FILE NO.: SCT-5002-16
CITATION: 2022 SCTC 5
DATE: 20220623

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
KAHKEWISTAHAW FIRST NATION Claimant	Stephen Pillipow and Adam Touet, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Scott Bell, Lauri Miller and Nicole Sample, for the Respondent
	HEARD: October 27–28, 2020 and November 17–19, 2021

REASONS FOR DECISION

Honourable Victoria Chiappetta, Chairperson

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

Cases Cited:

Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development), [1995] 4 SCR 344, 1995 CarswellNat 1278; *Southwind v Canada*, 2021 SCC 28, 2021 CarswellNat 2594; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Guerin v R*, [1984] 2 SCR 335, 1984 CarswellNat 813; *Quebec (AG) v Moses*, 2010 SCC 17, [2010] 1 SCR 557; *R v Marshall*, [1999] 3 SCR 456; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Williams Lake Indian Band v Canada (Indian Affairs and Northern Development)*, 2021 FCA 30; *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8; *Lac La Ronge Band and Montreal Lake Cree Nation v Canada*, 2015 FCA 154; *Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73, [2004] 3 SCR 511; *R v Sparrow*, [1990] 1 SCR 1075; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3; *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 6.

Statutes and Regulations Cited:

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

Indian Act, RSC 1927, c 98, ss 2, 34, 35, 51, 54.

Authors Cited:

House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 39-2, No 21 (2 April 2008) at 16:05 (Bryan Schwartz).

Black's Law Dictionary, 11th ed, *sub verbo* "undertaking".

Headnote:

Aboriginal Law — Specific Claim — Surrender — Fiduciary Obligation — Trespass on Reserve — Treaty No. 4 — Road Through Reserve

This Claim is related to the surrender of Indian Reserve No. 72A (IR 72A) by the Kahkewistahaw First Nation (Claimant, Kahkewistahaw, the First Nation or the Band) in southeastern Saskatchewan. Kahkewistahaw is a signatory to Treaty No. 4.

In 1944, an Indian Agent approached Kahkewistahaw to discuss a surrender of 1.5 acres of IR 72A for a road relocation. Kahkewistahaw surrendered the entire IR 72A, approximately 68 acres.

The Claim raises issues with respect to four separate historical events: the construction of the Craven Dam in 1909, the diversion of another road across the reserve in 1944, the surrender of the entire reserve in 1944 and a time lag of almost twelve years prior to the surrendered land being sold for the benefit of the Band.

Canada made the following admissions:

a. Compensation is owing to the Claimant further to the 1924 transfer of 2.64 acres of land to the Province of Saskatchewan;

b. Compensation is owing to the Claimant further to the 1.5 acres used by a municipality to construct a road on the road allowance between Townships 19 and 19A after the 1944 surrender of IR 72A; and,

c. Compensation is owing to the Claimant further to the Respondent's breach of fiduciary duty between 1948 and 1953.

The issues dealt with by the Tribunal are set out here.

Issue #1: Did Canada breach its pre-surrender fiduciary duty owed to the Claimant relating to the 1944 surrender of IR 72A?

Kahkewistahaw initiated the surrender of IR 72A. They decided, without a request by the Crown, to surrender the entire reserve and not just the 1.5 acres requested for the road. They explained to the Indian Agent that they did not use the land as most of their members fished in Round Lake. The stated plan was to purchase or lease a fishing station or camp site near Round Lake, upon selling IR 72A, as most of their children attend school there.

The surrender provisions of the *Indian Act* strike "a balance between the two extremes of autonomy and protection" (*Blueberry River Indian Band v Canada (Department of Indian Affairs &Northern Development)*, [1995] 4 SCR 344 at para 35, 1995 CarswellNat 1278[*Blueberry River*], per McLachlin J. (as she then was)). Kahkewistahaw had the right to decide whether to surrender the land. This decision is to be respected unless the Claimant's understanding of the terms of the surrender was inadequate or the decision to surrender IR 72A was so foolish or improvident that it constituted exploitation.

The evidence does not support the view that Kahkewistahaw's understanding of the terms of the surrender was inadequate.

The Crown's pre-surrender fiduciary obligation is one of "ordinary diligence" to avoid an exploitative bargain *(Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 100, [2002] 4 SCR 245). The Crown's failure to communicate further details to Kahkewistahaw at the time Kahkewistahaw expressed their desire to sell IR 72A falls short of breaching its pre-surrender fiduciary obligation to avoid an unconscionable bargain.

Kahkewistahaw had the right to decide whether to surrender IR 72A for sale and their decision to do so is to be respected. Their decision was neither foolish nor improvident. The Claimant reasoned and decided on its own volition to surrender the land for sale for its own determined best interests.

The Tribunal held that Canada did not breach its pre-surrender fiduciary duty owed to the Claimant relating to the 1944 surrender of IR 72A.

Issue #2: Did Canada breach its duty under the *Indian Act* owed to the Claimant relating to the 1944 surrender of IR 72A?

Express notice of a meeting to consider the question of surrender explicitly is an important protection enshrined in the *Indian Act* to ensure that all members are aware that a special meeting is being called and those members 21 years of age and over are fully apprised of when they are to attend the non-regular council meeting called for the reason to vote on the surrender proposed.

The evidence shows that there was express notice of a meeting specifically summoned for the purpose of voting on the surrender.

Substantial compliance, not strict compliance, with the technical surrender requirements of section 51 of the *Indian Act*, RSC 1927, c 98 [*Indian Act, 1927*], is required (*Blueberry River*).

Kahkewistahaw's intention to surrender for reasons stated to be in the best interests of their members is clearly supported by the evidence. The surrender was voted for by a majority of the male members of the Band eligible to vote at a meeting summoned for that purpose. The Tribunal therefore found that there was substantial compliance with the procedural precautions enshrined in section 51 of the *Indian Act, 1927*.

The Tribunal concluded that Canada did not breach its duty under the *Indian Act* owed to the Claimant with respect to the 1944 surrender of IR 72A.

Issue #3: Did Canada breach its duty under Treaty No. 4 owed to the Claimant relating to the 1944 surrender of IR 72A?

Treaty No. 4 provides in part that "the consent of the Indians entitled [to a reserve]" must be obtained prior to selling, leasing or otherwise disposing of the reserve.

In *R v Marshall*, [1999] 3 SCR 456, McLachlin J. (as she then was) laid out a two-step process to interpret treaty text. The first step begins with the "words of the treaty" themselves, which are "examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences" (para 82). The second step considers the meaning or meanings that could arise on the text itself and considers these "against the treaty's historical and cultural backdrop" in order to determine if a facial meaning reflects the parties' common intention or, if there are multiple possible interpretations, which facial meaning "comes closest to reflecting the parties' common intention" (para 83).

The Treaty is without negotiated specifics in terms of what form of consent would satisfy the stated protection. It is silent with respect to a mechanism to obtain the required consent to dispose of the land. It is reasonable, therefore, to conclude that the parties' common intention was to ensure that prior to any disposition, the Band was both duly informed and agreeable. The evidence supports the finding that Kahkewistahaw knew about the sale of IR 72A and agreed to proceed with it.

In these circumstances, the common negotiated intention to protect the Band from a unilateral sale of the land by the Crown is satisfied.

The Tribunal concluded that Canada did not breach its duty under Treaty No. 4 owed to the Claimant relating to the 1944 surrender of IR 72A.

Issue #4: Did Canada breach its post-surrender fiduciary duty owed to the Claimant, other than that expressly admitted?

As set out in the surrender document, Kahkewistahaw surrendered all of IR 72A to the Crown to hold in trust to sell, upon such terms as the Crown may deem most conducive to the welfare of the Band. The Crown assumed responsibility to sell the surrendered land at its discretion. The "hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion" (*Guerin v R*, [1984] 2 SCR 335, 1984 CarswellNat 813 at para 97[*Guerin*]). The post-surrender *sui generis* fiduciary duty of the Crown arises as the benefit to Kahkewistahaw from the surrender of IR 72A is dependent upon the post-surrender actions and decisions of the Crown. The Crown has the duty to act in the best interests of the First Nation (*Blueberry River* at para 20). It must act with reasonable diligence (*Blueberry River* at para 22). The duty is one of a person "of ordinary prudence in managing [their] own affairs" (*Blueberry River* at para 104, per McLachlin J., citing *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302 at 315).

The Crown admitted it failed to fulfill its fiduciary duty to Kahkewistahaw between 1948 and 1953. During this time, very little occurred regarding IR 72A. However, the Tribunal held that the "quiet years" between 1948 and 1953 represented only one part of Canada's failure to reasonably deal with the land for the use and benefit of the Band. The duty of reasonable diligence is linked to a duty to act "in a timely way" (*Manitoba Métis Federation Inc v Canada (AG)*, 2013

SCC 14, [2013] 1 SCR 623). Kahkewistahaw saw no benefit from the surrender for almost twelve years. IR 72A was an asset capable of generating income. The value of this asset was essentially ignored for over a decade. A person of ordinary prudence managing their own affairs, acting reasonably, would have explored or exploited its value on their own volition prior to an unsolicited expression of interest received nine years after the surrender.

It took three years, from 1944 to 1947, for Canada to resolve a dispute with the Rural Municipality of Grayson over a relocation of a road that took only 1.5 acres of reserve land. The Tribunal held that the duty of ordinary prudence would reasonably include Canada continuing to examine interim measures of monetizing the surrendered land pending resolution of the road diversion issue and resolving the road diversion issue without unreasonable delay. This duty is not excused by the conduct of the Province of Saskatchewan or the municipality. For these reasons, the Tribunal concluded that Canada did not meet its fiduciary duty between the years 1944 and 1947.

The Crown did not meet its fiduciary duty in part considering the delay and inaction between the time of surrender and the time of sale.

As part of its duty of reasonable diligence, Canada should have fully analyzed the option to subdivide the surrendered land, prior to selling it in three parcels. Its failure to do so amounts to a breach of its fiduciary duty.

The Tribunal concluded that Canada breached its post-surrender fiduciary duty owed to the Claimant with respect to its administration of reserve land, pursuant to paragraph 14(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

Issue #5: Did Canada breach its fiduciary duty owed to the Claimant with respect to a pre-surrender trespass on IR 72A?

At some point prior to 1944, a road allowance between Township 19 and Township 19A located on IR 72A was in use without the consent of the Claimant. The road provided access to the Sunset Beach Resort, owned by the Criddle family. The Criddle family constructed buildings on the road allowance.

Under section 34 of the *Indian Act, 1927*, it was unlawful for persons other than a member of a band to reside upon or occupy a road or road allowance on a reserve without authorization of the Superintendent General. The *Indian Act* imposes a process of allotting reserve lands to First Nations, while granting the discretionary power to control those lands to the Crown. The fiduciary duty of the Crown reasonably extends to include an obligation to use ordinary prudence to protect a First Nation from intrusion and exploitation by trespass on reserve land. A person of ordinary prudence managing their own affairs, acting reasonably, would not have permitted an unauthorized road and buildings to persist on their land.

Further, the Crown is to practice ordinary diligence to avoid destruction of the band's quasi-proprietary interest by a trespass from a third party. This would reasonably include the duty to remedy the trespass by actively taking steps to remove the unauthorized roads and buildings located on IR 72A.

The Tribunal concluded that Canada breached its fiduciary duty regarding the administration of reserve land owed to the Claimant with respect to a pre-surrender trespass on IR 72A, pursuant to paragraph 14(1)(c) of the *SCTA*.

Issue #6: Did Canada owe a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A?

It took about three years for Canada to resolve issues regarding the diversion of a road on 1.5 acres of the surrendered land with the Rural Municipality of Grayson.

Section 54 of the *Indian Act, 1927,* provides that surrendered reserve land "shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part". Upon accepting the surrender, therefore, the Crown assumes discretionary control over the dealings of the land. A fiduciary obligation regulates the way the Crown exercises its discretion in dealing with the land on the band's behalf (*Guerin* at para 105).

The Crown is charged with holding and managing the surrendered land between the time of surrender and, pursuant to the terms of the surrender at issue, the time of sale. In this case, the interim period lasted for almost twelve years.

Prior to the sale of the surrendered land, the Crown had a fiduciary duty to hold and manage the surrendered land with ordinary prudence and reasonable diligence. This included the duty to protect the surrendered land from intrusion by third party trespass.

The Crown is obliged to sell the surrendered land by means most conducive to the welfare of the Claimant. This obligation is defeated by a permissive approach to trespassers while managing the land prior to sale. Trespass on the surrendered land prior to sale threatens the best interests of the Band and its members who are entitled to receive value from the sale of the land, without impairment caused by a trespass.

The Tribunal concluded that Canada owed a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A.

