



SUPREME COURT OF CANADA

CITATION: Williams Lake Indian Band v. Canada
(Aboriginal Affairs and Northern Development),
2018 SCC 4

APPEAL HEARD: April 26, 2017
JUDGMENT RENDERED: February 2, 2018
DOCKET: 36983

BETWEEN:

Williams Lake Indian Band
Appellant

and

**Her Majesty The Queen in Right of Canada as represented by the Minister of
Aboriginal Affairs and Northern Development Canada**
Respondent

- and -

**Specific Claims Tribunal, Assembly of Manitoba Chiefs, Federation of Sovereign
Indigenous Nations, Indigenous Bar Association in Canada, Assembly of First
Nations, Union of British Columbia Indian Chiefs, Nlaka’pamux Nation Tribal
Council, Stó:lō Nation, Stó:lō Tribal Council, Carrier Sekani Tribal Council,
Assembly of First Nations of Quebec and Labrador, Cowichan Tribes,
Stz’uminus First Nation, Penelakut Tribe and Halalt First Nation**
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 132)

Wagner J. (Abella, Moldaver, Karakatsanis and Gascon JJ.
concurring)

REASONS DISSENTING IN PART:
(paras. 133 to 158)

Rowe J. (Côté J. concurring)

DISSENTING REASONS:
(paras. 159 to 213)

Brown J. (McLachlin C.J. concurring)

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WILLIAMS LAKE INDIAN BAND v. CANADA (AANDC)

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as represented by the Minister of Aboriginal Affairs
and Northern Development Canada**

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**Specific Claims Tribunal, Assembly of Manitoba Chiefs,
Federation of Sovereign Indigenous Nations,
Indigenous Bar Association in Canada,
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Indian Chiefs, Nlaka'pamux Nation Tribal Council,
Stó:lō Nation, Stó:lō Tribal Council,
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Cowichan Tribes, Stz'uminus First Nation,
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Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Aboriginal law — Land claims — Crown — Fiduciary duty — Indian reserves — Band seeking to establish statutory specific claim and obtain compensation for losses of lands within its traditional territory pre-empted by settlers before Confederation — Whether before Confederation Imperial Crown owed to band, and breached, legal obligation under colonial legislation to protect lands from pre-emption and set them aside as reserve — Whether after Confederation federal Crown owed, and breached, fiduciary obligation to set aside pre-emptions and allocate lands as reserve — Framework for determining whether Crown owed and breached fiduciary obligation — British Columbia Terms of Union, R.S.C. 1985, App. II, No. 10, art. 13 — Specific Claims Tribunal Act, S.C. 2008, c. 22, s. 14(1)(b), (c).

Aboriginal law — Land claims — Crown liability — Band seeking to validate statutory specific claim based on pre-Confederation breaches against federal Crown — Whether pre-Confederation legal obligation alleged to have been breached was legal obligation of Crown for which federal Crown assumed responsibility —

Extended meaning of “Crown” — British Columbia Terms of Union, R.S.C. 1985, App. II, No. 10, art. 13 — Specific Claims Tribunal Act, S.C. 2008, c. 22, s. 14(2).

Administrative law — Judicial review — Boards and tribunals — Standard of review applicable to Specific Claims Tribunal’s decision to validate band’s claim — Whether expanding upon Tribunal’s reasoning constitutes permissible supplementing of Tribunal’s reasons — Specific Claims Tribunal Act, S.C. 2008, c. 22, s. 14.

The Williams Lake Indian Band’s (“band”) traditional territory includes the site of a village near Williams Lake in British Columbia (“Village Lands”). In the early days of the Colony, settlers were rapidly taking up unsurveyed lands, including those occupied by the band. In response, the Colony enacted the *Proclamation relating to acquisition of Land, 1860* (“*Proclamation No. 15*”), under which “Indian settlements” were not available for pre-emption. The officials responsible for implementing the pre-emption system took no steps to protect the Village Lands from pre-emption or mark them out as a reserve. After British Columbia joined Confederation, Canada assumed, under Article 13 of the *British Columbia Terms of Union* (“*Terms of Union*”), responsibility for the creation of Indian reserves according to a policy as liberal as the Colony’s. The federal Crown officials acknowledged that the pre-emptions had been a mistake but were not prepared to interfere with settlers’ rights. Instead, they allocated to the band another tract of land as a reserve. The band

filed a claim to compensation under the *Specific Claims Tribunal Act* (“Act”) for losses arising from these events.

Parliament established the Specific Claims Tribunal (“Tribunal”) with a mandate to award monetary compensation to First Nations for claims arising from the Crown’s failure to honour its legal obligations to Indigenous peoples. In this case, the Tribunal concluded that the band had a valid specific claim for losses arising from the Crown’s acts and omissions in relation to the Village Lands. It found that the Imperial Crown had owed, and breached, a legal obligation to the band in relation to the protection of its lands from pre-emption based on s. 14(1)(b) of the Act and that the Crown in right of Canada (“Canada”) had owed, and breached, a fiduciary obligation to the band based on s. 14(1)(c). It further found that Canada could be held responsible under the Act for the band’s pre-Confederation claim. Before the Tribunal ruled on compensation, Canada sought judicial review of the Tribunal’s validity decision. The Federal Court of Appeal allowed Canada’s application and dismissed the band’s claim.

Held (Côté and Rowe JJ. dissenting in part and McLachlin C.J. and Brown J. dissenting): The appeal should be allowed and the Tribunal’s decision restored.

Per Abella, Moldaver, Karakatsanis, **Wagner** and Gascon JJ.: The standard of review applicable to the Tribunal’s decision is reasonableness. The validity of the band’s claim did not depend on the resolution of a constitutional issue.

Rather, it required the Tribunal to interpret its home statute to decide whether the grounds advanced relate to a legal obligation of the Crown within the meaning of s. 14 of the Act. It also required the Tribunal to derive legal obligations of the Crown from legislation, treaties and the common law, including fiduciary law. In making these legal determinations, the Tribunal applies judicial doctrines to historical circumstances that, by virtue of the applicable limitation periods, others will rarely consider. This distinctive task conferred by Parliament requires a measure of flexibility and adaptation to map onto historical claims. The application of fiduciary law in the historical contexts in specific claims and familiarity with the large and specialized evidentiary records fall within the Tribunal's expertise and are entitled to deference.

The Tribunal's analysis of the Crown's *sui generis* fiduciary obligation is a sufficient basis on which to restore its decision, without considering the application of an *ad hoc* fiduciary obligation to the conduct of Crown officials under either s. 14(1)(b) or (c) of the Act. A *sui generis* fiduciary obligation arises from the Crown's discretionary control over a specific or cognizable Aboriginal interest and is specific to the relationship between the Crown and Aboriginal peoples. The interest at stake must be sufficiently independent of the Crown's executive and legislative functions to give rise to fiduciary duties. A fiduciary obligation requires that the Crown's discretionary control be exercised in accordance with the standard of conduct to which equity holds a fiduciary, as embodied, for example, in the fiduciary duties of loyalty, good faith and full disclosure. The standard of care to which a

fiduciary is held in its pursuit of the beneficiary's interests is that of an ordinary prudence in managing one's own affairs. The conduct of the fiduciary that comes under scrutiny is its exercise of discretionary control over the Aboriginal interest vulnerable to the exercise of discretion. The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result. Although the Crown must have regard to competing interests, the existence of such interests does not absolve it altogether of its fiduciary duty to reconcile them fairly.

