grounds that the additions were necessary for the reasonable requirements of the Indians and statistics were brought forward to bear out my argument. Major Clark, however, has recommended that a grazing commonage (not a reserve) for the joint use of the Shuswap and Lower Columbia Lake tribes be allowed by the Grazing Commissioner for the use of Indian stock only and free from all grazing fees. [March 27, 1923, Chief Inspector Ditchburn final report to D.C. Scott, Deputy Superintendent General of Indian Affairs, on the results of his negotiations with Major Clark; ACBD, Vol 4, Tab 416; AASOF at para 89]

[136] Ditchburn's statistics were based on acreages needed to graze horses and cattle, multiplied by the stock actually being raised by the members of the Band. He viewed his calculations as justifying the 2,960 acres of Additional Lands, as shown in a letter from Ditchburn to the British Columbia Minister of Lands dated March 16, 1923 (ACBD, Vol 4, Tab 415).

[137] Ditchburn had earlier commented on the possibility of a grazing commonage, being established for the two bands. In his March 11, 1923, letter to Scott, he reported (ACBD, Vol 4, Tab 413): "In closing his report on the Kootenay Agency, Major Clar[k] has added a recommendation that a grazing commonage (not an Indian reserve) be found for the Shuswap and Columbia Lake Indians but I stated that as there would be no security of tenure under such an arrangement I could not agree to it."

[138] The point is a valid one. The grazing commonage would remain provincial land subject to the vagaries of a provincial government that went to great lengths to not lose title to land to

create reserves. Further, the ‘commonage’ would have been for the use of two bands, one of Kootenay people and the other, people of Shuswap heritage.

[139] Pattullo’s letter to Scott following the disparate reports, casts them “in general agreement and are largely a confirmation of the report of the Royal Commission with a few amendments, additions and deductions to the Reserves, confirmed cut offs and new reserves” (ACBD, Vol 4, Tab 417).

[140] He then identifies the area where they were not in accord, in relation to the Kootenay lands. He then follows with: “The Provincial Grazing Commissioner has investigated this questi[on] and a copy of this memo is submitted herewith. His recommendation, if adopted, should dispose of the matter in so far as the Lower Columbia Lake Band and the Shuswap Tribe are concerned.”

[141] Pattullo proposed that settlement be reached on the basis of Clark’s report with the additional grazing commonages. Initially, Scott asked that the Province reconsider its objection to the additions to the Kootenay reserves. However, Scott’s reply of April 9, 1923, abandoned Ditchburn’s objections and essentially agreed with Pattullo’s proposal. He stated (ACBD, Vol 4, Tab 419): “There would appear to be no reason, therefore, that the powers given the Governments by the statute should not be invoked, and the revised schedule of confirmations, cut-offs, and new reserves be adopted by both Governments.” A federal Order in Council was enacted to approve of the agreement seemingly reached between Pattullo and Scott. The two Orders in Council were essentially the same. However, the federal document stated that the Dominion was to retain control of reserves on the lands transferred to the Dominion in the process of construction of the Canadian Pacific Railway (ACBD, Vol 4, Tabs 422–23).

[142] Despite the previous assurances, Canada did not seek Indigenous consent to the resolution reached by the Dominion and the Province, nor is there any evidence of disclosure to the Kootenay bands of Canada’s intention to resile from its position in regard to the land recommended for the Kootenay reserves (Harris at 260). It is clear that the supposed settlement did not result in any material advantage to the Kootenay bands and Canada’s actions appear to have been based on a decision to attempt to end the matter, through abandoning the recommended Additional Lands.

[143] The transfer of the reserves did not follow and the matter remained in abeyance until 1938. The question of a grazing commonage was raised again by Ditchburn to the Grazing Commissioner on June 7, 1927. The Commissioner again promised to look into the matter of the commonage. Ditchburn wrote again on June 30, 1927:

> On this point I beg to say that at the time of the settlement of the Report of the Royal Commission of Indian Affairs, it was fully understood from your Deputy Minister and yourself that in lieu of the reserve which had been recommende[d] by the Royal Commission you would set aside a large grazing area for the use of the Indians, and I trust that you will not overlook this, as it is important that the Indians should feel assured that they will have plenty of room for the grazin[g] of their stock. [ACBD, Vol 4, Tab 433]

[144] Nothing was put in place and the Band ultimately got nothing out of the McKenna-McBride process.