Issue # 7: If Canada owed a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A, did Canada breach this duty?

The unauthorized use of the road allowance between Townships 19 and 19A, for the road leading to the Sunset Beach Resort, continued post-surrender. The unauthorized buildings constructed on this road as well endured post-surrender.

In managing the land post-surrender, the Crown is to practice ordinary diligence to ensure that the surrendered land can be sold in a way most conducive to the welfare of the band. This would reasonably include taking steps to remove the unauthorized roads and buildings located on IR 72A and repairing the flooded road allowance with oversight and diligence. The Crown was aware of the issue of the road as early as April 1944. Upon surrender, it controlled all dealings with the land. A person managing the land for the purposes of sale, acting reasonably, would have ensured the road was diverted or repaired in a timely manner to avoid any negative impact on the value of the land for sale. Instead, the Crown delayed addressing the matter, permitting the municipality to do so independently, without notice to the Crown, resulting in damage to the surrendered land.

The evidence supports a finding that Canada breached its fiduciary duty to the Claimant regarding the administration of reserve land with respect to a post-surrender trespass, pursuant to paragraph 14(1)(c) of the S*CTA*.

Issue #8: Does the Tribunal have jurisdiction to hear an asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam?

In around 1909, the Department of Marine and Fisheries of the federal government constructed a dam on the Qu'Appelle River at Craven, Saskatchewan (the Craven Dam), just below the Long Lake Creek, and some distance upriver from IR 72A. The evidence is such that the construction adversely affected Kahkewistahaw's ability to fish from their reserve land.

There is no evidence of consultation with Kahkewistahaw prior to construction of the dam.

The Tribunal concluded that it is without jurisdiction to address the asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam as it does not fall within any of the grounds enumerated in subsection 14(1) of the *SCTA*.

The Crown may have had a fiduciary obligation to accommodate and consult the Claimant prior to constructing the Craven Dam and Canada may owe compensation to the First Nation for a breach of its fiduciary obligation to accommodate and consult, but the Tribunal does not have jurisdiction to determine this issue.

Issue #9: If the Tribunal has jurisdiction to hear the asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam, did Canada breach its duty?

Given the Tribunal's finding above that it does not have jurisdiction to deal with the asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam, it is not necessary for the Tribunal to deal with this issue.

TABLE OF CONTENTS

I. OVERVIEW

[1] Early in 1944, the Crown approached the Kahkewistahaw First Nation to discuss a surrender of 1.5 acres of reserve land for a road relocation. By August 1944, they had surrendered the whole of Indian Reserve No. 72A (IR 72A), listed in the surrender document as 68.16 acres. By way of a Claim filed with the Specific Claims Tribunal (Tribunal) on October 5, 2016, the Kahkewistahaw First Nation (Claimant, Kahkewistahaw, the First Nation or the Band) seeks compensation for what they allege in part are breaches by the Crown of its statutory and equitable duties considering the way in which the surrender was taken and the conduct of the Crown post-surrender.

[2] By Endorsement and Order dated February 13, 2017, the Kahkewistahaw First Nation's Claim was bifurcated pursuant to Rule 10 of the *Specific Claims Tribunal Rules of Practice and Procedure,* SOR/2011-119. The Claim has proceeded before the Tribunal in two separate stages, to deal with the issues of validity and compensation respectively. The Tribunal received the evidence and arguments with respect to the issue of validity on October 27–28, 2020 and November 17–19, 2021. For reasons set out below, I have concluded that the Kahkewistahaw First Nation's Claim is valid. The Parties shall now proceed to the second stage of the Claim; the compensation stage.

II. PROCEDURAL HISTORY

[3] The Claimant originally filed its claim with the Minister of Indian Affairs and Northern Development (as the Minister of Crown-Indigenous Relations was then known) on December 9, 2004.

[4] In a letter dated September 13, 2013, the Claimant was advised by the Respondent that it was the decision of the Minister to accept part of the claim for negotiations.

[5] As of September 14, 2016, the claim was not resolved through negotiations with the Ministry.

[6] On October 5, 2016, the Claimant filed a Declaration of Claim with the Tribunal.

[7] On December 5, 2016, the Respondent filed a Response to the Declaration of Claim with

the Tribunal.

[8] On February 13, 2017, the Tribunal issued an Endorsement and Order bifurcating the hearing of this Claim into two separate stages: validity and compensation.

[9] On November 26, 2018, the Claimant filed an Amended Declaration of Claim with the Tribunal, and on May 14, 2021, it filed a Further Amended Declaration of Claim.

[10] On December 20, 2018, the Respondent filed an Amended Response with the Tribunal.

[11] On May 6, 2019, the Tribunal facilitated a mediation meeting between the Parties.

[12] On October 27–28, 2020, the Tribunal held a virtual expert evidence hearing on validity.

[13] On November 17–19, 2021, the Tribunal held a virtual oral submissions hearing on validity.

III. BACKGROUND

[14] The Kahkewistahaw First Nation is located in what is now southeastern Saskatchewan, about 150 kilometres east of Regina, between Crooked Lake and Round Lake. The First Nation adhered to Treaty No. 4 in 1874. In 1881, land was surveyed along Crooked Lake, and the surveyor recommended that this land be set aside as a fishing station for Kahkewistahaw. The Department of the Interior reserved the land, and the fishing station was confirmed as IR 72A by Order in Council PC 1151, dated May 17, 1889. The reserve included a southern portion (fractional 8-19A-5) and a northern portion (fractional SE ¼ 5-19-5), including the road allowance between Townships 19 and 19A. A letter sent on December 2, 1905, by J. D. McLean, Secretary of the Department of Indian Affairs, affirms that the southern portion had already been granted to the Hudson's Bay Company in the 17th century, and letters patent were issued in 1885. As a result of this discovery, IR 72A was reduced by 27.5 acres, from 96 to 68.5 acres. IR 72A was surrendered July 4, 1944, and sold for the First Nation's benefit in 1956. In the surrender document, its size is denoted as 68.16 acres. A March 28, 1944, letter from D. J. Allan, Superintendent of Reserves and Trusts, to W. J. D. Kerley, Indian Agent at Broadview, explains that this reduction occurred "by a transfer in 1924 to the Province [of Saskatchewan] of 2.64 acres for a roadway replacing an existing roadway of 2.3 acres" (Exhibit Ex-1, Vol 1, Tab 78).

[15] The Claim raises issues with respect to four separate historical events: the construction of a dam in 1909 (the Craven Dam), the diversion of another road across the reserve in 1944, the surrender of the entire reserve in 1944 and a time lag of almost twelve years prior to the surrendered land being sold for the benefit of the Band.

A. Craven Dam

[16] The Craven Dam was built in 1909 on the Qu'Appelle River at Craven, Saskatchewan, to divert water from the river into a lake known as Long Lake or Last Mountain Lake. The dam had the intended effect. On February 17, 1912, Inspector of Fisheries E. W. Miller wrote to Superintendent of Fisheries W. A. Founds to report that the dam had been a great benefit to Long Lake, regarding the fishery and in other respects. The letter also notes that the effect on the lower lakes, including Crooked Lake and Round Lake, had been correspondingly negative. He writes that "[t]he lower lakes (the Qu'Appelle chain, Crooked [Lake] and Round [Lake]) have ... unquestionably suffered correspondingly" and their waters had tended to become comparatively shallow and stagnant (Exhibit Ex-01, Vol 1, Tab 37). Inspector Miller noted that the conditions produced by the construction of this dam were "inimical to the continuance of the fisheries of these lakes in a healthy condition, more particularly to the valuable species which in a normal state the lakes are particularly well fitted to produce". There is no evidence that Kahkewistahaw was consulted about the building of the dam.

[17] Kahkewistahaw alleges that the Crown breached its fiduciary obligation to consult regarding the construction of the Craven Dam, adversely affecting Kahkewistahaw's reserve land and its treaty right to fish. The Crown argues that this claim is not within the jurisdiction of this Tribunal as it does not fall within any of the grounds enumerated in subsection 14(1) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

B. Diversionary Road Construction

[18] At some point prior to 1944, the road allowance between Township 19 and Township 19A located on IR 72A was in use without the consent of the Claimant. The road provided access to the Sunset Beach Resort, owned by the Criddle family. The Criddle family had also built buildings on the road allowance.

[19] In 1943, the road allowance between IR 72A and Sunset Beach Resort, located to the south of IR 72A, was flooded as a result of a dam that had been built the previous year on Crooked Lake. In 1944, the Rural Municipality of Grayson asked for 1.5 acres of IR 72A to divert the road away from the government road allowance, because it was flooded, and which formed the boundary between IR 72A (located in Township 19) and Sunset Beach Resort immediately to the south (located in Township 19A). The municipality said that this would move the road to higher ground and improve access to the Sunset Beach Resort in the spring and during wet periods throughout the year. A number of surveys and sketches were exchanged between the municipality and the Indian Affairs Branch. On November 20, 1944, the municipality paid the agreed-upon price of $30 for the 1.5 acres. Sometime before December 1944, the road was relocated, according to P.F.R.A. (Prairie Farm Rehabilitation Administration) Plan No. 1175-12-2, prepared by C. H. Biddell, Saskatchewan land surveyor, which noted that 1.83 acres was used, not the 1.5 acres originally indicated.

[20] On November 22, 1944, General Superintendent of Indian Agencies M. Christianson wrote to the Secretary-Treasurer of the municipality advising that Superintendent Allan preferred to divert the road in a different way than that proposed by the municipality. On December 5, 1944, the Secretary-Treasurer replied stating that payment for the road to the Sunset Beach Resort had already been made and the road already constructed. By July of 1945, Indian Affairs Branch informed the municipality that the road had not been approved, should not have been built, and any flooding issues to the previous road could have been solved by grading. The dispute between the municipality and Indian Affairs continued for years. In autumn 1947, the road was relocated again and constructed on the road allowance between Townships 19 and 19A which formed part of the reserve. A 1953 letter from Agent Kerley of Indian Affairs states that the $30 purchase price was refunded to the municipality, as no allowance would need to be made for a road, and therefore the whole of the reserve could be tendered for sale. However, there is no other record of a refund on file.

[21] Kahkewistahaw says that the Crown was under a fiduciary obligation to protect reserve land from exploitation, including by trespass, and that the Crown breached its fiduciary or trust-like obligations to the First Nation by doing the following:

(a) By allowing the [Rural Municipality of Grayson] to construct a road on the Road Allowance between Townships 19 and 19A leading to the Sunset Beach Resort prior to 1944…;

(b) By allowing the owner of the Sunset Beach Resort, Criddle, to construct a store and house on the Road Allowance between Township 19 and 19A; and

(c) By allowing the [Rural Municipality of Grayson] to, firstly, construct the road diversion in 1944 on IR 72A, in an area that was not approved, and then to once again use the Road Allowance between Townships 19 and 19A for the road leading to the Sunset Beach Resort, without lawful authority or compensation to the First Nation.

[22] Canada submits that there is insufficient evidence to prove any trespass occurred and that, even if trespass did occur, the Crown is not under a positive obligation to address trespass. Instead, Canada notes that section 35 of the *Indian Act*, RSC 1927, c 98 [*Indian Act, 1927* or the *Act*], in effect at the relevant time places the onus on the First Nation to make a complaint of trespass before any duty to remedy the situation arises, and that there is no evidence Kahkewistahaw raised any such complaint.

C. Surrender of IR 72A

[23] Indian Agent Kerley held a meeting with Kahkewistahaw on April 4, 1944, to discuss a proposed surrender of the 1.5 acres required for the road relocation. As there were not sufficient members present at that meeting, another meeting was held later in April 1944. At the second meeting, Kahkewistahaw decided to surrender the entire IR 72A. Indian Agent Kerley explained in correspondence to the Indian Affairs Branch dated April 27, 1944, that Kahkewistahaw did not use this land as most of them fished at Round Lake, and the majority of their children attended Round Lake School. He also explained that Kahkewistahaw had in mind selling the reserve land and, if possible, leasing or purchasing a fishing station and camp site near Round Lake School.

[24] Indian Agent Kerley sent completed surrender documents to the Indian Affairs Branch on July 8, 1944. The surrender covered the whole of IR 72A, listed in the surrender document as 68.16 acres. The surrender was accepted by Order in Council PC 6171 on August 7, 1944. The Order in Council stated that the land was to be sold on such terms as may be determined most conducive to the welfare of the Indians.