The Tribunal's conclusion that the band had established a valid claim on the grounds of the Imperial Crown's breach of a *sui generis* fiduciary obligation — before Confederation based on s. 14(1)(b) of the Act — was reasonable. The Tribunal identified the specific or cognizable Aboriginal interest at stake as the band's interest in the Village Lands, and found that, by *Proclamation No. 15*, the Imperial Crown had assumed discretionary control over that interest. The Tribunal further found that the Crown had not acted with reference to the band's best interest in exercising its control over these lands. The duty of ordinary prudence required the Crown, at a minimum, to inquire into the extent of the band's settlement so that it could be protected, and the failure to do so put the Crown in breach of the fiduciary obligation. The Village Lands would have qualified as "Indian settlements" under *Proclamation No. 15* and the colonial policy governing its implementation ought to have led to measures reserving them from pre-emption. In the Tribunal's view, the band's interest in the Village Lands in respect of which the Crown owed a fiduciary duty did not depend on whether or not Crown officials took the appropriate action to secure

land protection. This conclusion meets the requirement for an Aboriginal interest capable of grounding a *sui generis* fiduciary obligation insofar as officials were in a position to identify the interest at stake and it was sufficiently independent of the Crown's executive and legislative functions. The band's interest in the Village Lands was not created by colonial legislation. Rather, it was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation.

The Tribunal's conclusion that Canada owed, and breached, a fiduciary obligation in relation to the Village Lands, based on s. 14(1)(c) of the Act, was also reasonable. The Tribunal identified the specific or cognizable Aboriginal interest in the Village Lands as an interest that was vulnerable to the adverse exercise of Canada's discretion. It held that after British Columbia's entry into Confederation, Canada's discretion in relation to Aboriginal land interests flowed from its position as the exclusive intermediary with the Province in relation to those interests in the reserve creation process. It openly acknowledged that such discretion was limited by the need for provincial cooperation and that Canada could not unilaterally create a reserve. Its conclusion that a fiduciary obligation arose in the absence of complete or exclusive control aligns with general principles of fiduciary law — that the alleged fiduciary have scope for the exercise of discretion or control to affect the beneficiary's interests. The extent to which the claimed loss is attributable to Canada's breach, as opposed to the Province, raises questions of causation to be determined at the compensation stage. Furthermore, the Tribunal did not ignore the distribution of powers and responsibilities under the *Terms of Union* when it found

that the band's interest lay in the Village Lands and defined Canada's fiduciary obligation in relation to that interest. Neither Canada's constitutional obligation to create reserves according to a particular policy, nor the Province's obligation to convey land for that purpose, is in issue. The question is not whether the band was entitled to the allotment of the Village Lands as a reserve — either under the *Terms of Union* or as a consequence of Canada's fiduciary obligation — but whether the actions, decisions and judgments of the federal Crown officials that would affect the band's interest met the applicable standard of conduct in relation to that interest.

The Tribunal found that Canada had to fulfil the fiduciary duties with respect to an interest in the land with which the band had a tangible, practical and cultural connection, and that it had failed to discharge them. The Tribunal did not find that Canada owed the band a fiduciary duty at large, nor did it find that Canada's obligation as fiduciary was to deliver the allotment of the Village Lands as a reserve. The Tribunal considered all of the circumstances, and the extent to which Canada met the requisite standard of conduct was a heavily fact-based inquiry. It was reasonable for the Tribunal to conclude that federal Crown officials with knowledge of the circumstances surrounding the Williams Lake pre-emptions and the band's situation did nothing to challenge the pre-emptions. Their inaction and the decision-making that led to the eventual allotment of a reserve to the band elsewhere fell short of fulfilling the Crown's fiduciary obligations. The Tribunal reasonably concluded that ordinary prudence required them to make use of the available means of preserving the band's interest by seeking, on an immediate basis, enforcement of provincial

protection for Indian settlements, and, on a more permanent basis, having the land allotted as a reserve. While Canada was obliged to consider settler interests, in this case, the only competing interests were those acquired as unlawful pre-emptions, which the Tribunal did consider. The fact that Canada eventually procured a reserve for the band elsewhere cannot undo the breach of fiduciary duty, although the Tribunal reasonably concluded that it may reduce the amount of compensation.

The Tribunal's definition of the Crown as a single, continuous and indivisible entity to validate the band's claim against Canada for pre-Confederation breaches, under s. 14(2) of the Act, was reasonable. This conclusion is grounded in the Tribunal's decision as a whole, and expanding upon it based on the record, the arguments and the legal principles underlying the decision, constitutes permissible supplementing of the Tribunal's reasons.

Section 14(2) defines "Crown" by reference to the legal obligation whose breach or non-fulfilment forms the basis for a specific claim. A legal obligation of the Imperial Crown will satisfy the first branch — the "legal obligation" branch — where it "became . . . the responsibility of" Canada. Although the Tribunal did not apply it, the second branch — the "liability" branch — will be met where "any liability relating to its breach or non-fulfilment became . . . the responsibility of" Canada. The Tribunal found that the Imperial Crown came within the extended meaning of "Crown" because the fiduciary obligation that it had allegedly breached was a legal obligation that became the responsibility of Canada, and for which Canada would, if

in the place of the colony, have been in breach. This reading effectively projected Canada backwards into the place of the Imperial Crown for certain obligations. The Tribunal indicated that this interpretation of the legal obligation branch of s. 14(2) would not extend the application of s. 14(1)(b) to all potential liabilities of the Imperial Crown, and that Canada's post-Confederation fiduciary obligations supplied the limits contemplated by that branch.

The Tribunal treated s. 14(2) as a free standing basis for Canada's liability for the Imperial Crown's breaches of certain obligations and rejected the view that it operates as an enforcement mechanism. It found the legal obligation branch not to require an independent and outstanding obligation — transferred to Canada under the *Terms of Union* — to establish the Village Lands as a reserve. This interpretation of the legal obligation branch as encompassing certain fiduciary obligations of the former colonies is consistent with the structure of s. 14, and the nature of fiduciary obligations which does not require the transfer of the obligation itself. It was therefore open to the Tribunal to interpret s. 14(2) as giving effect, not to the assumption by Canada of a specific obligation, but of a discretionary power to affect the band's interests in the context of an established fiduciary relationship. The Tribunal's view of s. 14(2) is consistent with its understanding of the role Parliament intended the extended meaning of "Crown" to serve within the specific claims scheme — to remedy historical injustices committed by the Crown, be it the Imperial Crown or Canada. This view is also consistent with an Indigenous perspective on the

continuity of the fiduciary relationship between Indigenous peoples and the Crown before and after Confederation.