### A. Retrospect on the McKenna-McBride Commission

[145] Indigenous views on land issues were advanced by the Allied Tribes, an organization very interested in pressing for recognition of Aboriginal claims to title. The Allied Tribes felt that adjustment of the reserve lands was a misplaced effort in that it did not join the issue of Aboriginal title, and was likely to prejudice their efforts to have Aboriginal title recognized (Harris at 255, 257).

[146] The Ditchburn-Clark review was to include the assistance of James Teit, an anthropologist who was familiar with First Nations' views on reserve creation. However, Mr. Teit died not long after the review began. Mr. Teit's role was to ascertain the needs of the interior First Nations. As far as he was able to participate, his advice was that they all required greater areas of grazing land (Harris at 252).

[147] The federal government knew the Province would not participate if the issue was Aboriginal title, and avoided the issue. Canada was of the view that the Commission was restricted to a review of allocations of reserves made in accordance with Article 13 of the *Terms of Union* and the federal-provincial agreement that guided the JIRC, and later the IRC process (the Commission after installation of a single Commissioner has been referred to as the IRC). Specific issues that occupied Canada's attention included the Province's pursuit of the return of lands it wanted cut off from existing reserves, and the allocation of additional reserve lands

sought by bands in many of the areas of the Province. Canada participated in these negotiations, but at the same time, assured the Allied Tribes that it would not agree to reductions or cut offs to reserves proposed by the Commission without the consent of representatives of the indigenous groups (Harris at 229, 246).

[148] Ultimately, the Province met with a marked degree of success in obtaining cut offs from original reserve allocations. A contrast between the amount and value of cut off lands as compared with additional allocations contained in the recommendations of the Commission is as follows:

> The area and value of additions and new reserves is 87,561 acres valued at $458.000.00. The area and value of the deductions from existing reserves is 46,452 acres valued at $1,979,000.00. [Letter from Scott to Senator Bostock, ACBD, Vol 4, Tab 395]

[149] A further issue advanced by the Province was in respect of cut off lands from reserves located within the Railway Belt; land already ceded to the Dominion as part of the *Terms of Union* that led to the construction of a railway connecting the Province to the rest of the Dominion.

[150] The McKenna-McBride Commission recommendations contain sizable concessions won by the Province, who nonetheless remained reticent to a settlement based on the report. Mistaken calculations and other errors were alleged. Canada approved of a settlement of the very long outstanding dispute on the terms recommended, but again agreed to a review of the McKenna-McBride Commission recommendations after several years of provincial stalling, in 1920, by the subsequent Ditchburn-Clark review, looking again for some means of bringing the matter to resolution. Ditchburn, an official with the Federal Department of Indian Affairs, was motivated to lose as little as possible through the review and felt he was largely successful in this regard, except in respect of the Kootenay reserves. These became the last impasse, and, as described above, these lands were abandoned with the objective of bringing the governmental dispute to a seeming end.

## B. Arguments of the Parties regarding the Additional Lands

### 1. Claimant's Arguments

[151] The Claimant argues, among other things, that the Respondent had a fiduciary duty to

disclose, inform and consult with the First Nation and to take any action available to advance the interest of the First Nation acting with ordinary prudence as if managing its own affairs, in relation to the Additional Lands (Claimant's MOFL at paras 183–92, 214, citing these Tribunal decisions: *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2015 SCTC 6 at paras 99–100; *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2 at para 208; *Tobacco Plains Indian Band v Her Majesty the Queen in Right of Canada*, 2017 SCTC 4 at para 195; and this decision of the Supreme Court of Canada: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193).

[152] The Claimant asserts that the Additional Lands became part of a provisional reserve in March 1915, once the McKenna-McBride Commission had recommended the allotment of the Additional Lands (Claimant's MOFL at para 225).