[25] Kahkewistahaw alleges that the way the surrender was taken breaches statutory and

equitable duties of the Crown by breaching the terms of Treaty No. 4, failing to meet the requirements of the *Indian Act*, and by breaching the Crown's fiduciary duty by failing to protect the First Nation from a foolish or improvident bargain. The Crown denies these allegations. It submits that Treaty No. 4 does not and did not control surrender procedures, that the *Indian Act* superseded the terms of Treaty No. 4 with respect to surrender procedures, and, further, the *Indian Act*'s surrender provisions were complied with. The Crown also asserts that the requirements of the fiduciary duty in relation to the surrender of reserve land were complied with.

D. Sale of IR 72A

[26] The reserve was surrendered in 1944, but the sale of IR 72A was not finalized until 1956.

[27] Following the surrender, the Indian Affairs Branch began discussions about the best disposition of the surrendered land. In August 1944, Superintendent Allan wrote to General Superintendent Christianson to ask whether it would be expedient to offer the land for sale by public tender, whether a portion of the lake shore might profitably be subdivided, or whether the matter of its ultimate disposal should be left in abeyance. On September 25, 1944, General Superintendent Christianson replied that, having visited the reserve, the only use of the land was as summer cottages, and he suggested waiting until the war was over to subdivide the land. He said that the Indians would "lose nothing by waiting a year or two" and that "if times are good" there would be "a demand a little later on for a summer resort there" (Exhibit Ex-1, Vol 2, Tab 95). On October 4, 1944, Superintendent Allan agreed to postpone the disposition of the land, and asked General Superintendent Christianson to ascertain who the operators of the Sunset Beach Resort were, and what prices their lots garnered for sale and for lease. That same month, General Superintendent Christianson replied that a N. B. Criddle operated the Sunset Beach Resort and noted that there were 24 lots subdivided on the Sunset Beach Resort property and out of these lots 18 had been sold and six were still for sale, with the price for the lots ranging from $50 to $125, averaging about $100. General Superintendent Christianson also noted that N. B. Criddle had offered Indian Agent Kerley $500 for the reserve, but General Superintendent Christianson was of the view that more could be obtained by subdivision and sale.

[28] A rough proposal of subdivision was made by October 18, 1944, and sent to General Superintendent Christianson, who forwarded it to Superintendent Allan. Superintendent Allan

rejected the rough plan, indicating that it was based on incomplete information, and sent back his own proposal on October 31, 1944. Allan further noted that the 25 lots in his proposal could be rented for terms of 10 or 20 years for $10 per year, giving the Band an income, if a market for summer homes developed in the future.

[29] There is no evidence of any further discussion regarding IR 72A within the Indian Affairs Branch from October 1944 until July 1953.

[30] In July 1953, the Criddle family, through an agent, inquired again about the property. On July 8, 1953, Superintendent L. L. Brown wrote to Regional Supervisor of Indian Agencies J. P. B. Ostrander informing him of the interest being shown in the reserve, asking for a recommendation as to whether the land should be sold in a block or be subdivided, and suggesting that steps be taken to have the land appraised. On July 17, 1953, Ostrander replied that he and Indian Agent Kerley agreed the land should be offered for sale by tender, as it was felt that if it was offered for sale in that manner, there would be others than the Criddle family interested. In October of that year, Superintendent Brown wrote to Surveyor General B. W. Waugh seeking a description of IR 72A that lay north of the road allowance between Townships 19 and 19A, which Indian Affairs proposed to put up for tender. This letter, as well as a subsequent letter from Brown to Kerley, expressed an intention to transfer title of the road to the Province of Saskatchewan following the sale of the reserve.

[31] There is no evidence of any further discussion regarding IR 72A within the Indian Affairs Branch until February 1955.

[32] Correspondence from that month between Superintendent Brown and new Superintendent in Charge of the Indian Agency at Broadview, J. T. Warden, notes that the property is still available for sale and asks whether selling by tender would be the best way to sell it. In March 1955, the director of Indian Affairs Branch, Director H. M. Jones, asked for an appraisal, which returned a valuation of $1,920 in June of that year. In May 1955, the Criddle family renewed their interest in purchasing the property. By Band Council Resolution (BCR) dated October 11, 1955, Kahkewistahaw resolved that the costs for advertising the sale of IR 72A be paid from the revenue account of the First Nation.

[33] On September 30, 1955, a call for tenders was issued which offered the entire reserve—listed at this time as 64.36 acres, rather than the 68.16 acres surrendered in 1944—for sale in a single block. This tender was subsequently cancelled and on November 2, 1955, another call for tenders was issued, with a deadline of November 30. The land was subdivided into three parcels, per the tender: one containing approximately 15 acres, one containing approximately 18 acres and one containing approximately 20 acres for an advertised total of 53 acres. Two offers were received, with the Criddle family's being the highest at $2,500 for all three parcels. This offer was accepted, and letters patent were issued to Kenneth William Milton Criddle on June 18, 1956. The sale record indicates 64.36 acres sold for $2,500, an acreage which does not conform with the acreage noted in the surrender document or the call for tenders.

[34] Kahkewistahaw alleges that post-surrender fiduciary duties were breached by the Crown in relation to the ultimate disposition of the land. Among other things, the First Nation alleges that the disposition of the land was delayed by more than a decade, during which time the First Nation saw no benefit; the ultimate disposal via sale was less beneficial to the First Nation than leasing would have been; and, when a sale was ultimately concluded, the Crown transferred more land to the purchaser than was purchased. The Crown denies these allegations in part. It submits that it fulfilled its fiduciary duty for the time period between 1944 and 1947, and from 1953 to 1955 and that the First Nation suffered no losses by the Crown's conduct in disposing of the land. Canada does not assert that it fulfilled its fiduciary duty during the years between 1948 and 1953 as those years are unexplained and without documentation but for K. W. Criddle's inquiry to purchase the land.

E. Admissions Made by Canada

[35] Canada has made the following admissions:

a. Compensation is owing to the Claimant further to the 1924 transfer of 2.64 acres of land to the Province of Saskatchewan;

b. Compensation is owing to the Claimant further to the 1.5 acres used by a municipality to construct a road on the road allowance between Townships 19 and 19A after the 1944 surrender of IR 72A; and,

c. Compensation is owing to the Claimant further to the Respondent's breach of fiduciary duty between 1948 and 1953.

IV. ISSUES

[36] In determining whether the Claimant has a valid Claim, the Tribunal must consider the following issues:

1. Did Canada breach its pre-surrender fiduciary duty owed to the Claimant relating to the 1944 surrender of IR 72A?

2. Did Canada breach its duty under the *Indian Act* owed to the Claimant relating to the 1944 surrender of IR 72A?

3. Did Canada breach its duty under Treaty No. 4 owed to the Claimant relating to the 1944 surrender of IR 72A?

4. Did Canada breach its post-surrender fiduciary duty owed to the Claimant, other than that expressly admitted?

5. Did Canada breach its fiduciary duty owed to the Claimant with respect to a pre-surrender trespass on IR 72A?

6. Does Canada owe a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A?

7. If Canada owes a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A, did Canada breach this duty?

8. Does the Tribunal have jurisdiction to hear an asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam?

9. If the Tribunal has jurisdiction to hear the asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam, did Canada breach its duty?

[37] For reasons set out below, I have concluded as follows:

1. Canada did not breach its pre-surrender fiduciary duty owed to the Claimant relating to the 1944 surrender of IR 72A;

2. Canada did not breach its duty under the *Indian Act* owed to the Claimant relating to the 1944 surrender of IR 72A;

3. Canada did not breach its duty under Treaty No. 4 owed to the Claimant relating to the 1944 surrender of IR 72A;

4. Canada did breach its post-surrender fiduciary duty owed to the Claimant, with respect to its administration of reserve land, pursuant to paragraph 14(1)(c) of the *SCTA*, other than that expressly admitted;

5. Canada did breach its fiduciary duty regarding the administration of reserve land owed to the Claimant with respect to a pre-surrender trespass on IR 72A, pursuant to paragraph 14(1)(c) of the *SCTA*;

6. Canada did owe a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A;

7. Canada did breach its fiduciary duty to the Claimant regarding the administration of reserve land with respect to a post-surrender trespass on IR 72A pursuant to paragraph 14(1)(c) of the *SCTA*; and,

8. The Tribunal does not have jurisdiction to hear an asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam.

V. DISCUSSION

A. Issue #1: Did Canada Breach its Pre-Surrender Fiduciary Duty Owed to the Claimant Relating to the 1944 Surrender of IR 72A?

1. Background

[38] As set out above, the Indian Agent at Broadview, W. J. D. Kerley, advised the General Superintendent of Indian Agencies, M. Christianson, that Kahkewistahaw Chief Harry Favel was willing to surrender the 1.5 acres needed for the relocation of an access road, and wished to take

up the potential surrender with the members. Christianson advised Kerley to take it up with the Chief and Council and that, if the members approved, Ottawa would accept the surrender. Kerley was sent the necessary forms to affect the surrender of the 1.5 acres for the road on March 28, 1944. A meeting was held with the Band on April 4, 1944. Not enough members attended to legally effect a surrender, however, so another meeting was held sometime later that month. At the second meeting, the First Nation informed Kerley that it did not wish to surrender just the 1.5 acres, it wished to surrender the entirety of IR 72A. A letter from Indian Agent Kerley to the Indian Affairs Branch, dated April 27, 1944, requested surrender forms for the entire reserve, stating that Kahkewistahaw wanted to move closer to Round Lake, where their members fished and where their children attended school.

[39] On May 3, 1944, the Director of the Indian Affairs Branch, H. W. McGill, sent new surrender forms covering the whole reserve, described as 68.16 acres. The surrender was completed July 4, 1944. According to the record of the vote, of the 43 members of Kahkewistahaw eligible to vote, 25 were present at the meeting and 23 of these voted in favour of the surrender, with two voting against. A July 8, 1944, letter from Kerley to the Indian Affairs Branch states that, of the 18 members absent, "twelve are either working off the reserve or in the armed forces" (Exhibit Ex-1, Vol 1, Tab 86). The completed surrender form is signed by Indian Agent Kerley, Chief Favel, and five other members of the First Nation. On July 8, 1944, Indian Agent Kerley, Chief Favel, and two other members of the First Nation filed an affidavit which asserted that Kahkewistahaw's "assent was given at the meeting or council of the said Band summoned for that purpose and according to its rules or the rules of the Department" (Exhibit Ex-1, Vol 1, Tab 85). Order in Council PC 6171 ratified the surrender on August 7, 1944, stating that the land was to be sold "on such terms as may be determined most conducive to the welfare of the Indians" (Exhibit Ex-1, Vol 1, Tab 89).

[40] In 1954, prior to the ultimate sale of the surrendered land, Indian Affairs offered lands on Round Lake to the First Nation. Kahkewistahaw purchased these lands for $10,000 taken out of their capital account. Six years later, by Order in Council dated November 10, 1960, these lands were set apart for the First Nation "as an addition to Kahkewistahaw Indian Reserve number seventy-two" (Exhibit Ex-12).

2. Claimant's Position

[41] The Claimant alleges the Crown did not comply with its pre-surrender fiduciary duties in taking the surrender of IR 72A in 1944. Relying on the Supreme Court of Canada case *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 SCR 344, 1995 CarswellNat 1278 [*Blueberry River*], Kahkewistahaw argues the Crown breached its pre-surrender fiduciary duties to the First Nation in two ways. First, the Band's understanding of the terms of surrender were inadequate. Second, the decision to surrender the reserve was so foolish or improvident that the Governor in Council had a duty to withhold its consent to avoid exploitation (*Blueberry River* at paras 14, 35).

[42] The Claimant relies on four pieces of evidence to argue that the First Nation's understanding of the surrender was inadequate. First is the affidavit of Urbin Louison, a member of Kahkewistahaw born August 18, 1944. His affidavit swears he and his family travelled to IR 72A and utilized the land well into the 1950s for ceremony and leisure. Second, although Kahkewistahaw desired land nearer to Round Lake, the First Nation did not need to surrender and sell IR 72A to afford it as the Band had nearly $214,000 in its capital account in March of 1944 with which it could have purchased land. Finally, the Claimant points to two letters from D. J. Allan, Superintendent of Reserves and Trusts, to M. Christianson, General Superintendent of Indian Agencies. On October 4, 1944, Allan suggests subdivision and leasing as the most profitable way to dispose of the First Nation's reserve. The second, a letter sent October 31 of the same year, continues to suggest subdivision and leasing of cottage sites as a way to "give the Band some income from Reserve No. 72A" (Exhibit Ex-1, Vol 2, Tab 101).

3. Respondent's Position

[43] Canada submits that it met its pre-surrender fiduciary obligations in relation to the 1944 surrender.

[44] The Respondent argues that the First Nation had decided to surrender the reserve land, and the duty of the Crown was limited to preventing exploitative bargains. At the time of the surrender, it is argued, the surrender for sale was based on a logical rationale that cannot be characterized as foolish or improvident.