Per Côté and **Rowe JJ.** (dissenting in part): There is agreement with the majority that the Tribunal reasonably found that the Imperial Crown owed and breached a fiduciary duty to the band prior to Confederation, and that the federal Crown owed and breached a *sui generis* fiduciary duty to the band following the entry of British Columbia into Confederation. There is also agreement that the Act allows the Tribunal to validate specific claims based on certain wrongs committed by the “Sovereign of Great Britain and its colonies” prior to Confederation. In this case, the band has such a claim pursuant to s. 14(1)(b) of the Act based on the fiduciary breach by the Colony of British Columbia prior to 1871. For the Tribunal to hold the federal Crown liable for this claim, however, it must have found that the Colony of British Columbia came within the extended meaning of “Crown” pursuant to s. 14(2) of the Act. Given the near-total silence of the Tribunal on whether and — more importantly — how the obligation or liability underlying the claim became that of the federal Crown upon Confederation, the matter should be remitted to the Tribunal for further consideration rather than adopting the supplementary reasons set out by the majority.

In a reasonableness review, reasons are an essential focus for reviewing courts as they describe both the result and — crucially — the justificatory process used to reach that result. It is not that reasons need attain a uniform standard of perfection. In many cases, reviewing courts will have a certain latitude to uphold

administrative decisions that would, under stricter scrutiny, be deficient in their justification. In so doing, reviewing courts pay respectful attention to the reasons offered or which could be offered in support of a decision. Thus, in certain circumstances, reviewing courts will properly supplement the reasons under review. The power of reviewing courts to supplement deficient reasons, however, is not limitless. There must be a sufficient basis in the reasons themselves to which can be added supplementary justification.

In this case, the Tribunal was virtually silent on the operation of s. 14(2). Given the pivotal role played by s. 14(2) in the scheme of the Act, this lack of justification — this absence of reasons — is untenable. In supplementing — or even substituting — the Tribunal's sparse reasons on the subject of s. 14(2), the majority sets out an analysis based on the common law of fiduciary obligations. While its reasons lead to the same conclusion as the Tribunal, this is the extent of their commonality. Having said nothing about the interplay between s. 14(2) and the common law of fiduciary obligations, the Tribunal did no more than state a bald conclusion about the operation of the Act relative to pre-Confederation claims. The reasons of the majority, thus, are supplementary in that they supply the entirety of the analysis.

Reviewing courts can sometimes supplement reasons that are silent on certain issues that may have been implicitly decided. When the implied line of reasoning is obvious, supplementing may be an appropriate means of paying

respectful attention to the reasons offered or which could be offered in support of a decision. However, when faced with an absence of analysis on an essential element such that the implied line of reasoning is inconclusive or completely obscure, the reviewing court should not impute its own justification as a means of upholding the decision. Supplementary reasons must build upon those actually provided by the legislature's chosen decision maker. The matter should therefore be remitted to the Tribunal for further reasons on whether — and how — the obligations and liabilities of the Colony pursuant to s. 14(1)(b) of the Act became those of the federal Crown pursuant to s. 14(2).

Per McLachlin C.J. and **Brown** (dissenting): The Tribunal's decision is reviewable for reasonableness, subject to the caveat that its interpretation of the *Terms of Union* — a constitutional instrument — is reviewable for correctness. There is agreement with the majority's conclusion that the Tribunal reasonably found that, prior to Confederation, the Imperial Crown breached its fiduciary duty owed to the band. However, the conclusion that Canada breached its *ad hoc* and *sui generis* fiduciary duties to the band is unreasonable, as is the Tribunal's treatment of the legal question of Canada's liability for the Imperial Crown's breach pursuant to s. 14(2) of the Act. The matter should be remitted to the Tribunal for determination of whether the legal obligation that was breached or liability relating to its breach became the responsibility of Canada.

The Tribunal's finding that an *ad hoc* fiduciary duty of utmost loyalty was owed to the band by operation of Article 13 of the *Terms of Union* is contrary to binding authority and is, as such, unsustainable. As to its finding that Canada breached a *sui generis* fiduciary duty under s. 14(1)(c) of the Act, the Tribunal's starting premise for this conclusion — that the band's best interests could lie only in securing the Village Lands as a reserve — is misguided in three respects. First, this assertion is neither justified in the Tribunal's reasons nor supported by the evidentiary record. Second, the finding of a breach of Canada's fiduciary duty fails to account for the limits of Canada's responsibilities and powers under the *Terms of Union*, and in particular, under Article 13. The exercise of discretion by Canada in relation to Aboriginal interests was confined by the country's federal structure and the *Terms of Union*. Canada could not unilaterally mark out provincial land as reserves. The Province retained jurisdiction over the setting apart of provincial Crown lands as a reserve and exercised that effective veto. Third, the Tribunal's premise does not cohere to jurisprudence, which calls for a measure of flexibility, grounded in the historical context of a matter, in relation to the creation of reserves under Article 13. This provision imposed upon Canada not an obligation to continue the Colony's policy regarding the creation of Indian reserves, but rather to pursue a policy that is as liberal as that pursued by the Colony. In light of Article 13, Canada owed no obligation arising from cognizable interests in specific lands. The *sui generis* fiduciary duty does not demand a perfect solution, and Canada did not fail to discharge this duty in its dealings with the band relating to the Village Lands. Finally, by confining the significance of Canada's allotment of land to the band, the Tribunal

unduly narrowed its focus, thereby truncating its analysis of Canada's efforts to discharge its fiduciary duty. The band's claim brought under s. 14(1)(c) of the Act should therefore be dismissed.

The Tribunal also unreasonably held Canada responsible for the Imperial Crown's breach of this duty. Section 14(2) of the Act does not impose blanket responsibility upon Canada for all colonial obligations and liabilities that are the subject of a specific claim under s. 14(1)(b). It is an enforcement mechanism which compels Canada to answer for the Imperial Crown where Canada has by some other means acquired responsibility for an obligation or a liability relating to Indians or lands reserved for Indians. This interpretation is consistent with the careful wording of the provision, which expresses Parliament's intention to disclaim liability for matters falling under provincial responsibility. In this case, s. 14(2) of the Act can only be triggered by an obligation or liability acquired by Canada under Article 13 of the *Terms of Union*. Canada's responsibility for the Imperial Crown's breach on the liability branch of s. 14(2) could also be triggered by Article 1 of the *Terms of Union*, by which Canada agreed to be "liable for the debts and liabilities of British Columbia existing at the time of the Union". The Tribunal, however, failed to consider whether this provision embraces the Imperial Crown's liability for its failure to protect the Village Lands from pre-emption. It simply equated pre-Confederation colonial obligations and liabilities with post-Confederation obligations and liabilities, which is not remotely defensible by any standard of review.