[153] The Claimant argued that although the Respondent was engaged in an attempt to finally settle the "Indian Land Question" in the interest of all "bands" that were allotted reserves, any such obligation could not override the individual fiduciary obligation owed to the Claimant (Claimant's MOFL at para 205).

[154] Lastly, the Claimant asserts that the failure to settle the Additional Lands issue should have prompted Canada to employ the Article 13 reference process, stipulated for resolution of "a disagreement between the two Governments respecting the quantity of…tracts of land". Such a reference in accordance with Article 13 was to be advanced to the British Secretary of State for the Colonies (Claimant's MOFL at paras 226–29).

### 2. Respondent's Arguments

[155] Canada disagrees with the contention of the First Nation that the Additional Lands were a provisional reserve. Canada states that the McKenna-McBride Commission had only the power to make recommendations, subject to approval by both governments. The Additional Lands were never formally accepted for addition to the Reserve; thus it never became part of a reserve under the *Indian Act* or a provisional reserve (Respondent's MOFL at paras 91–92, citing *Wewaykum* at paras 50–51).

[156] The Respondent states that it actively pursued the 2,960 acre addition to the Reserve and

that its actions fulfilled its fiduciary duty to the Claimant to act in its best interests with respect to the Additional Lands (Respondent's MOFL at para 112).

[157] Canada says that it also had a broader duty to reach consensus with British Columbia on a final determination of reserves for all First Nations in the Province. Canada argued that it had a fiduciary duty to be even-handed towards and among the various beneficiaries or First Nations (Respondent's MOFL at paras 119–20, citing *Wewaykum* at para 97 and *Williams Lake SCC* at para 55). Canada says it was concerned that it should not delay in reaching agreement with British Columbia in order to avoid losing a significant amount of land allotted to other First Nations in British Columbia, as recommended by the McKenna-McBride Commission Report, and amended by the Ditchburn-Clark review (Respondent's MOFL at para 123).

[158] Lastly, the Respondent says that its decision not to pursue a reference to the Secretary of State for the Colonies was reasonable, given the fact that any positive result for British Columbia First Nations was unlikely (Respondent's MOFL at paras 13, 167). Furthermore, the relationship between Canada and the colonial authority that existed at the relevant time did not offer a reasonable means of dealing with the dispute (Respondent's MOFL at para 168).

## X. DISCUSSION: EMPLOYING THE DISPUTE RESOLUTION REFERENCE IN ARTICLE 13, *TERMS OF UNION*

[159] The dispute resolution provision in Article 13 of the *Terms of Union* was never invoked by either level of government. Other means of resolution were stipulated through the JIRC, and later the IRC process; initially contemplating a reference to the Lieutenant Governor. Later, by reference to a judge of the British Columbia Supreme Court. Like the Article 13 reference, these two forms of resolution were never employed.

[160] As indicated by the evidence of Dr. Kennedy, there was considerable evolution in the relationship of the federal and provincial governments with the Government of Great Britain through the history of events 1871–1938. Canada and its provinces were emerging from colonial influences and Great Britain was standing down from its imperial role. In Dr. Kennedy's view, the office of the Secretary of State for the Colonies never showed much interest in taking on settlement of Colonial disputes. The Secretary would predictably send such matters back for further attempts at resolution by the disputing Parties.

Dr. Kennedy observed:

> The British were not prepared to acknowledge [a] continued relationship with the Aboriginal people…and, importantly, were unwilling to become involved in disagreements between Canada and British Columbia regarding settlement of the Indian Land Question. Consequently, no disagreements between Canada and the Province with respect to the quantity of lands to be granted for the use and benefit of Indigenous people were ever referred for decision to the Secretary of State for the Colonies by the two governments and any attempt to do so by the Aboriginals was met by demurral from Britain. [Kennedy Report at 74]

[161] Nonetheless, the role was express in the *Terms of Union* and Dr. Kennedy's evidence given to questions put by the Tribunal relating to the prospect of the secretary providing a resolution, if a final question all the disputes were to be jointly posed by the two referring governments, was as follows:

> Tribunal: ...Dr. Kennedy, I am looking at Article 13.
>
> Witness: Mhmm.
>
> Tribunal: And I think I gathered from some of what you said today that, for a dispute to come to the Secretary, it first of all would have to have been advanced by one of the governments, or perhaps both, and I thought perhaps you were suggesting that to really engage the Secretariat, perhaps would have to be both?
>
> Witness: Yes, I think there would have to be agreement between the provincial and the federal government to take it forward.
>
> Tribunal: So the words in the last half-sentence in Article 13: "and in case of disagreement between the two governments, respecting the quantity of such land, tracts of land, to be so granted, the matter shall be referred for the Decision of the Secretary of State for the Colonies." And so that referral, then you think would have … to have any prospect of intervention by the Secretary, …[to] have been advanced by both governments, with a fairly clearly described dispute, I suppose.
>
> Witness: Yes.
>
> Tribunal: And, then of course, they could each advance their arguments in respect of what each of them had proposed.
>
> Witness: Yes.
>
> Tribunal: And, if it were so described, and came before it seems, Carnarvon, [who] … shouldered, much of the responsibility of the Secretary for the relevant periods of time, it would have then a better prospect I take it, and he may have then acted more decisively in the matter.

| | |
|---|---|
| Witness: | I think if it had the support of both governments, it would certainly receive some response, but the consistent response from Britain was that they didn't want that involvement. |
| Tribunal: | I appreciate that, but in light of the words of the Article, and were to be joined by both governments, it seems to me it likely would have carried more weight. |
| Witness: | Yes. |
| Tribunal: | Was there ever any discussion in your research that would have joined both governments in such a referral? I hear you that there was certainly discussion from the federal government's point of view, with reference to that part of the Article. Did the provincial government join in any of that at any time? |
| Witness: | In the early days, in the mid-1870s, the Province was more inclined to engage with Britain, but the Province had such a bad reputation with Britain, that it would have been difficult for them to bring it forward without the support of Canada. |
| Tribunal: | But if they had support of Canada, that would have been one of those cases, perhaps, that had better prospect? |
| Witness: | If they had the support of Canada. But British Columbia wanted to separate title from reserve creation, and then they were caught up with the reversionary interest in the lands, and so there was little common ground for them to go forward. |
| Tribunal: | Mhm. Article 13 doesn't seem to have much to do with title; it has, seems to be solely designed to the setting aside of appropriate lands. |
| Witness: | Yes. |
| Tribunal: | To house the various First Nations populations. |
| Witness: | Exclusively. |
| Tribunal: | …So any interjection of the question of Aboriginal title would have come from the Province I take it, in their efforts to try and squelch that sort of thing? |
| Witness: | Yes, the Province never acknowledged Aboriginal Title. |
| Tribunal: | No. |
| Tribunal: | [A]fter, say, the 1870s, which of course are almost coincident with Article 13, which 1871, it didn't seem that the Province was much inclined to reach to the State Secretary for any sort of resolution. Is that fair enough? |
| Witness: | I'd say they were very disinclined. [Hearing Audio Recording, Oral Submissions, January 29, 2019, at approximately 16:10 P.M. and 16:16 P.M.] |

[162] If the question of the Kootenay reserves had been jointly referred under Article 13 of the *Terms of Union*, the above indicates some prospect for the Colonial Secretary to have ended the

decades' long dispute. It has to be recognized, however, that some measure of goodwill would have had to have been demonstrated by the Province, a commodity not much in evidence, and Canada's case in support of the Kootenay band's claims, and specifically the claim for additional land to be annexed to IR No. 3, would have had to prevail if the resolution were to be in the band's favour.