4. Analysis

[45] The allegations made by Kahkewistahaw in their Claim cause the Tribunal to consider whether the Crown breached its fiduciary obligation to the Claimant. The nature of the Crown's fiduciary duty towards Indigenous peoples was most recently detailed by the Supreme Court of Canada in *Southwind v Canada*, 2021 SCC 28, 2021 CarswellNat 2594 [*Southwind*]:

> The Crown's fiduciary duty is rooted in the obligation of honourable dealing and in the overarching goal of reconciliation between the Crown and the first inhabitants of Canada (*Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511*, at paras. 17-18). Professor Slattery describes the honour of the Crown as a "grounding postulate of Canadian constitutional law" (B. Slattery, "The Aboriginal Constitution" (2014), 67 *S.C.L.R.* (2d) 319, at p. 320). McLachlin C.J. explained in *Haida Nation* that the "process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people" (para. 32; see also *R. v. Desautel*, 2021 SCC 17, at para. 22). This is an ongoing project that seeks the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10).
>
> This Court first acknowledged a fiduciary duty in *Guerin*. In *Guerin*, Canada argued that it could not be subject to a fiduciary duty and, at best, the Crown's control over Indigenous interests in land is a political trust which is unenforceable by the courts (p. 371). Dickson J., writing for a majority, rejected Canada's argument. Instead, he found that Indigenous interests in land are "a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision" (p. 379; see also J. T. S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (2008), at pp. 150-51). In other words, the Indigenous interest in land *did not flow from the Crown*; it pre-existed the Crown's assertion of sovereignty.
>
> Through the *Royal Proclamation, 1763*, the Crown undertook discretionary control over these pre-existing Indigenous interests in land. The *Proclamation* provided: "And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, <u>without our especial leave and Licence for that Purpose first obtained</u>." The *Indian Act* and its predecessor statutes formalized the process for setting aside reserve land and the Crown's legal control over that land. The Crown thus undertook the "historic responsibility ... to act on behalf of the Indians so as to protect their interests in transactions with third parties" (*Guerin*, at p. 383). In *Guerin*, this Court recognized that a fiduciary duty arose because the Crown interposed itself between Indigenous lands and those who want to lease or purchase the land, thereby exercising discretionary control over the land (pp. 383-84). The Crown has a duty that is "in the nature of a private law duty" (p. 385). [emphasis in original; paras 55–57]

[46] In *Blueberry River*, the Blueberry River and Doig River Indian Bands argued that the Crown had breached its fiduciary obligations by consenting to a surrender of reserve land in 1945 by their predecessor band, the Beaver Indian Band, as the surrender was not in the band's best interests. The Blueberry River and Doig River Indian Bands argued that the paternalistic scheme of the *Indian Act* imposes a duty on the Crown to protect Indigenous peoples from making foolish decisions with respect to the alienation of their land. The Crown argued that bands should be treated as independent agents regarding the disposition of their lands. McLachlin J. stated, at paragraphs 33 and 35, in a minority concurring opinion that has been widely cited:

> The first issue is whether the *Indian Act* imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this question is found in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, where the majority of this Court, *per* Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains.
>
> …
>
> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident — a decision that constituted exploitation — the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

[47] Kahkewistahaw initiated the surrender of IR 72A. They decided, without a request by the Crown, to surrender the entire reserve and not just the 1.5 acres requested for the road. The explanation provided was that they did not use the land as most of their members fished in Round Lake. The stated plan was to purchase or lease a fishing station or camp site near Round Lake, upon selling IR 72A, as most of their children attended school there. It is within these findings that the Tribunal must strike the stated balance between the two pillars of autonomy and protection. Kahkewistahaw had the right to decide whether to surrender the land. This decision is to be respected unless the Claimant's understanding of the terms of the surrender was inadequate or the

decision to surrender IR 72A was so foolish or improvident that it constituted exploitation.

[48] The evidence does not support the view that Kahkewistahaw's understanding of the terms of the surrender was inadequate. The surrender document signed by the Chief and five members of the Band clearly sets out the purpose of the surrender as a surrender for sale. The affidavit of Urbin Louison, a Kahkewistahaw member born August 18, 1944, proves that his family continued to use the land after the surrender, but it does not support a finding that Kahkewistahaw, as a whole, lacked an understanding that the surrender was a surrender for sale. The Claimant argues that the fact that Kahkewistahaw could have purchased the desired land near Round Lake with funds in their capital account and did not require the sale for this purpose, supports a finding that Kahkewistahaw lacked an adequate understanding of the terms of the surrender. I disagree. Again, a surrender for sale was specifically set out in the surrender document and it is reasonable to infer that the Chief and Council would have been aware of the amount of money in the capital account. Similarly, the letters from D. J. Allan, Superintendent of Reserves and Trusts, to M. Christianson, General Superintendent of Indian Agencies, on October 4 and 31, 1944, suggesting subdivision and leasing of IR 72A as the most profitable way to dispose of the First Nation's reserve, speak only to their opinions at the time of writing and not an inadequate understanding by Kahkewistahaw members of the terms of the surrender. Kahkewistahaw were aware of the idea of leasing as they were considering a lease or a purchase of land at Round Lake. They nonetheless consented to a sale, consistent with their originally stated intention.

[49] Still, it is difficult to consider the facts surrounding the pre-surrender without concluding that the Crown could have better guided Kahkewistahaw when they decided that they wished to sell all of IR 72A. It could have investigated the land around Round Lake to determine availability and cost and inform Kahkewistahaw of its findings, considering the money in Kahkewistahaw's capital account. The Crown ultimately did not offer Kahkewistahaw lands on Round Lake to purchase until 1953 and the purchase price was a small fraction of the amount in their capital account at the time of surrender. The Crown could have informed and discussed leasing with the Claimant as an alternative to selling the land, pre-surrender. The Crown's pre-surrender fiduciary obligation, however, is one of "ordinary diligence" to avoid an exploitative bargain. In *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 100, [2002] 4 SCR 245 [*Wewaykum*], Binnie J. describes ordinary diligence in this context as follows:

> It is in the sense of "exploitative bargain", I think, that the approach of Wilson J. in *Guerin* should be understood. Speaking for herself, Ritchie and McIntyre JJ., Wilson J. stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction" (p. 350). The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). This is consistent with *Blueberry River* and *Lewis*. Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself. (Of course, there will also be cases dealing with the ordinary accountability by the Crown, as fiduciary, for its administrative control over the reserve and band assets.)

[50] In *Blueberry River*, McLachlin J. noted at paragraph 36 that the surrender of the surface rights in IR 172 was not an exploitative bargain as "from the perspective of the Band at the time, it [the surrender and sale of the land] made good sense." In *Guerin v R*, [1984] 2 SCR 335, 1984 CarswellNat 813 [*Guerin*], Wilson J., in a minority concurring judgment, held the behaviour of the Crown was "unconscionable" as the terms of the lease ultimately entered into bore little resemblance to what was discussed and approved at the surrender meeting. It was found that had the band been aware of the terms in fact contained in the lease it would never have surrendered its land (*Guerin* at para 19). In *Wewaykum*, Binnie J. concluded that there was not an exploitative bargain as the band "enter[ed] a quit claim in favour of a sister band with a superior interest … intended in good faith to resolve a 'difference of opinion' with a sister band" (para 102).

[51] Kahkewistahaw had the right to decide whether to surrender IR 72A for sale and their decision to do so is to be respected. Their decision was neither foolish nor improvident. Rather, it was grounded in reflection evidenced by a clear explanation why land near Round Lake would be more suitable to the members. The Claimant reasoned and decided on its own volition to surrender the land for sale for its own determined best interests. The Crown had the obligation to refuse to consent to the sale, only if the sale represented an exploitative bargain. The bargain cannot be said to have been exploitive as the pre-surrender plan was to obtain a different quasi-proprietary interest, better suited to the needs and interests of the members of Kahkewistahaw. While the Crown could have communicated further details to Kahkewistahaw at the time they expressed their desire to sell IR 72A, its failure to do so falls short of breaching its pre-surrender fiduciary obligation to avoid an unconscionable bargain.

5. Conclusion

[52] For reasons stated above, I have concluded that Canada did not breach its pre-surrender fiduciary duty owed to the Claimant relating to the 1944 surrender of IR 72A.

B. Issue #2: Did Canada Breach its Duty Under the *Indian Act* Owed to the Claimant Relating to the 1944 Surrender of IR 72A?

1. Background

[53] The background related to this issue is set out above at paragraphs 23–25.

2. Claimant's Position

[54] The Claimant submits there is no evidence the *Indian Act*, *1927*, was complied with, and in the absence of any such evidence, this Tribunal should find section 51 of the *Act* was breached.

[55] The Claimant also raises questions about the veracity of the surrender document. The surrender document was signed by Indian Agent Kerley, Chief Favel, and five additional members of the Kahkewistahaw First Nation. Relying on an affidavit by Joseph Arthur Crowe, sworn September 19, 1979, the Claimant argues that one of the signatures on the surrender document, which it says reads "Joe Crowe", is false. According to the affidavit, Joseph Arthur Crowe's father, Joseph Louis Crowe, was known as "Louis Crowe." He signed his name "Louis Crowe" and was "never chief or council[lor] of the Kahkewistahaw Indian Band" (Exhibit Ex-4 at paras 6–7). Joseph Crowe further attests that no one by the name of "Crowe" acted as chief or councillor between 1940 and 1950 and that the "Joe Crowe" signature "does not resemble my father's handwriting" (Exhibit Ex-4 at paras 8, 11).

[56] The Claimant further points to a "Lawrence Kay" on the voters list, recorded as voting in favour of the surrender on July 4, 1944. Kahkewistahaw submits that Lawrence Kay was born September 3, 1923, making him merely 20 years old on the date of the vote. According to the *Indian Act*, to be eligible to vote on the question of surrender, a member had to be male and at least 21 years of age (*Indian Act*, *1927*, subsection 51(1)). While in and of itself this does not invalidate the surrender, the Claimant argues, it "does raise questions" about Indian Agent Kerley's familiarity with the surrender requirements of the *Indian Act*.

3. Respondent's Position

[57] The Respondent argues that Kahkewistahaw bears the onus of proving their allegations and, in the absence of evidence from which a reasonable inference can be drawn that the statutory requirements were not met, the evidence supports the conclusion that Canada met the statutory requirements under the *Indian Act*.

4. Analysis

[58] The *Indian Act, 1927*, was in effect at the relevant time. The Claimant relies on section 51 of the *Act* which reads in relevant part:

> ... no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

[59] In accordance with section 51 of the *Indian Act, 1927*, the surrender was assented to by a majority of the male members of the Band of the full age of twenty-one years. One underage member voted on the surrender, but his vote was of no consequence to the fact that a majority of eligible voters attended the meeting and voted for the surrender.

[60] Kahkewistahaw argues that express notice of the proposed surrender was not provided. Express notice of a meeting to consider the question of surrender explicitly is an important protection enshrined in the *Indian Act* to ensure that all members are aware that a special meeting is being called and those members 21 years of age and over are fully apprised of when they are to attend the non-regular council meeting called for the reason to vote on the surrender proposed. A meeting was held with Kahkewistahaw on April 4, 1944, to consider the question of surrendering the 1.5 acres for the road. Not enough members attended to legally effect a surrender. A second meeting was held later that month. It was during the second meeting called specifically to consider the question of surrender of the 1.5 acres that Kahkewistahaw informed Indian Agent Kerley of their desire to surrender the entirety of IR 72A. It is reasonable to infer that, as the surrender of IR 72A was initiated by Kahkewistahaw, that it had been discussed by the Chief and Council with the members previous to the second meeting wherein it was put to Indian Agent Kerley and that the

members present were aware of the surrender contemplated. It is further reasonable to infer that because of the two meetings prior to the July 4, 1944, meeting wherein the surrender vote took place, eligible voters of Kahkewistahaw had knowledge that there would be a third meeting specifically called to vote on the issue of surrender. In all probability, the proposed surrender and the meeting to vote on the same was a live topic within the community leading up to the July 4 meeting. This is a reasonable conclusion considering that only six out of 43 members eligible to vote did not attend the meeting, other than those members working off the reserve or in the armed forces. Further, the third meeting was specifically summoned for the purpose of voting on the surrender contemplated as attested to by the July 8, 1944, affidavit of Kerley, Chief Favel and two other members of the Band. Taken together, in my view, the above noted evidence, supports the finding of express notice of the July 4 meeting, as that precautionary measure is described in the *Indian Act, 1927*.