The majority's "backward-looking projection" theory of Canada's statutory liability is not an appropriate supplement to the Tribunal's deficient reasons regarding s. 14(2) of the Act. It fails to account for the intention of Parliament and has no support in law. On this theory, a finding of a post-Confederation breach of a legal obligation under s. 14(1)(c) would appear to be determinative of Canada's liability in respect of pre-Confederation breaches, and s. 14(2) is superfluous where a related post-Confederation breach by Canada is made out. The fact that the theory may be consistent with Indigenous views as to the continuity of fiduciary relationships with the Crown, and Canada's growing acceptance of responsibility for remedying historical wrongs does not justify the Tribunal's reading out of clear statutory text. The legal obligation or liability relating to its breach must still be shown to have otherwise become the responsibility of Canada. This theory furnishes no comprehensible guidance to the Tribunal as it adjudicates the claims brought before it. Nor does it explain how the Tribunal is to apply ss. 14(1)(b) and 14(2) where the legislative shortcut via this theory is unavailable — that is, where liability has not been imposed on Canada for breach of a related legal obligation under s. 14(1)(c).

Rights and responsibilities whose discharge is of potentially central importance to achieving reconciliation between Canada and Indigenous peoples in British Columbia were constitutionally entrenched, by mutual accord, between the Province and Canada. The Tribunal's reasons elide that constitutional division of responsibilities, and thereby risk upsetting that accord. The question of whether Articles 1 and 13 of the *Terms of Union*, correctly understood and interpreted, support

Canada's liability under s. 14(2) should therefore be remitted to the Tribunal for determination. If the band succeeds on either question, the matter may then proceed to the compensation stage.

Cases Cited

By Wagner J.

Applied: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; **referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Lac La Ronge Band v. Canada (Indian Affairs and Northern Development)*, 2014 SCTC 8; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Canada v. Kitselas First Nation*, 2014 FCA 150, 460 N.R. 185, aff'g 2013 SCTC 1; *Lac La Ronge Indian Band v. Canada*, 2015 FCA 154, 474 N.R. 283; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Kovach, Re*, [1999] 1 W.W.R. 498, rev'd 2000 SCC 3, [2000] 1 S.C.R. 55; *Alberta (Workers' Compensation Board) v. Alberta (Appeals Commission for Workers' Compensation)*, 2013 ABCA 412, 370 D.L.R. (4th) 118; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1

S.C.R. 247; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321; *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223; *Popkum First Nation v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 12; *Huu-Ay-Aht First Nations v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 14; *McInerney v. MacDonald*, [1992] 2

S.C.R. 138; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Lake Babine Nation v. Canada (Indian Affairs and Northern Development)*, 2015 SCTC 5; *Akisiq'nuk First Nation v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 3; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, rev'd 2011 SCC 57, [2011] 3 S.C.R. 572; *Canada (Attorney General) v. Delios*, 2015 FCA 117, 472 N.R. 171; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2; *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.

By Rowe J. (dissenting in part)

Wewaykum Indian Band v. Canada, 2002 SCC 79, [2002] 4 S.C.R. 245; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Edmonton*

(City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47, [2016] 2 S.C.R. 293; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2; *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267. By Brown J. (dissenting)

British Columbia (Attorney General) v. Canada (Attorney General), [1994] 2 S.C.R. 41; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105; *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252; *Nowegijick v.*

The Queen, [1983] 1 S.C.R. 29; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

Statutes and Regulations Cited

British Columbia Terms of Union (reprinted in R.S.C. 1985, App. II, No. 10), Arts. 1, 13.

Constitution Act, 1867, s. 92(5). *Constitution Act, 1982*, s. 52(2).

Indian Act, R.S.C. 1952, c. 149.

Land Act, 1875, S.B.C. 1875, c. 5 (reprinted in R.S.B.C. 1877, c. 98), ss. 3, 61.

Land Amendment Act, 1879, S.B.C. 1879, c. 21, s. 5.

Land Ordinance, 1865, O.B.C. 1865, c. 27 (reprinted in R.S.B.C. 1871, App. No. 23), s. 12.

Land Ordinance, 1870, O.B.C. 1870, c. 18, s. 3.

Pre-emption Consolidation Act, 1861 (reprinted in R.S.B.C. 1871, App. No. 21), s. 3.

Proclamation relating to acquisition of Land, 1859 (reprinted in R.S.B.C. 1871, App. No. 13).

Proclamation relating to acquisition of Land, 1860 (reprinted in R.S.B.C. 1871, App. No. 15), Cl. 1.

Royal Proclamation (1763) (reprinted in R.S.C. 1985, App. II, No. 1).

Specific Claims Tribunal Act, S.C. 2008, c. 22, preamble, ss. 2 “Crown”, 3, 6(2), 11, 13(1)(a)(b), 14, 16(1), 20, 23.

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r. 10.

Authors Cited

- Black's Law Dictionary*, 10th ed., by Bryan A. Garner, ed. St-Paul, Minn.: Thomson Reuters, 2014, "cognizable".
- Canada. House of Commons. Standing Committee on Aboriginal Affairs and Northern Development. *Evidence*, No. 12, 2nd Sess., 39th Parl., February 6, 2008, p. 2.
- Canada. Indian and Northern Affairs. *Federal Policy for the Settlement of Native Claims*. Ottawa: Indian and Northern Affairs Canada, 1993.
- Canada. Indian and Northern Affairs. *Outstanding Business: A Native Claims Policy — Specific Claims*. Ottawa: Indian and Northern Affairs Canada, 1982.
- Canada. Indian and Northern Affairs. *Specific Claims: Justice at Last*. Ottawa: Indian and Northern Affairs Canada, 2007.
- Canada. Indian and Northern Affairs. *The Specific Claims Policy and Process Guide*. Ottawa: Indian and Northern Affairs Canada, 2009.
- Canada. Library of Parliament. Parliamentary Information and Research Service. *Bill C-30: The Specific Claims Tribunal Act*, Legislative Summary LS-592E, by Mary C. Hurley, Law and Government Division, January 14, 2008, revised June 26, 2008.
- Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*. Ottawa: The Commission, 1996.
- Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.
- Elliott, David W. "Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown" (2003), 29 *Queen's L.J.* 1.
- Salambier, Paul, et al. *Modern First Nations Legislation Annotated*, 2016 ed. Toronto: LexisNexis, 2015.
- Tennant, Paul. *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989*. Vancouver: University of British Columbia Press, 1990.

APPEAL from a judgment of the Federal Court of Appeal (Gauthier, Ryer and Near JJ.A.), 2016 FCA 63, 396 D.L.R. (4th) 164, 481 N.R. 75, [2016] 2 C.N.L.R. 1, [2016] F.C.J. No. 237 (QL), 2016 CarswellNat 493 (WL Can.), allowing the application for judicial review of a decision of the Specific Claims Tribunal, 2014 SCTC 3. Appeal allowed, Côté and Rowe JJ. dissenting in part and McLachlin C.J. and Brown J. dissenting.

Clarine Ostrove and Leah Pence, for the appellant.