[163] Canada explored the prospect of advancing a reference to the Secretary of State for the Colonies well into the McKenna-McBride, Ditchburn-Clark process. In April 1915, Justice Deputy Minister E. L. Newcombe gave Deputy Superintendent General of Indian Affairs Duncan Campbell Scott an opinion stating that the McKenna-McBride process had likely superseded the Article 13 of the *Terms of Union* provision regarding a reference to the Secretary of State for the Colonies (E. L. Newcombe to Duncan C. Scott, 26 April 1915. L.A.C., RG 7, Series G 21, Vol. 321, File 2001, Part 7 (b) 1909–1914, cited in the Kennedy Report at 71).

[164] Dr. Kennedy opined that after the provision of this opinion, "[t]he likelihood of the Dominion approving a reference to the Secretary of State for the Colonies under Article 13 diminished significantly" (Kennedy Report at 71). The opinion, however, assumed the McKenna-McBride Commission process would result in a final determination. This did not happen in respect of the Additional Lands, and the allotment of the Additional Lands remained, in the words of Article 13 of the *Terms of Union*, "a disagreement between the two Governments respecting the quantity of such tracts of land".

[165] There is no express record of the rejection of the referenced approach. Further, Scott himself recognized the Article 13 of the *Terms of Union* reference as being viable in his letter dated February 7, 1917, to Senator Hewitt Bostock, Speaker of the Senate and a British Columbia Senator resident at Kamloops, which stated in part:

> I think it is advisable that the Province and the Dominion should come to a reasonably speedy and harmonious decision on the Commission's report, otherwise the question would have to be referred to the Secretary of State for the Colonies under the provisions of Clause 13 of the Terms of Union. [ACBD, Vol 4, Tab 395; ASOF at para 77]

[166] However it seems evident that Scott ultimately decided not to use Article 13 of the *Terms of Union*, and to accept the approach put forward by Pattullo, including the doubtful prospect of

the grazing commonage. It seems clear that Scott thought that abandoning the claim for additional reserve land in the Kootenays was likely to settle the overall process of reserve creation, and the seeming resolution of the dispute must have been a compelling prospect, but that was not the result, or at least was not the result for the next 15 years. Had Scott not proceeded to settle the matter by abandoning the Kootenay additions, his original suggested course of action, "otherwise the question would have to be referred to the Secretary of State for the Colonies under the provisions of Clause 13 of the Terms of Union" (ACBD, Vol 4, Tab 395), would have become the prospective alternative. This too carried risk that the matter would not be resolved, or not resolved to the advantage of the Band.

[167] But this opportunity for a reference to the Secretary of State for the Colonies was lost through Canada's management of the issue.

## XI. CANADA'S FIDUCIARY RELATIONSHIP TO THE BAND

[168] The Supreme Court of Canada, in *Wewaykum,* analyzed Canada's fiduciary role towards Indigenous people in the Province, during the process of setting reserves. Before the transfer of reserve lands to the Dominion in 1938, land that functioned as a reserve and was managed by Canada as a reserve set in accordance with the *Indian Act*, was termed in *Wewaykum* a provisional reserve. Binnie J. discussed Canada's duty in this context as follows, at paragraph 89:

> In the present case the reserve-creation process dragged on from about 1878 to 1928, 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.

[169] In *Wewaykum*, Binnie J. also noted that the fiduciary duty was not plenary and existed only in relation to "specific Indian interests" (para 81). He explained the general approach for finding a *sui generis* fiduciary duty at paragraphs 83 and 85, as follows:

> 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]

### A. Discussion: Canada's Fiduciary Duty with Respect to the Additional Lands

[170] The Parties agree that the applicable law in respect of Canada's fiduciary relationship in the course of reserve creation begins with consideration of *Wewaykum*.

[171] When Agent Galbraith introduced the addition to the Reserve in recognition of the need for more area to the east of the boundaries set by Skinner, he extended the line Skinner set between Stations 5 and 6 another 160 chains to the east, to a point near the peak of Mount Tegart, the mountain to the east of that portion of the Reserve. The eastern boundary he set then extended 380 chains to the south, before turning 40 chains to the west, to join the southern leg of the existing eastern boundary. This avoided the central narrowing of the Reserve boundary and gave the Reserve a nearly triangular overall shape. It added 2,960 acres, much of which would have been useful as included grazing areas. The Additional Lands would have otherwise been of little use to others intending to settle in the valley.