[61] The Claimant relies on the affidavit of Joseph Arthur Crowe sworn on September 19, 1979, to question one of the signatures on the July 8, 1944, surrender document, which it submits reads Joe Crowe. Joseph Crowe attests that his father, Joseph Louis Crowe signed his name Louis Crowe and the signature on the surrender document does not resemble his father's.

[62] Joan Holmes testified on behalf of Kahkewistahaw. She was qualified, on consent, to give expert evidence in the areas of historical research, research methodologies, and explain how the historical documents and research relate to the issues in this Claim. Her testimony focused on the creation and surrender of IR 72A.

[63] Joan Holmes testified that the signature does not read "Joe Crowe" but, instead, reads "Jno Crowe". Her expert opinion is that "Jno" is usually an abbreviation for John, so John Crowe. A "John Crowe" also appears on the list of voters. The evidence supports a finding, therefore, that the signature on the surrender certification document is <u>not</u> that of Joseph Crowe's father. Rather, it is the signature of the same John Crowe that appeared on the voter's list.

[64] Joseph Arthur Crowe further attests that no one by the name of Crowe acted as chief or councillor of the Kahkewistahaw Band between 1940 and 1950. Pursuant to subsection 51(3) of the *Indian Act, 1927*, the fact that a surrender has been assented to shall be certified by "some of the chiefs or principal men present thereat and entitled to vote". In this case, the surrender

document was signed by the Chief and five other members of the Band. Whether Crowe was or was not a "principal" man at the time, therefore, is of no consequence to compliance with subsection 51(3) of the *Act* as the document was otherwise signed by the Chief and four other members, whose status as principal men is unchallenged.

[65] Kahkewistahaw argues that the Crown breached section 51 of the *Indian Act, 1927,* as the evidence does not sufficiently demonstrate that the July 4, 1944, meeting of council was conducted according to the rules of the Band. They rely on the July 8, 1944, surrender affidavit which reads that the "assent was given at the meeting or council of the said Band summoned for that purpose and according to its rules or the rules of the Department". The surrender affidavit is not definitive in describing whether the meeting was called in accordance with the rules of the Kahkewistahaw Band. It could have been, or it could have been called in accordance with the rules of the department. Section 51 reads that the meeting must be called in accordance with the rules of the band.

[66] Kahkewistahaw further argues that the Crown breached section 51 of the *Indian Act,1927*, as Indian Agent Kerley, who took the surrender, was not duly authorized by the Governor in Council or the Superintendent General to attend the council. Pursuant to section 51 of the *Indian Act, 1927*, the surrender vote is to be held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General. The Claimant submits that Indian Agent Kerley was forwarded the applicable forms by H. W. McGill, a director at the Indian Affairs Branch. The Claimant argues that a director's authorization does not comply with section 51. The evidence is, however, that Indian Agent Kerley was duly authorized by the Deputy Superintendent. The surrender affidavit supports the finding that Indian Agent Kerley was "duly authorized to attend such council or meeting by the Deputy Superintendent General of Indian Affairs" (Exhibit Ex-1, Vol 1, Tab 85).

[67] In *Blueberry River*, McLachlin J. discussed how strictly the Crown must comply with section 51 of the *Indian Act, 1927*. She concluded that, although the section includes the word "shall", strict compliance is not mandatory. Considering the object of the section of the *Act*, the most important aspect is to "ensure that the surrender was validly assented to by the Band" (*Blueberry River* at para 43). Gonthier J., writing for the majority, agreed with McLachlin J.'s

assessment of section 51 compliance, writing that "there was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*" (*Blueberry River* at para 14).

[68] Indian Agent Kerley was duly authorized to take the surrender by the Deputy Superintendent and not the Superintendent. The evidentiary record renders it unclear whether the July 4, 1944, meeting was conducted according to the rules of the Band or the rules of the department. What is clearly supported by the evidence, however, is Kahkewistahaw's intention to surrender for reasons stated to be in the best interests of their members at the time. The surrender was voted for by a majority of the male members of the Band eligible to vote at a meeting summoned for that purpose. I therefore find that there was substantial compliance with the procedural precautions enshrined in section 51 of the *Indian Act, 1927*.

5. Conclusion

[69] For reasons set out above, I have concluded that Canada did not breach its duty under the *Indian Act*, *1927*, owed to the Claimant with respect to the 1944 surrender of IR 72A.

C. Issue #3: Did Canada Breach its Duty Under Treaty No. 4 Owed to the Claimant Relating to the 1944 Surrender of IR 72A?

1. Background

[70] As set out above, by a majority vote, the Kahkewistahaw First Nation surrendered IR 72A to the Crown in 1944. Twenty-five eligible voters were present, and 18 were absent; 23 voted in favour of surrender, and two voted against. A letter dated July 8, 1944, from Indian Agent W. J. D. Kerley to the Indian Affairs Branch explains that, of the 18 absentees, "twelve are either working off the reserve or in the armed forces". An affidavit also dated July 8, 1944, and signed by Indian Agent Kerley, Chief Harry Favel, and two additional Kahkewistahaw members confirms the surrender. Order in Council PC 6171, dated August 7, 1944, ratifies the surrender on behalf of the Dominion government. The land was ultimately disposed of by the Crown via letters patent in 1956.

2. Claimant's Position

[71] The Claimant submits that the procedure used to dispose of IR 72A breaches the terms of

Treaty No. 4, which Kahkewistahaw adhered to on September 15, 1874. The relevant portion of the Treaty reads as follows:

> ... and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained**,** but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves. [emphasis added; Exhibit Ex-1, Vol 1, Tab 1]

[72] Kahkewistahaw submits that the text of the Treaty was breached because, prior to disposing of the surrendered reserve land, the Crown did not obtain the consent of all members of the First Nation. They argue that this failure amounts to a breach of the Crown's fiduciary obligation to fulfill treaty promises.

3. Respondent's Position

[73] The Respondent submits that the Crown was under no duty to discuss the disposition of IR 72A with Kahkewistahaw because the terms of surrender could be fulfilled. Treaty No 4, it is argued, was made within the context of the *Secretary of State Act*, and altered by successive *Indian Acts*, such that the surrender and disposition requirements in these *Acts* governed reserve land disposition, rather than the Treaty.

4. Analysis

[74] The nine principles of interpreting Crown-First Nations treaties in Canada are well-established. These nine principles are:

> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
>
> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the [A]boriginal signatories.
>
> 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
>
> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.

> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
>
> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
>
> 7. A technical or contractual interpretation of treaty wording should be avoided.
>
> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.
>
> 9. Treaty rights of [A]boriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context. [citations omitted; *Quebec (AG) v Moses*, 2010 SCC 17 at para 107, [2010] 1 SCR 557, citing *R v Marshall*, [1999] 3 SCR 456 at para 78, per McLachlin J. (as she then was), dissenting, but not on this point [*Marshall*]].

[75] In *Marshall*, McLachlin J. laid out a two-step process to interpret treaty text. The first step begins with the "words of the treaty" themselves, which are "examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences" (*Marshall* at para 82). The second step considers the meaning or meanings that could arise on the text itself and considers these "against the treaty's historical and cultural backdrop" in order to determine if a facial meaning reflects the parties' common intention or, if there are multiple possible interpretations, which facial meaning "comes closest to reflecting the parties' common intention" (*Marshall* at para 83).

[76] Treaty No. 4 reads that the reserve land could be sold by the government for the use and benefit of the Band, with the consent of the Band. It is unclear whether the text is meant to mean with the consent of the majority of the Band, with the consent of the majority of the male members of the Band, with the consent of every member of the Band, with the consent of the Band council or whether there is an age requirement to provide sufficient consent. The common intention is to require consent from the Band prior to the disposition of its land. The nature of that consent, however, is unclear.

[77] The Tribunal is asked to determine a facial meaning to the Band's consent to sell the reserve land, that comes closest to reflecting the parties' common intention at the time of negotiating the Treaty. The purpose for the negotiated protection is simply stated to ensure that the land was not

sold against the wishes and without the knowledge of the Band. The Treaty is without negotiated specifics in terms of what form of consent would satisfy the stated protection. It is silent with respect to a mechanism to obtain the required consent to dispose of the land. It is reasonable, therefore, to conclude that the Parties' common intention was to ensure that prior to any disposition, the Band was both duly informed and agreeable. The evidence supports the finding that Kahkewistahaw knew about the sale of IR 72A and agreed to proceed with it. In October 1955, the Crown was preparing the tender that would ultimately dispose of the surrendered land. A BCR dated October 11, 1955, authorizes "[t]hat the cost for advertising the Sale of Kahkewistahaw Indian Reserve land No. 72 A be paid from the Revenue Account of Kahkewistahaw Band" (Exhibit Ex-1, Vol 2, Tab 202). The BCR is signed by the Chief and two Councillors, on behalf of the Band. The Band's governing body therefore had knowledge of the impending disposition and was working with the Crown to ensure its completion by funding the advertisement for this purpose. This is significant evidence indicating the Band's consent to the sale of the land, as demonstrated through its governing body. In these circumstances, the common negotiated intention to protect the Band from a unilateral sale of the land by the Crown is satisfied.

5. Conclusion

[78] For reasons stated above, I have concluded that Canada did not breach its duty under Treaty No. 4 owed to the Claimant relating to the 1944 surrender of IR 72A.

D. Issue #4: Did Canada Breach its Post-Surrender Fiduciary Duty Owed to the Claimant, Other than that Expressly Admitted?

1. Background

[79] Kahkewistahaw surrendered IR 72A in 1944. The sale of the reserve was finalized in 1956.

[80] Following the ratification of the surrender, D. J. Allan, Superintendent of Reserves and Trusts, wrote to M. Christianson, General Superintendent of Indian Agencies, on August 15, 1944, to inform him that the surrender was ratified, and the Indian Affairs Branch was ready to "proceed with the application of the Municipality who require an acre and a half for the roadway" (Exhibit Ex-1, Vol 1, Tab 90). On November 20, 1944, Indian Agent Kerley recorded that the $30 payment for the 1.5 acres was received. On November 22, 1944, General Superintendent Christianson wrote to the Secretary-Treasurer of Grayson to ask for a change in the proposed location of the road as

the department was "considering putting in a subdivision at the lake [ad]joining Sunset Beach" and the municipality's proposed plan would cut off a number of the intended lots (Exhibit Ex-1, Vol 2, Tab 106). On December 5, 1944, the Secretary-Treasurer replied, informing General Superintendent Christianson that the road "has already been paid for and constructed" and that, therefore, "there is nothing else we are prepared to do" regarding its placement (Exhibit Ex-1, Vol 2, Tab 108). The road had been built according to a plan authored by Saskatchewan land surveyor C. H. Biddell.

[81] The dispute over the road's placement continued for years. On June 4, 1947, J. P. B. Ostrander, wrote to Indian Affairs Branch in Ottawa to report that, having inspected the placement of the road through IR 72A, "there is no good reason" for it to have been built the way it was (Exhibit Ex-1, Vol 2, Tab 135). In the same letter, he suggested that officials with the Prairie Farm Rehabilitation Administration, responsible for the road's location and construction, "did not take sufficient care to ascertain the rights of the Indians when expropriation for road purposes was under consideration". The road was eventually relocated to the satisfaction of the Indian Affairs Branch in autumn of 1947. A letter from Regional Supervisor Ostrander, dated April 6, 1948, reports the completion of the road and advises that "[i]t would therefore be in order to offer leases of cottage sites on the lake front" (Exhibit Ex-1, Vol 2, Tab 142).

[82] Between 1948 and 1953, very little occurred regarding IR 72A. The Crown, in oral submissions, admitted it failed to fulfill its fiduciary duty to Kahkewistahaw between 1948 and 1953.

[83] On July 27, 1953, K. W. Criddle, owner of the Sunset Beach Resort, wrote to the Indian Affairs Branch to inquire about the reserve. He wrote, "I would like to buy this [land] and hereby make an offer of $30.00 (thirty dollars) per acres and will buy it all at this price" (Exhibit Ex-1, Vol 2, Tab 156).

[84] Ostrander believed "the land should … be appraised in one block, and an upset price be decided upon before offering the land for sale by tender" (Exhibit Ex-1, Vol 2, Tab 152). His preference for sale by tender stemmed from his opinion that "if it is offered for sale in that manner, there will be others than Mr. Criddle interested". He rejected the department's earlier consideration of subdivision into cottage lots, opining that it would be "many years before it would all be cleared

up, and the difference in amount realized to the Indians would not be worth all the additional trouble and expense".