Mark Kindrachuk, Q.C., and Sharlene Telles-Langdon, for the respondent.

Paul J. J. Cavalluzzo, Adrienne Telford and Jennifer Campbell, for the intervener the Specific Claims Tribunal.

Senwung Luk, Krista Nerland and Cathy Guirguis, for the intervener the Assembly of Manitoba Chiefs.

Cynthia Westaway and Darryl Korell, for the intervener the Federation of Sovereign Indigenous Nations.

Scott Robertson and Chris Albinati, for the intervener the Indigenous Bar Association in Canada.

Stuart Wuttke and *David C. Nahwegahbow*, for the intervener the Assembly of First Nations.

Rosanne Kyle, for the interveners the Union of British Columbia Indian Chiefs, the Nlaka'pamux Nation Tribal Council, the Stó:lō Nation, the Stó:lō Tribal Council and the Carrier Sekani Tribal Council.

David Schulze, *Benoît Amyot*, *Léonie Boutin* and *Marie-Eve Dumont*, for the intervener the Assembly of First Nations of Quebec and Labrador.

David M. Robbins, *Sonya Morgan* and *Michael Bendle*, for the interveners the Cowichan Tribes, the Stz'uminus First Nation, the Penelakut Tribe and the Halalt First Nation.

The judgment of Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. was delivered by

WAGNER J. —

I. Overview

[1] In the early days of British Columbia, there was a rapid influx of settlers following the gold rush up the Fraser River into the interior of the Colony. From 1860 on, some of these settlers displaced the Williams Lake Indian Band from the site of its

village and surrounding lands at the foot of Williams Lake. This appeal concerns the failure of the Sovereign of Great Britain and its colonies (“Imperial Crown”) to prevent the band’s Village Lands from being taken up by settlers. It also concerns the failure of the Imperial Crown and the Crown in right of Canada to rectify the situation over the 20 years that followed. At issue is the validity of a claim to compensation under the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, for losses arising from these events.

[2] Parliament established the Specific Claims Tribunal with a mandate to award monetary compensation to First Nations¹ for claims arising from the Crown’s failure to honour its legal obligations to Indigenous peoples, even where delay or the passage of time would bar an action in the courts. A just resolution of these types of claims is essential to the process of reconciliation.

[3] Historical grievances that fall within one of the grounds enumerated in s. 14(1) of the Act are known as specific claims. The question before the Tribunal was whether the band had established valid grounds for such a claim.

[4] The Tribunal examined the band’s history in the Williams Lake area and the events surrounding the reserve creation process. The band’s village and surrounding lands, the Tribunal concluded, ought to have been marked out as a reserve under the applicable colonial legislation. The Imperial Crown was under a

¹ In these reasons, I will use “First Nations” to refer to the legal entities capable of filing specific claims; “Aboriginal” as this word is used in the jurisprudence; “Indian” where appropriate to reflect the historical context of the band’s specific claim; and otherwise “Indigenous peoples”.

legal obligation to take the appropriate measures to do so. The Tribunal concluded that the band had a valid claim on the grounds that the responsible colonial official in the Williams Lake area had not taken such measures.

[5] The Tribunal also determined that, after British Columbia joined Confederation in 1871, federal officials had failed to take appropriate measures to address the consequences of the Imperial Crown's earlier omissions. This, it found, was also valid grounds for a specific claim. The Tribunal considered the eventual allotment of other reserves for the band to be a matter going to the amount of compensation, not to the existence of a breach of a legal obligation of the Crown.

[6] Before the Tribunal had the opportunity to make a decision on compensation, Canada applied for judicial review of the Tribunal's validity decision. The Federal Court of Appeal allowed Canada's application and substituted its own decision dismissing the band's specific claim. In its view, the Crown in right of Canada had not breached a legal obligation to the band. Further, its eventual allotment of reserve land elsewhere had cured any prior breaches by the Imperial Crown. The band appeals to this Court.

[7] For the reasons that follow, I would allow the appeal and restore the Tribunal's decision. The Tribunal reasonably found that both the Imperial Crown and the Crown in right of Canada had owed, and breached, fiduciary obligations to the band in relation to the protection of its Village Lands from pre-emption and that the band's pre-Confederation specific claim was valid under the Act.

II. Background

A. *The Band's Specific Claim*

[8] The subject of the band's specific claim is the site of a village at the foot of Williams Lake, within its traditional territory. In the band's language, the village is called "Yucwt". In 1883, the land was surveyed as "District Lots 71 and 72". Those lots include parts of what is now the City of Williams Lake. The Tribunal's decision refers to the subject lands as the Village Lands.

[9] When the Colony of British Columbia was established in 1858, settlers were rapidly taking up unsurveyed lands. Several Indian Chiefs counselled war in response. Governor Douglas held meetings with the Indians in Cayoosh and Lytton and provided assurances on behalf of the Crown that the magistrates had been instructed to stake out and reserve for their benefit "all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support": Letter from James Douglas to the Duke of Newcastle, October 9, 1860, A.R., vol. II, at p. 121. Records of the instructions issued to colonial officials reflect this policy.

[10] Governor Douglas also enacted a system of land pre-emption. On February 14, 1859, he issued the *Proclamation relating to acquisition of Land, 1859* (reprinted in R.S.B.C. 1871, App. No. 13), which asserted Crown title to all land in the Colony of British Columbia. On January 4, 1860, Douglas issued the

Proclamation relating to acquisition of Land, 1860 (reprinted in R.S.B.C. 1871, App. No. 15) (“*Proclamation No. 15*”),² Clause 1 of which provided:

That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved and unsurveyed Crown Lands in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement, in fee simple) under the following conditions

[11] In accordance with colonial policy, land that was the site of an “Indian settlement” was not available for pre-emption. Elsewhere in the Colony, lands were set apart as reserves: see, for example, *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 379. Settlers whose pre-emptions encroached on an Indian settlement could be dispossessed without compensation. This also occurred elsewhere in British Columbia.

[12] The first pre-emptions were recorded in 1860, and more followed. The pre-emptions were traded among settlers, seemingly in contravention of the pre-emption legislation. Those covering Lots 71 and 72 were eventually consolidated in the hands of William Pinchbeck, the local constable. Pinchbeck was granted fee simple title in 1885.

² Legislation that succeeded *Proclamation No. 15* in the Colony of British Columbia and in the Province of British Columbia continued to prohibit the pre-emption or purchase of unoccupied land that was the site of an “Indian settlement”: *Pre-emption Consolidation Act, 1861* (reprinted in R.S.B.C. 1871, App. No. 21), s. 3; *Land Ordinance, 1865*, O.B.C. 1865, c. 27, s. 12; *Land Ordinance, 1870*, O.B.C. 1870, c. 18, s. 3; *Land Act, 1875*, S.B.C. 1875, c. 5, s. 61; *Land Amendment Act, 1879*, S.B.C. 1879, c. 21 s. 5. In these reasons, a reference to *Proclamation No. 15* includes the pre-emption legislation applicable at the time.