[172] The Additional Lands, however, enclosed the Crown granted parcels and during the Ditchburn-Clark review process this fact ultimately became an impediment to the recommended inclusion of the Additional Lands. It was not that these parcels were inaccessible. The Cranbrook to Golden Waggon Road and later the provincial highway, gave public access to this area from outside the Reserve, but the Province nonetheless took the fact of the enclosure as a negative feature in respect of the eastern addition to the Reserve.

[173] The recommendations of the McKenna-McBride Commission could not have been unilaterally endorsed by Canada. The agreement establishing the Commission still required provincial ratification. This did not follow and the continuing delay by the Province led to the Ditchburn-Clark review. Throughout this, the Band was dependent on Canada's representation but, at this stage, Canada was confronted with the Province's apparent agreement to a resolution acceptable to Canada, except for non-inclusion of the Additional Lands for the Kootenay bands. Resolution of the five decades old process of reserve allocation appeared to hang in the balance. Ultimately, Canada abandoned the Kootenay additions and agreed to Pattullo's terms but again,

resolution remained elusive and the land transfer remained outstanding until 1938.

[174] The Parties agree that the Band had a cognizable interest in the additional lands based on a full list of previous and then current uses of the land. Canada's fiduciary duties arose from assumption of its role in acting for the Band during the reserve creation process. This duty included the duty 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" (*Wewaykum* at para 94). Canada argues that it had conflicting obligations to the many other bands it represented through these processes and was required to take the best option available in satisfaction of its multiparty obligations.

[175] There was, however, no consensus by the Bands to enter into the McKenna-McBride process. The Allied Tribes were opposed to the limited scope of the Commission and the prospect of cut offs to reserves. They were assured by Canada that the recommendations of the Commission would be subject to First Nations' approval, but they were not given the final report until 1919, three years after the Commission had completed its report (Harris at 229, 246, 251).

[176] Canada attempted to get to agreement with the Allied Tribes and other Indigenous representatives after the Ditchburn-Clark review was completed but, again, they could find no Indigenous support. Scott tried to get Pattullo to reconsider, but ultimately, Scott acted independently of any First Nations support and entered into the agreement with Pattullo (ACBD, Vol 4, Tab 419).

[177] Canada argues that it was pursuing the greater good, or as the Respondent puts it: "the need to consider 'conflicting interests' in balancing the Claimant's interest in the Additional Lands against the interests of all other First Nations in British Columbia awaiting resolution of the longstanding issue of reserve creation" (Respondent's MOFL at para 122). Notwithstanding it had no support for its actions, the Respondent argues that it was justified in abandoning the Additional Lands claim to secure this objective.

[178] The changes recommended in the McKenna-McBride Report, themselves, did not disproportionately favour the First Nations. The acreages to be added as reserve lands were considerably more than the deductions recommended, but these additional areas were of

comparatively lesser valued lands. The value of the additions was only one-quarter of the value of the deductions. In the final analysis, the Ditchburn-Clark review resulted in five cut offs recommended by the McKenna-McBride Commission being reversed (Harris at 253), but also a loss of recommended additions to 20 reserves, 6,000 acres of which were intended for grazing purposes for the Kootenay reserves (Harris at 253), including the 2,960 acres intended for Columbia Lake IR No. 3 (AASOF at para 101). I do not find in this a clear advantage to be preserved.

[179] The value in these processes, from Canada's perspective, was to be found in the supposed resolution achieved. The additions and the deductions on balance may not have assisted the First Nations, but confirmation of the reserves established prior to the McKenna-McBride Commission, and the quieting of provincial claims for reversionary rights, were seen as achievements.

[180] In 1923–1924, both governments passed Orders in Council adopting the revised Ditchburn-Clark Report, as a "full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfilment of the [McKenna-McBride Agreement] of the 24th day of September, 1912, and also of Section 13 of the Terms of Union" (Order in Council PC 1265; ACBD, Vol 4, Tab 422). The federal statute empowering the adoption of the report, the *British Columbia Indian Lands Settlement Act*, SC 1920, c 51, expressly empowered adoption of the Commission's report without the need to comply with the consent and surrender provisions indicated in paragraph 2(a) of the McKenna-McBride Agreement, effectively cancelling any earlier legal assurances suggesting there would be disclosure and consultation and ultimately the Bands' consent to reserve reductions.