[85] On August 6, 1953, Superintendent Brown inquired of the Surveyor General about the size of the reserve, believing it to be "somewhere in the neighbourhood of 64 acres" (Exhibit Ex-1, Vol 2, Tab 160). This, Brown notes, does not accord with the surrender document, which says the reserve contains 68.16 acres. On October 15, 1953, D. R. Slessor, Chief of Legal Surveys, put the total acreage at 64.36. Also on October 15, 1953, the Surveyor General put the total acreage at 65.86. On October 20, 1953, Superintendent Brown put the acreage at 64.36. No further action was taken regarding the disposition of IR 72A in 1953.

[86] On February 3, 1955, Superintendent Brown wrote to Superintendent Warden to inquire about the status of the land. He describes the total acreage that could be put up for sale as 65.86, excluding the road allowance between Townships 19 and 19A. He writes, "[w]e surmise that any purchaser would buy this for the purpose of cottage sites and it may therefore be advisable not to sell the whole area at one time" (Exhibit Ex-1, Vol 2, Tab 174).

[87] Around the same time, K. W. Criddle renewed his interest in acquiring the reserve. On March 2, 1955, the Minister of Agriculture, James Gardiner, wrote to the Minister of Citizenship and Immigration, John Pickersgill, to inform him that he had received representations "on behalf of Mr. Ken Criddle who operates a summer resort adjacent" to the reserve, and wished to purchase it (Exhibit Ex-1, Vol 2, Tab 175). The letter estimated the size of the reserve as 67 acres, and asked the Minister of Citizenship and Immigration to advise as to how the land was to be sold: en bloc or subdivided, and by tender or by public auction. The request was forwarded to the Director of Indian Affairs, H. M. Jones and, by letter dated March 7, 1955, Minister Pickersgill assured Minister Gardiner he would look into the matter. Three days later, on March 10, Director Jones wrote to the Director of the Veterans' Land Act requesting an appraisal of the reserve which was said to contain 65.86 acres. Due to bad road conditions, the appraisal was delayed. On June 13, 1955, the appraisal was submitted (Exhibit Ex-1, Vol 2, Tab 187). It showed 65 acres, divided into three categories based on utility. The most valuable 13-acre parcel was valued at $100 per acre, and the next most valuable 8-acre parcel was valued at $50 per acre, based on their suitability as "cabin sites". A map appended to the appraisal shows that the most valuable land parcels were

located on the waterfront, and the difference between the value of the two parcels is based on the quality of beach. In the 13-acre parcel the beach is described as "reasonable" whereas in the 8-acre parcel it is described as "very steep and rocky". The remaining 44 acres, deemed unsuitable for cultivation, were valued at $5 per acre. The total appraised value of the 65 acres was $1,920.

[88] On March 12, 1955, a local Boy Scouts Association wrote Member of Parliament Henry Mang to inform him the group was "anxious to obtain a site for a District Camp and [the reserve] would be an ideal location" (Exhibit Ex-1, Vol 2, Tab 179). They also informed Member of Parliament Mang that "like most organizations of our kind, we have very little money".

[89] Following internal government correspondence over the summer, it was determined that the reserve would be sold en bloc. A call for tenders, authored by Director Jones and dated September 30, 1955, was written utilizing the legal description provided by D. R. Slessor, Chief of Legal Surveys, which put the total acreage at 64.36. This call was subsequently cancelled, and a new call for tenders authored sometime prior to October 19, 1955. On that date, Minister Pickersgill approved a new call for tenders authored by Director Jones. The new call for tenders was released November 2, 1955. It divided the reserve into three parcels: one containing approximately 15 acres; a second containing approximately 18 acres; and a third containing approximately 20 acres. This creates a total reserve size of approximately 53 acres. Sealed tenders were to be accepted until November 30, 1955. Advertisements were placed in seven Saskatchewan newspapers and twenty "for sale" notices were printed to make the public aware of the sale, all of which was paid for out of Kahkewistahaw's funds.

[90] Two sealed tenders were received and opened on November 30, 1955. K. W. Criddle bid on all three parcels, and the Boy Scouts Association bid on parcel 2, which contained 18 acres. K. W. Criddle's bid for parcel 1 was $150, for parcel 2 was $850, and for parcel 3 was $1,500, for a total bid of $2,500 which was accompanied by a 10 percent down payment. The Boy Scouts Association bid $10 per acre for parcel 2, for a total bid of $180, also accompanied by a 10 percent down payment. A memorandum written by H. M. Jones and sent to Minister Pickersgill on December 2, 1955, notes that K. W. Criddle's bids exceeded the appraised value, and recommended accepting his offer. The memorandum was endorsed by the Minister. On December 12, 1955, Acting Superintendent of Reserves and Trusts, W. C. Bethune, wrote K. W. Criddle to

inform him his offers had been accepted, and that his deposit had been credited to his account. Upon the remittance of the balance of $2,250, Bethune informed Criddle that "we will proceed with the issue of Letters Patent in your favour" (Exhibit Ex-1, Vol 3, Tab 223).

[91] Payment was not forthcoming immediately: K. W. Criddle wrote to the Indian Affairs Branch on December 27, 1955, to inform them he had been "very hard hit with this year['s] flood which destroyed my home and property" and thus needed to arrange a loan in order to pay the purchase price (Exhibit Ex-1, Vol 3, Tab 227). Three days later he submitted a cheque for $500. On January 11, 1956, W. C. Bethune wrote to Criddle acknowledging the situation, and informing him that the letters patent would issue "upon receipt of the balance of the purchase price" (Exhibit Ex-1, Vol 3, Tab 231). A $650 cheque was received in January 1956 and the $1,100 balance was received on May 10, 1956.

[92] On June 4, 1956, Indian Affairs Branch submitted a request to the Department of Justice for draft letters patent. A draft was duly returned on June 8, 1956, but did not indicate the acreage. This draft was forwarded to the Department of the Secretary of State, which returned the "duly registered" letters patent, made out in favour of Kenneth William Milton Criddle, to the Indian Affairs Branch on July 3, 1956 (Exhibit Ex-1, Vol 3, Tab 244). According to Joan Holmes's expert report, the sale record held by Indigenous and Northern Affairs Canada, now known as Indigenous Services Canada, "indicates … 64.36 acres was sold for $2500" (Exhibit Ex-2 at 65). This acreage, she points out, "is at odds with the descriptions of the individual parcels which totaled 53 acres more or less".

2. Claimant's Position

[93] Kahkewistahaw alleges that the Crown breached its post-surrender fiduciary duty in the following ways:

1. By the delay in the sale of and the manner in which IR 72A was sold;

2. By disposing of IR 72A in a manner that was not in the best interest of the First Nation, namely selling it rather than leasing it;

3. By failing to consult the First Nation regarding the ultimate sale; and,

4. By failing to receive compensation for the full amount of the land sold and patented to K. W. Criddle.

3. Respondent's Position

[94] With certain stated exceptions, the Respondent denies these allegations.

[95] The Crown submits that it diligently addressed the road diversion issue between 1944 and 1947. It admits that between 1948 and 1953, the Crown breached its fiduciary duty as there was no movement towards the sale of the surrendered land. Following K. W. Criddle's renewed interest in 1953, however, the Respondent submits that it fulfilled its duty as a fiduciary because it immediately got to work on the process to fulfill the terms of the surrender.

[96] The Respondent further submits that it fulfilled its fiduciary duty regarding the way IR 72A was disposed of. The decision to sell the reserve in three parcels without further subdivision was reasonable, it is argued, as any delay would not have been in the best interests of the Band. Following a successful harvest in 1955, it was believed that a better return could be achieved for the land immediately, rather than risk additional delay subdividing. There was further concern that spring flooding in 1956 could decrease the land's value.

4. Analysis

[97] The surrender document lists the size of the reserve as 68.16 acres. The revised call for tenders dated November 2, 1955, states that the total available acreage for sale is 53 acres. The sale record indicates that 64.36 acres were sold to K. W. Criddle. The Claimant therefore submits that Canada breached its fiduciary duty to act in the best interests of Kahkewistahaw by transferring more land to Criddle than was purchased.

[98] I disagree. Alana J. Kelbert testified on behalf of the Claimant. She was qualified, on consent, to give expert evidence on current and historical land valuation, and historical loss of use determinations in Western Canada. Hal Love testified on behalf of the Respondent. He was qualified, on consent, to testify as an expert in current and historical land valuation and historical loss of use determinations in Western Canada. Although this hearing was related to validity, the Parties agreed that the Tribunal could refer and rely upon evidence related to compensation, as required. The compensation experts of both Parties opine that the inconsistencies in the land's size

between the tender and the sale record are attributable to high water levels caused by flooding. They further agree that "the loss of 12 acres would have resulted at the time of flooding and not at the time of purchase in 1955" (Exhibit Ex-7 at 3).

[99] Joan Holmes details the discrepancy with an aerial photograph used in 1955 in preparation of the sale which illustrated the change in the shoreline from an earlier 1924 survey. Ultimately, the loss of the 12 acres from flooding did not negatively impact the best interests of Kahkewistahaw. The appraised value of IR 72A valued 65 acres at $1,920. Kahkewistahaw received $2,500 for 53 acres, more than the appraised value of the acres indicated on the sale record.

[100] As set out in the surrender document, Kahkewistahaw surrendered all of IR 72A to the Crown to hold in trust to sell, upon such terms as the Crown may deem most conducive to the welfare of the Band. The Crown assumed responsibility to sell the surrendered land at its discretion. As described by Professor E. J. Weinrib, cited in *Guerin* at paragraph 97, "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion". The post-surrender *sui generis* fiduciary duty of the Crown arises as the benefit to Kahkewistahaw from the surrender of IR 72A is dependent upon the post-surrender actions and decisions of the Crown. The Crown has the duty to act in the best interests of the First Nation (*Blueberry River* at para 20). It must act with reasonable diligence (*Blueberry River* at para 22). The duty is one of a person "of ordinary prudence in managing [their] own affairs" (*Blueberry River* at para 104, per McLachlin J., citing *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302 at 315).

[101] Canada has admitted that it did not fulfill its post-surrender fiduciary duty during what it refers to as 'the quiet years between 1948 and 1953'. The Tribunal is without evidence to indicate that the sale of IR 72A or the best interests of the Band were being considered or discussed by the Crown during this time. In my view, however, the quiet years represent only one part of Canada's failure to reasonably deal with the land for the use and benefit of the Band. In *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623, the court held that the duty of reasonable diligence is linked to a duty to act "in a timely way", and that this duty applies with respect to treaty obligations, in cases where the honour of the Crown is engaged, and where there

is a constitutional obligation (para 79). Kahkewistahaw saw no benefit from the surrender for almost twelve years. IR 72A was an asset capable of generating income. The value of this asset was essentially ignored for over a decade. A person of ordinary prudence managing their own affairs, acting reasonably, would have explored or exploited its value on their own volition prior to an unsolicited expression of interest received nine years after the surrender.

[102] Canada began in 1944 with this exact intention. It considered several options regarding leasing and subdividing the surrendered land as an interim measure to earn revenue for Kahkewistahaw pending the ultimate sale of the land, as it was thought that the value of the surrendered land would increase significantly if the government delayed the sale of the land until the Second World War ended. Superintendent D. J. Allan suggested it would be "profitable" to undertake the subdivision immediately in October 1944 to rent out the lakefront lots (Exhibit Ex-1, Vol 2, Tab 96). Canada failed to take any action to implement these reasoned intentions, however, other than consulting a surveyor to determine the cost of surveying the land. It did not consult Kahkewistahaw with respect to the interim income generating measures being considered.

[103] Canada submits that the interim measures did not occur in 1944 because of the diversionary road issue. The dispute over the road's displacement continued for approximately three years. Canada argues that it was not its decision to build the road in a harmful location and, when it was discovered, Canada did what was necessary to address the issue and maintain the value of the reserve. It submits that although the dispute persisted until late 1947, the existence of the delay does not equate to a breach of fiduciary duty as the delays were not attributable to Canada.

[104] In essence, therefore, Canada is saying that, unlike its failure between 1948 and 1953 to reasonably source revenue for the Band from the surrendered land, the actions of the municipality and the Province of Saskatchewan excuse the same failure between 1944 and 1947. It agrees that it did not meet its fiduciary duty between 1948 and 1953 but argues that the duty was met between 1944 and 1947. I do not accept this distinction.