[13] Pinchbeck had arrived in Williams Lake in 1860 with his associate, Gold Commissioner and Magistrate Phillip Nind, who was the official responsible for implementing the pre-emption system in Williams Lake. The Tribunal found that Nind would have known of the band's settlement even though its numbers had been diminished by a smallpox epidemic and most of its members had been driven off the land. He would also have been aware of the colonial law and policies governing pre-emption and his role in enforcing them. He took no steps to identify the site of the band's Indian settlement, to mark it out as reserved from pre-emption or to call into question the pre-emptions that had already been recorded when it became apparent that they contravened the legislation.

[14] British Columbia joined Confederation in 1871. Under Article 13 of the *British Columbia Terms of Union* (reprinted in R.S.C. 1985, App. II, No. 10), Canada assumed responsibility for the creation of Indian reserves according to a policy "as liberal" as the Colony's, and the Colony agreed to convey land to Canada for that purpose.

[15] This process was carried out through the Joint Indian Reserve Commission. The Commission's mandate was to visit each Nation in British Columbia and determine "the number, extent, and locality" of the reserves to be allotted to it: Order-in-Council P.C. 1088, November 10, 1875. In performing this mandate, commissioners were instructed to have regard "to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by

them, and to the claims of the white settlers”: Memorandum attached to the Governor in Council’s Order approving the Joint Indian Reserve Commission, November 5, 1875. The Commission’s work was carried out under the leadership of Gilbert Sproat between 1876 and 1880 and by Peter O’Reilly after 1880.

[16] In the years following its displacement, the band resided on lands owned by the Catholic mission. Records of communications between 1878 and 1880 indicate that, without land to cultivate, the band’s members faced starvation. The band twice conveyed the urgency of its situation to Sproat so that he would come to Williams Lake and allot reserve land to it.

[17] O’Reilly came to Williams Lake in 1881 and met with then Chief William. Records indicate his acknowledgement that it had been a mistake to permit the pre-emptions and that the government wished to remedy it. To that end, he had purchased a tract of land at the head of the lake known as the Bates Estate, which he allocated to the band as a reserve. However, O’Reilly told the band that it could not interfere with the “white men’s rights”.

B. *The Specific Claims Tribunal and the Act*

[18] Draft legislation creating an independent commission with the authority to award financial compensation for the wrongful acts of the Crown, including those prior to Confederation, was first proposed in the 1960s. The bills never became law.

Over the ensuing 50 years, the Government of Canada pursued a policy of researching, accepting and negotiating specific claims.

[19] A persistent source of dissatisfaction with this process was that it was not overseen by an independent body, which First Nations felt put the government in a conflict of interest: *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*, (1996) at pp. 427-28 and 530-36 (“RCAP”).

[20] Following collaboration between the government and First Nations to address the shortcomings of the specific claims process, the Specific Claims Tribunal was established in 2008.

[21] The Tribunal hears claims that have previously been filed with the Minister for negotiation: s. 16(1). The Tribunal first decides whether a claim is valid according to six enumerated grounds, which mirror the government’s policy on claims that will be accepted for negotiation. The grounds relevant to the band’s specific claim are set out in s. 14 of the Act:

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:

...

(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;

[22] "Crown" is defined for the purposes of the Act as "Her Majesty in right of Canada": s. 2. However, subss. (2) to (4) of s. 14 extend the meaning of "Crown" for the purpose of establishing grounds for a specific claim based on events in the former colonies prior to Confederation. Section 14(2) at issue in this appeal reads:

14 (2) For the purpose of applying paragraphs (1)(a) to (c) in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

[23] The Tribunal has the power to hold its proceedings in separate phases, one to decide the validity of the specific claim and one to decide any compensation arising from it: *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, r. 10; Act, s. 11(1). The rationale for bifurcating proceedings is to avoid the delay and expense of a compensation phase if it becomes unnecessary, or else to focus the scope of that phase: see *Lac La Ronge Band v. Canada (Indian Affairs and Northern Development)*, 2014 SCTC 8, at para. 197 (CanLII). The Tribunal awards monetary compensation against the Crown according to the terms set out in ss. 20 to 23, the provisions of which are reproduced in the Appendix.

[24] In this case, Canada sought judicial review of the Tribunal's validity decision prior to the compensation phase.

III. Questions on Appeal

[25] This appeal raises the following initial question:

A. What is the standard of review for a decision of the Specific Claims Tribunal?

Given that I conclude that the standard of review is reasonableness, the following further questions arise. Did the Tribunal reasonably decide that the band had established valid grounds for a specific claim on the basis that:

B. before British Columbia's entry into Confederation, the Crown owed, and breached, a legal obligation under legislation of the Colony (s. 14(1)(b))?

C. after British Columbia's entry into Confederation, the Crown owed, and breached, a fiduciary obligation arising from the Crown's provision or non-provision of reserve lands (s. 14(1)(c))?

D. the pre-Confederation legal obligation alleged by the band to have been breached was a legal obligation of the "Crown" within the extended meaning of that term (s. 14(2))?

IV. Analysis

A. *Standard of Review*

[26] This appeal raises questions of statutory interpretation, questions of fiduciary law and questions of mixed fact and law arising from the Tribunal's application of the law to the facts of a specific claim. The Federal Court of Appeal applied correctness review to some of these questions and reasonableness review to others, and it declined to address the remainder. Before this Court, the parties agreed that the standard of review for all of these questions is reasonableness.

[27] I agree that the standard of review is reasonableness. None of the points of statutory interpretation or common law on which the Tribunal's decision rests falls into the categories that this Court identified in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 58-61, as attracting a correctness standard. Nor does the Act provide any contextual indicators sufficient to displace the presumption that Parliament intended the Tribunal to be accorded deference on the interpretation of the term "legal obligation" as used in s. 14: see *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at paras. 32-34.

[28] In particular, I am of the view that the Tribunal's decision to validate the band's claim did not depend on its resolution of a constitutional issue as contemplated in *Dunsmuir* or in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC

54, [2003] 2 S.C.R. 504, at para. 31. Article 13 of the *Terms of Union* forms part of the historical circumstances of the fiduciary relationship between the Crown and Indigenous peoples in the Province of British Columbia. However, the fiduciary obligation alleged was not imposed or created by any particular enactment; it was a common law obligation arising from that relationship. Specific questions pertaining to whether the circumstances of the implementation of Article 13 gave rise to fiduciary obligations and what those obligations entailed do not necessarily take on the character of constitutional issues so as to be reviewable on a correctness standard. I do not consider questions about the nature of the band's Aboriginal interest in the Village Lands, and whether that interest stood to be adversely affected by exercises of discretionary power by Crown officials, to be constitutional issues.