[181] The Orders in Council further provided that subject to surveys being submitted by Canada and approved by the Province, reserve lands were to be conveyed from the Province to the Dominion. This again proved elusive.

[182] The Orders in Council both excepted the questions posed by the imposition of Treaty 8 on lands in the north-east corner of the Province to be settled at a later time, but Canada, although accepting the recommendations affecting the lands in the Railway Belt already in the name of the federal Crown, decided not to implement the cut offs recommended.

[183] Later in 1924, Pattullo again joined issue with Canada and asserted reversionary rights in respect of these railway lands. Disputes and partial resolutions continued involving claims to Treaty 8 lands and Railway Belt lands, and provincial claims to reversionary interests and to reserve minerals and timber in respect of reserves on railway lands, continued until, finally, in 1938, conveyance of the 1,221 British Columbia reserves was effected from the Province to the Dominion (Harris at 260–61).

[184] Binnie J. in *Wewaykum* said at paragraph 97, "the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regarded as the best interest of the beneficiaries," and later in that paragraph, said "as a fiduciary, it was the Crown's duty to be even-handed towards and among the various beneficiaries". These principles were reiterated by the Supreme Court of Canada more recently in *Williams Lake* SCC at paragraph 55. From the outset, the McKenna-McBride process was intended to settle reserve lands, and was accompanied by assurances by the Dominion that Indigenous consent would be a condition of settlement. What followed was not indicative of loyalty, good faith and full disclosure. The Additional Lands were not a cut off and the decision to abandon them did not engage paragraph 2(a) of the McKenna-McBride Agreement; however abandonment of their recommended inclusion in the Reserve was a matter that engaged the Crown's fiduciary duty to the Band. The Ditchburn-Clark review proceeded without involvement of the bands and the acceptance of Pattullo's proposal abandoning the recommended Kootenay Additional Lands was done without disclosure or consultation. Further, the assurance of the grazing commonage lapsed without further comment than Ditchburn's letter asking Mackenzie not to forget his obligation.

[185] This management by Canada of the review of reserves undertaken by McKenna-McBride and Ditchburn-Clark was in breach of its fiduciary obligation 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", as outlined in *Wewaykum* at paragraph 94. This breach was more egregious in the case of the Kootenay bands who suffered the most pronounced loss through Canada's decision not to insist on inclusion of the recommended Additional Lands.

[186] Was this justified by Canada's other obligations to the many bands it represented? The duty was to be even-handed, to be loyal, and to disclose. Notwithstanding Canada was acting for many bands, this did not preclude an even handed approach, disclosing the situation, and consulting with those whose interests were affected. In *Wewaykum*, at paragraph 104, the Supreme Court of Canada commented: "With respect, the role of an honest referee does not exhaust the Crown's fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty." In my view if no consensus could be obtained, Canada's obligation to the Kootenay bands to be loyal to their interests may well have precluded Scott from accepting Pattullo's terms. At the very least, Canada should have insisted on allocation of the grazing commonage, or if this could not have been assured, abandoned the prospect as having any mitigating value.

[187] In *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 6, the Tribunal recognized the duty of Canada as fiduciary to consult with bands whose cognizable interest in land could be affected by the actions of Canada. At paragraph 61, the Tribunal stated:

> In light of the legislation of the day and the inchoate state of reserve creation, Canada had the responsibility to do what it could to disclose, consult, and take any action available to advance the interest of the Band, acting with ordinary prudence as if managing its own affairs…

[188] Were there options? The letter from Superintendent Scott to Senator Bostock spoke of the Article 13 of the *Terms of Union* referral as being a viable step to resolve the question. Dr. Robertson doubts Great Britain would have wanted to take on the referral, except if presented jointly as the last step to reserve creation. This would have required good faith on behalf of the Province, an often doubtful commodity, but if agreed as a joint referral, was a form of resolution that could have been put to the Band and likely would have been endorsed, when the prospect was loss of the Additional Lands entirely.