[105] In *Williams Lake Indian Band v Canada (Indian Affairs and Northern Development),* 2021 FCA 30, the Federal Court of Appeal considered whether British Columbia's likely unwillingness to cooperate in the transfer of replacement lands effectively absolved Canada from needing to pursue such an option. The Court concluded that it was not open to Canada to justify its failure to

replace expropriated reserve lands for the Williams Lake Indian Band on the fact that British Columbia would likely not agree to provide replacement lands:

> Such a conclusion fails to respect the applicable common law principles governing the scope of the Crown's duty of minimal impairment, discussed above. In short, it is not open to Canada to rely on likely provincial intransigence as an excuse for a failure to meet its own fiduciary obligations, even if such intransigence might well be, in and of itself, also a breach of fiduciary duty. [para 48]

[106] As a fiduciary, Canada had a duty of reasonable diligence to source a revenue from the surrendered land most conducive to the welfare of the people of Kahkewistahaw in a timely way. The evidence fails to indicate that income generating sources were being considered or examined during the years wherein the road diversion was a live issue. The amount of land involved at issue for the road diversion was only 1.5 acres. Disproportionately, it took three years before the issue of the road relocation was resolved. Once resolved, Canada made no effort to sell the land. These efforts were only triggered years later by an unsolicited expression of interest to purchase the land. In my view, the duty of ordinary prudence would reasonably include Canada continuing to examine interim measures of monetizing the surrendered land pending resolution of the road diversion issue and resolving the road diversion issue without unreasonable delay. This duty is not excused by the conduct of the Province of Saskatchewan or the municipality. For these reasons, I have concluded that Canada did not meet its fiduciary duty between the years 1944 and 1947.

[107] Kahkewistahaw submits that the post-surrender fiduciary duties were breached by the Crown as the ultimate disposal of the surrendered land via sale was less beneficial to the First Nation than leasing would have been. The terms of the surrender, however, limited the obligation of the Crown to a sale of the land on such terms as may be determined most conducive to the Claimant. The Crown was under no duty, therefore, to consider leasing as a final means of dealing with the surrendered land in the best interests of the First Nation.

[108] The Claimant further argues that the failure to include the option to lease the land on behalf of Kahkewistahaw in the surrender document was a mistake, inadvertence, or misjudgement that the Crown was obligated to correct. The Claimant relies on McLachlin J.'s concurring opinion in *Blueberry River* wherein she references an early 1940 policy of the Department of Indian Affairs which demonstrated a preference to "lease unused Indian interests rather than sell them, so that the land would be available for use by the Indians and their descendants in the future" (para 48). If

there was such a policy in 1944, however, a failure to include leasing in the surrender document would not amount to a breach of fiduciary duty as Kahkewistahaw clearly articulated their reasoned desire to sell the land (*Blueberry River* at para 51). The evidence does not support the view that it was a mistake to limit the surrender to a sale. Kahkewistahaw's consent to a surrender for sale was consistent with their expressed intention to sell IR 72A.

[109] The quiet years between 1948 and 1953 ended only because of an unsolicited expression of interest from K. W. Criddle, owner of the Sunset Beach Resort, on July 27, 1953. This prompted some discussion by the Crown respecting the method of disposition and the size of the surrendered land. The concept of subdividing the surrendered land was dismissed by the Crown because it would take "many years before it would all be cleared up, and the difference in amount realized to the Indians would not be worth all the additional trouble and expense". Despite a stated concern for delay, no further action was taken regarding the disposition of IR 72A until 1955. Once again, the action was triggered by a third party's uninvited expression of interest. In February 1955, K. W. Criddle renewed his interest in acquiring the surrendered land and in March 1955, a local Boy Scouts Association expressed an interest in the land. Again, subdividing the land was dismissed by the Crown because "field staff advised against it, as the real value of the land comprised of the part suitable for summer cottages" and "a survey would be required and this would delay the sale for at least one year" (Exhibit Ex-1, Vol 2, Tab 199). The sale proceeded en bloc (three parcels without further subdividing) as described above, without any evidence of consultation with Kahkewistahaw regarding the proposed method to be used for the sale. Kahkewistahaw did consent to the sale, as demonstrated by the October 1955 BCR approving the cost of advertising the sale.

[110] The Respondent's compensation expert evidence is such that in 1955, the surrendered land was adjacent to the Sunset Beach Resort. As owner of the Sunset Beach Resort, K. W. Criddle subdivided the property and sold the lots for cottage purposes. There were other properties on Crooked Lake that had been subdivided and rented out for recreational purposes. The properties surrounding the surrendered land, therefore, had been subdivided for the purpose of selling or leasing. In February 1955, Superintendent Brown advised that any purchaser would buy this for the purpose of cottage sites and it may therefore be advisable not to sell the whole area at one time. The Crown dismissed the idea of subdividing the land outright without a detailed investigation

into the benefits for the Band to do so, for reasons in part that related to "trouble" and "expense". Unlike in 1944, there was no reasoned examination of the lots at Sunset Beach Resort, how many were sold at what price, how many remained available. The surrendered land had sat dormant for 11 years. A survey to indicate the value of a subdivision was to take only a further year. Despite this, the Crown made no significant effort to consider whether subdividing the surrendered land would prove more beneficial to Kahkewistahaw. The Crown was entrusted to sell the surrendered land on terms most conducive to the welfare of the Band. In these circumstances, this reasonably would include conducting a substantive analysis of the costs and benefits for the Band, of subdividing the surrendered land versus selling the land en bloc. This analysis was not done.

[111] The sale of the surrendered land to K. W. Criddle was completed in 1956. The Respondent's expert evidence is such that the Criddle family had subdivision plans completed for the land in 1958. They extended their existing development of the Sunset Beach Resort into the surrendered land and subdivided the lots. There was a steady sale of lots on the surrendered land between 1959 and 1967. In my view, as part of its duty of reasonable diligence, Canada should have fully analyzed the option to subdivide the surrendered land, prior to selling it to K. W. Criddle, in three parcels. Its failure to do so amounts to a breach of its fiduciary duty.

[112] Kahkewistahaw argues further that the Crown breached its fiduciary duty by failing to consult with the Band prior to selling the reserve. As part of the Crown's basic fiduciary duties of loyalty and full disclosure appropriate to the subject matter (*Wewaykum* at para 86), the Crown, in dealing as a fiduciary with surrendered reserve lands, has a duty to inform the First Nation of any proposed changes to the compensation or use of the reserve lands, and to consult with, or seek direction from, the First Nation regarding its views on the new information in a timely way (*Guerin* at para 52; *Southwind* at paras 86, 114; *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8, appeal dismissed *Lac La Ronge Band and Montreal Lake Cree Nation v Canada*, 2015 FCA 154). The Tribunal has jurisdiction to consider this issue in the context of the Crown's administration of reserve lands pursuant to paragraph 14(1)(c) of the *SCTA.* This is distinguished from the Tribunal's lack of jurisdiction to consider the duty to consult with respect to the construction of the Craven Dam, in the context of Aboriginal and treaty rights, as set out in the discussion of Issue #8 below.

[113] I have concluded that Canada did not meet its fiduciary duty in part considering the delay and inaction between the time of surrender and the time of sale. In my view, however, the delay in and of itself does not trigger Canada's duty to inform and consult. Canada ultimately fulfilled the terms of the surrender without change. Significantly, the Band was made aware of the sale sometime prior to October 11, 1955, and agreed to proceed with it, despite the delay, by approving the cost of advertising the land for sale to be paid out of its revenue account. In these circumstances, the Crown's failure to consult with Kahkewistahaw from 1945 until 1953 does not constitute an additional breach of fiduciary duty.

5. Conclusion

[114] For reasons set out above, I have concluded that Canada breached its post-surrender fiduciary duty owed to the Claimant with respect to its administration of reserve land, pursuant to paragraph 14(1)(c) of the *SCTA*.

E. Issue #5: Did Canada Breach its Fiduciary Duty Owed to the Claimant with Respect to a Pre-Surrender Trespass on IR 72A?

1. Background

[115] As set out above, at some point prior to 1944, a road allowance between Township 19 and Township 19A located on IR 72A was in use without the consent of the Claimant. The road provided access to the Sunset Beach Resort, owned by the Criddle family. The Criddle family constructed buildings on the road allowance.

2. Claimant's Position

[116] Kahkewistahaw submits that the Crown was under a fiduciary obligation to protect the reserve land from exploitation, including by trespass. They argue that the Crown breached its fiduciary obligations to the First Nation by allowing the Rural Municipality of Grayson to construct a road on the road allowance and by allowing the owner of the Sunset Beach Resort to construct a store and a house on the road allowance.

3. Respondent's Position

[117] Canada submits that there is insufficient evidence to prove any trespass occurred and that, even if trespass did occur, the Crown is not under a positive obligation to address trespass.

4. Analysis

[118] The *Indian Act, 1927,* in effect at the relevant time rendered it unlawful for persons other than a member of the band to reside upon or occupy a road or road allowance on a reserve without authorization of the Superintendent General (section 34 of the *Indian Act, 1927*). It is unclear when the road allowance was constructed or when the buildings on it were built. The road led to the Sunset Beach Resort; a resort owned by the Criddle family from since approximately 1920. Joan Holmes' evidence is that in 1943 the road allowance flooded. The evidence supports a finding of trespass therefore as, at the very least, sometime prior to 1944, without authorization, a road located on IR 72A was constructed and in use, and the Criddle family constructed buildings on it.

[119] The *Indian Act* imposes a process of allotting reserve lands for First Nations, while granting the discretionary power to control those lands to the Crown. The nature of the statutory framework is such to establish a fiduciary duty on the Crown to protect the band's quasi-proprietary interest (*Wewaykum* at para 86). The *Indian Act* specifically protects the First Nation against unauthorized use of the reserve land. The reserve land has been statutorily set aside for the use and occupation by the band. Intrusion on reserve land by those not entitled to occupy or use the land exploits the benefits of and threatens the existence of the band's quasi-proprietary interest as granted. For these reasons, in my view, the fiduciary duty of the Crown reasonably extends to include an obligation to use ordinary prudence to protect the First Nation from intrusion and exploitation by trespass on reserve land. A person of ordinary prudence managing their own affairs, acting reasonably, would not have permitted an unauthorized road and buildings to persist on their land.

[120] Subsection 35(c) of the *Indian Act, 1927*, provides that if any person other than a member of the band settles, resides upon or occupies any road, or allowance for a road on a reserve, "without the license of the Superintendent General", the Superintendent General "shall, on complaint made to him" take action to remove the person. Paragraph 35(4)(a) of the *Indian Act, 1927*, provides that a "chief of the band", an Indian Agent, or a constable may require a person other than a member of the band to leave a "road, or allowance for road" they are occupying on reserve.

[121] The Respondent argues that the Crown, therefore, bears no duty to remedy the trespass unless the First Nation first makes a complaint of trespass and submits that the Band had the power

to address the trespass itself. Pursuant to the *Indian Act*, the Superintendent General controls who, other than members of the Band, can reside upon, use or occupy a road or road allowance on the reserve land. The Crown has a fiduciary duty to protect the Band's quasi-proprietary interest from interference by those not authorized to occupy or use the reserve. The duty is not diminished because the Crown has statutorily permitted the Band to address the trespass as well. Similarly, the fiduciary duty is not triggered by complaint of the beneficiary. It is the Crown's control over the First Nation's interest in the reserve land that grounds the duty. The Crown is to practice ordinary diligence to avoid destruction of the Band's quasi-proprietary interest by a trespass from a third party. This would reasonably include the duty to remedy the trespass by actively taking steps to remove the unauthorized roads and buildings located on IR 72A.

5. Conclusion

[122] For reasons set out above, I have concluded that Canada breached its fiduciary duty regarding the administration of reserve land owed to the Claimant with respect to a pre-surrender trespass on IR 72A, pursuant to paragraph 14(1)(c) of the *SCTA*.

F. Issue #6: Does Canada owe a Fiduciary Duty to the Claimant with Respect to a Post-Surrender Trespass on IR 72A?

1. Background

[123] As set out above, in 1944, the Rural Municipality of Grayson asked for 1.5 acres of IR 72A to divert the road away from the government road allowance which formed the boundary between IR 72A (located in Township 19) and Sunset Beach immediately to the south (located in Township 19A). Sometime before December 1944, the road was relocated.

[124] By July of 1945, Indian Affairs informed the municipality that the road had not been approved, should not have been built, and any flooding issues to the previous road could have been solved by grading. The dispute between the municipality and Indian Affairs continued for years. In autumn 1947, the road was relocated again and constructed on the road allowance between Townships 19 and 19A which formed part of the reserve.

2. Claimant's Position

[125] The Claimant argues that the Crown breached a fiduciary duty to the Claimant with respect

to a post-surrender trespass on IR 72A by allowing the Rural Municipality of Grayson to construct the road diversion in 1944 on IR 72A, in an area that was not approved. The Claimant further argues that the continued, post-surrender, unauthorized use of the road allowance between Townships 19 and 19A, for the road leading to the Sunset Beach Resort, represents a breach of fiduciary duty.