[29] Further, and with respect for the contrary view taken by the Federal Court of Appeal to date (F.C.A. reasons, 2016 FCA 63, 396 D.L.R. (4th) 164, at para. 31; *Canada v. Kitselas First Nation*, 2014 FCA 150, 460 N.R. 185, at paras. 22-24; *Lac La Ronge Indian Band v. Canada*, 2015 FCA 154, 474 N.R. 283, at paras. 20-21), the Tribunal is entitled to deference on questions of fiduciary law. I have reached this conclusion on the basis of the same considerations that inform the application of the reasonableness standard of review to a tribunal's resolution of common law questions: see *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 34 and 41. It is most useful to address those considerations as part of that discussion, to which I now turn.

[30] The Tribunal's mandate is to decide issues of validity and compensation relating to specific claims: ss. 3 and 11. The Tribunal may determine any question of law or fact in relation to these matters: s. 13(1)(a).

[31] The Tribunal's mandate requires it to make determinations of law of two kinds. First, the Tribunal interprets its home statute to decide whether the grounds advanced by a First Nation relate to a legal obligation of the Crown within the meaning of s. 14. This statutory interpretation exercise defines the scope of the Tribunal's inquiry into the nature and sources of legal obligations of the Crown whose breach or non-fulfilment may give rise to a specific claim. Second, having defined the scope of the inquiry, the Tribunal derives the particular legal obligations of the Crown in issue from legislation, treaties and the common law. The legal determinations of this second type fall outside of the Act.

[32] In reviewing legal determinations of this second type, particularly with respect to the principles of fiduciary law in issue here, a court must pay close attention to the Tribunal's statutory mandate. This Court explained in *Nor-Man* that, in their own fields, administrative decision-makers may be entitled to "flex" common law and equitable principles and develop doctrines to respond to the distinctive nature of their tasks and the context in which they make their decisions: paras. 44-47 and 52. The extent to which they may reasonably do so depends on their statutory role and the breadth of their mandate or, put differently, "the scope of decision-making power conferred on the decision-maker by the governing legislation": *Catalyst Paper Corp.*

v. North Cowichan (District), 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 18; *Edmonton (City)*, at para. 21; see also *Nor-Man*, at paras. 45-47; *Kovach, Re*, [1999] 1 W.W.R. 498 (B.C.C.A.), at paras. 28-31, per Donald J.A. (dissenting), rev'd 2000 SCC 3, [2000] 1 S.C.R. 55; *Alberta (Workers' Compensation Board) v. Alberta (Appeals Commission for Workers' Compensation)*, 2013 ABCA 412, 370 D.L.R. (4th) 118, at para. 20.

[33] To resolve the historical grievances of First Nations against the Crown, Parliament created an independent tribunal comprised of superior court judges: s. 6(2). Parliament designed the Tribunal to adjudicate specific claims “in accordance with law and in a just and timely manner”: Act, preamble. The Tribunal’s mandate expressly tethers the scope of its decision-making power to the applicable legal principles.

[34] The range of reasonable outcomes available to the Tribunal is therefore constrained by these principles as they are understood and applied by the courts. But since the Tribunal adjudicates historical claims, it also applies evolving judicial doctrines to historical circumstances that, by virtue of the applicable limitation periods, other judges will rarely consider: see *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 121. The application of these doctrines requires a measure of flexibility and adaptation to map onto historical claims.

[35] Parliament intended the Tribunal to perform this “distinctive task”: Act, preamble. In my view, it did not intend to deprive the Tribunal of the basic flexibility inherent in the common law: *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 40. Instead, it gave the Tribunal the opportunity at first instance to resolve legal issues arising from the application of legal principles and doctrines to the kinds of historical claims it is particularly suited to adjudicate. The Tribunal is therefore entitled to deference in its analysis of such questions.

[36] To accord this deference, a reviewing court must “stay close to the reasons given by the [T]ribunal” and pay them “respectful attention”: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 49; *Dunsmuir*, at para. 48. The Tribunal’s reasons provide the basis for determining why it reached the decision it did and whether that decision is within the range of outcomes “defensible in respect of the facts and law”: *Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 14-16; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 89-90; *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766, at paras. 121-22. The reviewing court must start from the Tribunal’s decision and ask whether it is justified based on the authorities. Other decisions of the Tribunal may also inform the reasonableness analysis: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654

(“A.T.A.”), at para. 56; see also *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at paras. 6 (Abella J.) and 75 (Rothstein and Moldaver JJ., dissenting).

[37] The Tribunal’s manner of explaining itself may strike a reviewing court as conclusory. Many of the propositions that make up its analysis, and that come under scrutiny on judicial review, could have been the subject of a lengthy analysis on their own with reference to the basic principles that govern the Crown-Aboriginal fiduciary relationship. However, to fulfil the timeliness aspect of its mandate, the Tribunal must be able to rely on reviewing courts to endeavour to make sense of its reasons by looking to the authorities on which it relied, the submissions of the parties to which it responded and the materials before it: *Newfoundland Nurses*, at paras. 17-18. Failure by reviewing courts to do so risks defeating the purpose of delegating the resolution of long standing grievances to a highly specialized group of superior court judges specifically tasked with resolving them efficiently.

[38] Finally, although specific legal questions may arise, questions about the existence and breach of a fiduciary duty — the latter requiring an assessment of what the applicable duties required of the fiduciary in the circumstances — are questions of mixed fact and law: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 13; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 49; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 425-26. The Tribunal will continue to develop expertise in the application of fiduciary law in the

historical contexts at issue in specific claims and familiarity with the large and specialized evidentiary records involved, which may include oral history, archival materials, anthropological and historical studies and archaeological reports: Act, s. 13(1)(b). In light of these considerations, a reviewing court should exercise particular caution before interfering with a decision of the Tribunal on the basis that the facts as it has found them cannot reasonably support its conclusions about the existence and content of a fiduciary obligation: *Dunsmuir*, at para. 54.

B. *Breach of a Legal Obligation of the Crown Under Colonial Legislation Prior to British Columbia's Entry Into Confederation (Section 14(1)(b))*

[39] For two independent reasons, the Tribunal concluded that Nind's failure to take any measures to reserve the Village Lands from pre-emption amounted to "a breach of a legal obligation of the Crown under . . . other legislation — pertaining to Indians or lands reserved for Indians": s. 14(1)(b). The Tribunal found that Nind's inaction was both a breach of a fiduciary obligation arising under *Proclamation No. 15* and a breach of its express provisions.

[40] These conclusions depended in part on the Tribunal's interpretation of s. 14(1)(b), which is not in dispute. The Tribunal found that "legislation — pertaining to Indians or lands reserved for Indians" included *Proclamation No. 15* and that a "legal obligation . . . under . . . legislation" may include a fiduciary obligation that arises when legislation confers discretion in relation to acknowledged interests in land. The

Tribunal's conclusions also depended on its interpretation of the extended meaning of "Crown" in s. 14(2), which is in dispute.