[189] Canada's actions through these processes, the McKenna-McBride Commission and the Ditchburn-Clark review, can be characterized as focused on bringing reserve creation to a conclusion, but without disclosure of the matters being pursued and the options available and without any attempt at consultation with the Band. Canada's loyalty to the Claimant was a disposable quantity.

[190] The non-pursuit of the grazing commonage appears to be a further case on point. Although the Band abandoned its claim with respect to a proposal for a grazing commonage as being outside the Tribunal's jurisdiction, the dealings between Canada and the Province referencing the commonage remained part of the narrative and illustrate Canada's failure to disclose, consult or to take necessary action to secure the Band's interests (Third Amended Declaration of Claim; Claimant's MOFL at para 249).

### B. Conclusion

[191] I find Canada's actions with respect to the Additional Lands, namely its failure to disclose and consult with the Band in respect of the state of negotiations and any prospective action to be taken, including a possible reference under Article 13 of the *Terms of Union*, to be a breach of the fiduciary duties undertaken in the reserve creation process and hence a breach of paragraph 14(1)(c) of the *SCTA*.

## XII. POTENTIAL LIABILITY OF BRITISH COLUMBIA

[192] There may remain questions relating to causation and any appropriate contingencies that need to be taken into account relating to the assessment of compensation for the breach.

[193] Further, the Respondent has indicated that it intends to argue at the compensation hearing that British Columbia's actions leading up to and following the Commission's final recommendations substantially caused or contributed to the alleged fiduciary breaches at issue in this Claim (Respondent's MOFL at para 197).

[194] By Order of this Tribunal, dated January 9, 2014, the issues of validity and compensation in this Claim were bifurcated. The Respondent's claim for contribution from the Province resulted in the following direction:

> If the Respondent intends to claim relief against the Province of British Columbia as being partially responsible for any breach, then that aspect of the issue will be reserved for the compensation hearing before the Tribunal. [Order and Endorsement dated August 21, 2018 at para 5]

[195] Support for the approach taken by the Tribunal in directing questions of causation, contingencies and contribution to the compensation hearing is found in the decisions of the Supreme Court of Canada in *Williams Lake SCC* and the Federal Court of Appeal in *Kitselas*

*FCA*. In *Williams Lake SCC*, the Supreme Court of Canada noted that under the *SCTA*, questions of causation or damages are addressed in the compensation phase:

> The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result:….[citations omitted] The extent of the loss, if any, flowing from a breach of fiduciary duty engages questions of causation. Equity addresses such questions under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established…[citations omitted] Correspondingly, the [Specific Claims Tribunal] Act assigns matters of causation and apportionment of fault to the compensation phase. [para 48]

[196] This approach was taken by the Tribunal in *Kitselas*, with apparent approval by the Federal Court of Appeal. The Federal Court of Appeal noted at paragraph 67 that "the potential contribution of British Columbia (if any) to the breach" of fiduciary duty by Canada was "a matter to be dealt with at the compensation stage of the hearing" (*Kitselas FCA*).

[197] Accordingly, these questions bearing on assessment of loss are for the compensation phase, after full argument from the Parties.

WILLIAM GRIST

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Honourable William Grist

**SPECIFIC CLAIMS TRIBUNAL**

**TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**Date: 20200130**

**File No.: SCT-7006-12**

**OTTAWA, ONTARIO January 30, 2020**

**PRESENT: Honourable William Grist**

BETWEEN:

**ʔAKISQ̓NUK FIRST NATION**

**Claimant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**
**As represented by the Minister of Crown-Indigenous Relations**

**Respondent**

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**TO**: **Counsel for the Claimant ʔAKISQ̓NUK FIRST NATION**
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**AND TO**: **Counsel for the Respondent**
As represented by Deborah McIntosh, Shelan Miller and Michael Mladen
Department of Justice