3. Respondent's Position

[126] The Respondent submits that any fiduciary duty owed to the Claimant to protect reserve land from damage by third party trespass, ceases with the surrender of the reserve land. A fiduciary obligation only exists, it is argued, when the Crown has discretionary control over the use and benefit of the reserve land. The trespass provisions of the *Indian Act, 1927*, apply only to reserve lands. Upon surrender, therefore, there is no longer a cognizable interest to ground the fiduciary duty.

4. Analysis

[127] The definition of "reserve" under section 2 of the *Indian Act, 1927*, expressly excludes land that has been surrendered to the Crown. Sections 34 and 35 of the *Indian Act, 1927*, governing the issue of trespass refer only to "reserve" land. I would agree therefore that sections 34 and 35 of the *Indian Act, 1927*, do not apply to surrendered land.

[128] Section 54 of the *Indian Act, 1927*, provides that surrendered reserve land "shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part". Upon accepting the surrender, therefore, the Crown assumes discretionary control over the dealings of the land. A fiduciary obligation regulates the way the Crown exercises its discretion in dealing with the land on the band's behalf (*Guerin* at para 105). The Crown is charged with holding and managing the surrendered land between the time of surrender and, pursuant to the terms of the surrender at issue, the time of sale. In this case, the interim period lasted for almost twelve years. Throughout that period, the Claimant remained vulnerable to the way in which the Crown exercised control over the surrendered land. The post-surrender *sui generis* fiduciary duty of the Crown that arises as the ultimate benefit to Kahkewistahaw from the surrender of IR 72A is dependent upon actions and decisions of the Crown in managing the surrendered land, prior to

sale. The Crown must act with reasonable diligence during this time. The duty is one of a person of ordinary prudence in managing their own affairs.

[129] In my view, the Crown's fiduciary duty to hold and manage the surrendered land with ordinary prudence and reasonable diligence includes the duty to protect the surrendered land from intrusion by third party trespass, prior to sale. Upon surrender, Kahkewistahaw is without an ability by which to address a trespass. It is left to rely on the authority of the Crown to ensure that the surrendered land remains free from damage by trespass. The Crown is obliged to sell the surrendered land by means most conducive to the welfare of the Claimant. This obligation is defeated by a permissive approach to trespassers while managing the land prior to sale. Trespass on the surrendered land prior to sale threatens the best interests of the Band and its members who are entitled to receive value from the sale of the land, without impairment caused by a trespass.

5. Conclusion

[130] For reasons set out above, I have concluded that Canada owes a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A.

G. Issue #7: If Canada Owes a Fiduciary Duty to the Claimant with Respect to a Post-Surrender Trespass on IR 72A, Did Canada Breach this Duty?

[131] The unauthorized use of the road allowance between Townships 19 and 19A, for the road leading to the Sunset Beach Resort, continued post-surrender. The unauthorized buildings constructed on this road as well endured post-surrender.

[132] In 1943, the road allowance flooded. On August 7, 1944, the surrender was accepted by Order in Council. On November 22, 1944, the Crown advised the municipality of its desire to divert the flooded road in a different way than proposed by the municipality. On December 5, 1944, the Crown learned that the road was built, contrary to its desire and without its authorization. On June 23, 1945, J. P. B. Ostrander, Inspector of Indian Agencies, wrote to D. J. Allan, Indian Affairs Branch. He said that although the municipality paid $30.00 for the land used for the diversionary road, "they have done a great deal more than $30.00 damage to the property" (Exhibit Ex-1, Vol 2, Tab 114). He also said that the original location of the road between Townships 19 and 19A "was not by any means flooded and was in low ground for only a short distance and could have been easily overcome by grading". He stated further that "the new road which the

Municipality have built spoils a considerable part of our property and I maintain is not necessary".

[133] In managing the land post-surrender, the Crown is to practice ordinary diligence to ensure that the surrendered land can be sold in a way most conducive to the welfare of the Band. This would reasonably include taking steps to remove the unauthorized roads and buildings located on IR 72A and repairing the flooded road allowance with oversight and diligence. The Crown was aware of the issue of the road as early as April 1944. Upon surrender, it controlled all dealings with the land. A person managing the land for the purposes of sale, acting reasonably, would have ensured the road was diverted or repaired in a timely manner to avoid any negative impact on the value of the land for sale. Instead, the Crown delayed addressing the matter, permitting the municipality to do so independently, without notice to the Crown, resulting in damage to the surrendered land.

[134] The evidence supports a finding, therefore, that Canada breached its fiduciary duty to the Claimant regarding the administration of reserve land with respect to a post-surrender trespass, pursuant to paragraph 14(1)(c) of the *SCTA*.

H. Issue #8: Does the Tribunal Have Jurisdiction to Hear an Asserted Breach of the Duty to Consult and Accommodate with Respect to the Construction of the Craven Dam?

1. Background

[135] In around 1909, the Department of Marine and Fisheries of the federal government constructed a dam on the Qu'Appelle River at Craven, Saskatchewan (the Craven Dam), just below the Long Lake Creek, and some distance upriver from IR 72A. The purpose and effect of this dam was to turn the water from the Qu'Appelle River into Long or Last Mountain Lake.

[136] There is no evidence of consultation with the Kahkewistahaw First Nation prior to construction of the dam.

[137] On February 17, 1912, E. W. Miller, Inspector of Fisheries, wrote to W. A. Founds, Superintendent of Fisheries, regarding the construction of the dam on the Qu'Appelle River. He noted that the dam had been a very great benefit to Long Lake both in regard to the fishery and other respects, but that "[t]he lower lakes (the Qu'Appelle chain, Crooked [Lake] and Round

[Lake]) have however unquestionably suffered correspondingly" and their waters had tended to become comparatively shallow and stagnant. Inspector Miller noted that the conditions produced by the construction of this dam were "inimical to the continuance of the fisheries of these lakes in a healthy condition, more particularly to the valuable species which in a normal state the lakes are particularly well fitted to produce".

2. Claimant's Position

[138] The Claimant submits that the Crown had a fiduciary obligation to consult with the First Nation prior to the construction of the Craven Dam. This consultation would have triggered the duty to accommodate the First Nation's interests. The duty to consult and accommodate the interests of First Nations is "grounded in the honour of the Crown" (*Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73 at para 16, [2004] 3 SCR 511). The Crown knew or should have known that construction of the Craven Dam would adversely affect Kahkewistahaw's treaty right to fish and their interest in the reserve land. There is no record that the First Nation was ever consulted with respect to the Craven Dam. The Crown, therefore, it is argued, owes compensation to the First Nation for this breach of its fiduciary obligations.

3. Respondent's Position

[139] The Respondent submits that the Tribunal does not have jurisdiction to hear the asserted breach of the duty to consult and accommodate regarding the construction of the Craven Dam. This duty does not fall within any of the grounds enumerated in subsection 14(1) of the *SCTA* on which a First Nation may file a claim.

4. Analysis

[140] The Claimant is correct that the duty to consult and accommodate is grounded in the honour of the Crown (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [2004] 3 SCR 511). There is no record that the First Nation was ever consulted with respect to the Craven Dam. The evidence is such that the construction adversely affected Kahkewistahaw's ability to fish from their reserve land. The Claimant argues that the honour of the Crown is subject to fiduciary duties. The Crown may have had a fiduciary obligation to accommodate and consult the Claimant prior to constructing the Craven Dam and Canada may owe compensation to the First Nation for a breach of its fiduciary obligation to accommodate and consult, but the Tribunal does

not have jurisdiction to determine this issue.

[141] The jurisdiction of the Tribunal is restricted to those claims enumerated by its governing statute. Subsection 14(1) of the *SCTA* reads as follows:

> **Grounds of a specific claim**
>
> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> **(a)** a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> **(b)** a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;
>
> **(e)** a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
>
> **(f)** fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

[142] The Claimant relies upon paragraph 14(1)(c) of the *SCTA*. It submits that the act of constructing the Craven Dam gave rise to a fiduciary obligation at law to consult with the First Nation. The dam was constructed without consultation. This, it is submitted, was a unilateral undertaking by the Crown, in breach of its fiduciary duty to the Claimant, which adversely affected Kahkewistahaw's reserve land and treaty rights, such that the Tribunal has jurisdiction over the issue.

[143] In my view, the Claimant's interpretation of the phrase "unilateral undertakings" in the context of paragraph 14(1)(c) of the *SCTA* is incorrect. The section grants jurisdiction to the Tribunal to hear claims based on a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including those claims arising from the Crown's provision or

non-provision of lands wherein the Crown undertook to do something for the benefit of the Indigenous group. The unilateral undertaking in this context does not refer to a single act taken by the Crown that adversely affects the First Nation, but rather a solemn promise made to the First Nation arising from the provision or non-provision of reserve land.

[144] This interpretation is consistent with the stated purpose of the subsection at its inception. Professor Bryan Schwartz, a witness before the Standing Committee on Aboriginal Affairs and Northern Development in 2008, cited the decision of the Supreme Court of Canada in *Wewaykum*, stating that this wording in paragraph 14(1)(c) was intended to ensure that "Wewa[y]kum kinds of claims, which occur when the federal government has unilaterally promised to provide reserve land pursuant to a treaty commission", could be brought before the new Specific Claims Tribunal (emphasis added; House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 39-2, No 21 (2 April 2008) at 16:05 (Bryan Schwartz)). The word undertaking is defined in *Black's Law Dictionary*, 11th ed, *sub verbo* "undertaking", as "a promise, pledge, or engagement", but the stated intention is perhaps better illustrated in the French language version of paragraph 14(1)(c) wherein unilateral undertaking is translated as "un engagement unilatéral", meaning a promise or engagement.

[145] This interpretation is equally consistent with the jurisprudence of the Tribunal. The Tribunal considered the meaning of the phrase "unilateral undertakings" in the context of paragraph 14(1)(c) in *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3 at paras 215–223 and *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 6 at para 558 [*Atikamekw*]). The decisions considered the impact of unilateral undertakings made to the respective First Nations by the colonial governments in both British Columbia and Quebec, prior to confederation. In each case the Tribunal found that unilateral undertaking as that phrase is used in paragraph 14(1)(c) of the *SCTA* is properly interpreted as a solemn promise made to an Indigenous group, for the benefit of that group.

[146] In *Atikamekw*, the Tribunal held that the Crown gave a unilateral undertaking to the Atikamekw of Opitciwan First Nation in the context of paragraph 14(1)(c) of the *SCTA* when it promised to consult with the First Nation before approving an agreement with the Quebec government regarding payment of compensation to it. There is no evidence in this Claim that the

Crown made any such promise to the Claimant with respect to the Craven Dam. This does not mean that the Crown may not have had a duty to consult the Claimant prior to the construction of the Craven Dam. It only means that the Tribunal does not have the jurisdiction to determine whether the Crown had a fiduciary obligation to accommodate and consult the Claimant prior to constructing the Craven Dam or whether Canada owes compensation to the First Nation if it breached its fiduciary obligation to accommodate and consult.

5. Conclusion

[147] For reasons set out above, I have concluded that the Tribunal is without jurisdiction to address the asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam as it does not fall within any of the grounds enumerated in subsection 14(1) of the *SCTA*.

I. Issue #9: If the Tribunal has Jurisdiction to Hear the Asserted Breach of the Duty to Consult and Accommodate with Respect to the Construction of the Craven Dam, Did Canada Breach this Duty?

[148] Given the Tribunal's finding above that it does not have jurisdiction to deal with the asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam, it is not necessary for the Tribunal to deal with this issue.

VI. CONCLUSION

[149] For reasons set out above, I have concluded as follows:

1. Canada did not breach its pre-surrender fiduciary duty owed to the Claimant relating to the 1944 surrender of IR 72A;

2. Canada did not breach its duty under the *Indian Act,1927,* owed to the Claimant relating to the 1944 surrender of IR 72A;

3. Canada did not breach its duty under Treaty No. 4 owed to the Claimant relating to the 1944 surrender of IR 72A;

4. Canada did breach its post-surrender fiduciary duty owed to the Claimant, other than that expressly admitted;

5. Canada did breach its fiduciary duty owed to the Claimant with respect to a pre-surrender trespass on IR 72A;

6. Canada did owe a fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A;

7. Canada did breach its fiduciary duty to the Claimant with respect to a post-surrender trespass on IR 72A; and,

8. The Tribunal does not have jurisdiction to hear an asserted breach of the duty to consult and accommodate with respect to the construction of the Craven Dam.

VICTORIA CHIAPPETTA

Honourable Victoria Chiappetta, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20220623

File No.: SCT-5002-16

OTTAWA, ONTARIO June 23, 2022

PRESENT: Honourable Victoria Chiappetta, Chairperson

BETWEEN:

KAHKEWISTAHAW FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant KAHKEWISTAHAW FIRST NATION**
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AND TO: **Counsel for the Respondent**
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