[41] The Tribunal's decision that the band had established a valid claim on the grounds of the Imperial Crown's breach of a fiduciary obligation was based on two related findings. First, the Tribunal found that the Imperial Crown came within the extended meaning of "Crown" for the purposes of that obligation. This finding was based on the Tribunal's interpretation of s. 14(2), to which I will return after reviewing its application of fiduciary law to the circumstances in the Williams Lake area before and after British Columbia's entry into Confederation. Second, the Tribunal found that the Imperial Crown owed and breached a fiduciary obligation. This involved considering the legal requirements for the existence of a fiduciary obligation and deciding whether they were satisfied in this case.

[42] In my view, the Tribunal's resolution of these issues was reasonable, and I would restore its decision to validate the band's claim under s. 14(1)(b) based on breach of a fiduciary obligation arising under *Proclamation No. 15*. It is therefore unnecessary for me to consider the Tribunal's analysis of the breach of *Proclamation No. 15* itself. To explain why, I begin with the applicable framework for identifying and defining the fiduciary obligations of the Crown. For the most part, the Tribunal set out the relevant points of law in the course of its s. 14(1)(b) analysis, but they apply to its decision in relation to both of the grounds on which it validated the band's claim.

(1) Framework for Determining Whether the Crown Owed, and Breached, a Fiduciary Obligation

[43] The relationship between the Crown and Indigenous peoples is fiduciary in nature, and this was so even prior to Confederation. In the Tribunal’s view, it is the fiduciary relationship grounded in the assertion of Crown sovereignty in British Columbia, rather than any particular enactment, that was the source of the fiduciary obligations at issue in this case: Tribunal Reasons, 2014 SCTC 3 (“T.R.”), at paras. 173, 176 and 183-86 (CanLII); see also *Wewaykum*, at paras. 78-79, citing *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1108. Since *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, the relationship from which these obligations derived — both before and after British Columbia joined Confederation (see T.R., at paras. 268-69) — has been linked with the honour of the Crown: T.R., at paras. 178-80.

[44] A fiduciary obligation may arise from the relationship between the Crown and Indigenous peoples in two ways. First, it may arise from the Crown’s discretionary control over a specific or cognizable Aboriginal interest: *Manitoba Metis Federation*, at paras. 49 and 51; *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18; T.R., at para. 180-81. Because this obligation is specific to the relationship between the Crown and Indigenous peoples, it has been characterized as a “*sui generis*” fiduciary obligation: *Wewaykum*, at para. 78; *Guerin*, at p. 385; *Sparrow*, at p. 1108. Second, a fiduciary obligation may arise where the general conditions for a

private law *ad hoc* fiduciary relationship are satisfied — that is, where the Crown has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the alleged beneficiary: *Manitoba Metis Federation*, at para. 50; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36; T.R., at paras. 182 and 217.

[45] I find that the Tribunal’s analysis of the Crown’s *sui generis* fiduciary obligation is a sufficient basis on which to restore its decision to validate the band’s specific claim. As a result, I need not comment on its application of an *ad hoc* fiduciary duty to the conduct of Crown officials under either s. 14(1)(b) or (c).

[46] A fiduciary obligation requires that the Crown’s discretionary control be exercised in accordance with the standard of conduct to which equity holds a fiduciary (*Guerin*, at p. 384; *Wewaykum*, at para. 80). This is embodied, for example, in the fiduciary duties of loyalty, good faith and full disclosure. The standard of care to which a fiduciary is held in its pursuit of the beneficiary’s interests is “that of a man of ordinary prudence in managing his own affairs”: *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at para. 104 (McLachlin J., as she then was), citing *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315; *Wewaykum*, at para. 94.

[47] As Binnie J. explained in *Wewaykum* (at para. 79), “[t]he fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal

peoples.” However, a fiduciary obligation exists only in relation to the specific interest at stake:

The appellants seemed at times to invoke the “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* (“the lands occupied by the Band”), *Blueberry River* and *Guerin* (disposition of existing reserves).

(*Wewaykum*, at para. 81; see also paras. 80-85; *Manitoba Metis Federation*, at paras. 48-51; T.R., at paras. 176-77 and 181.)

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

[48] The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result: see *Guerin*, at p. 385 and 388-89; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at para. 57. The extent of the loss, if any, flowing from a breach of fiduciary duty engages questions of causation. Equity addresses such questions under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established: *Guerin*, at pp. 357 (Wilson J.) and 390-91 (Dickson J.); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Hodgkinson*, at pp. 440-41;

Whitefish Lake Band of Indians v. Canada (Attorney General), 2007 ONCA 744, 87 O.R. (3d) 321, at paras. 48 and 58. Correspondingly, the Act assigns matters of causation and apportionment of fault to the compensation phase. It provides that compensation is to be awarded against the Crown in right of Canada only to the extent that the breach by the Crown in issue — as opposed to the acts and omissions of third parties — caused the loss: Act, s. 20(1)(i); *Kitselas* (F.C.A.), at paras. 63-67.

[49] A breach of fiduciary obligation can be found even where the beneficiary has not proven that the breach resulted in a compensable loss, or has not suffered a loss at all: *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223; *Lac La Ronge Band* (S.C.T.), at para. 197. By the same token, the fact that the Crown eventually procured a reserve for the band in the Williams Lake area cannot — as Canada argued, and as the Federal Court of Appeal accepted (at para. 109) — undo the earlier breach of fiduciary duty, although it may reduce the loss that can be said to have flowed from it. Here, too, the Act recognizes the distinction between finding a breach of fiduciary obligation and remedying the consequences of that breach. It does so by directing the Tribunal to deduct from the amount of compensation the value of any benefit received by the claimant in relation to the subject matter of the specific claim: Act, s. 20(3).

[50] The Tribunal has therefore considered the principles governing equitable compensation for loss flowing from a breach of fiduciary duty during the compensation phase of its proceedings: see, for example, *Popkum First Nation v.*

Canada (Indian Affairs and Northern Development), 2016 SCTC 12; *Huu-Ay-Aht First Nations v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 14. In the instant case, it signalled its intention to consider the provision of the Bates Estate as part of that analysis: T.R., at para. 343.

[51] At the validity stage, the relevant question — and the one the Tribunal asked — is whether “the Crown [has] act[ed] with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake”: *Haida Nation*, at para. 18 (emphasis added). The need to focus on the particular interest that is vulnerable to the fiduciary’s discretionary control is a reflection of the general principle of fiduciary law that “not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature”: *Wewaykum*, at para. 83; T.R., at para. 177.

[52] The specific or cognizable Aboriginal interest at stake must be identified with care. The fiduciary’s obligation is owed in relation to that interest, and its content will depend on “the nature and importance of the interest sought to be protected”: *Manitoba Metis Federation*, at para. 49; *Wewaykum*, at para. 86. If there is no Aboriginal interest sufficiently independent of the Crown’s executive and legislative functions to give rise to “responsibility ‘in the nature of a private law duty’”, then no fiduciary duties arise — only public law duties: see *Wewaykum*, at paras. 74 and 85; *Guerin*, at p. 385; see also D. W. Elliott, “Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown” (2003), 29 *Queen’s L.J.* 1.

[53] Interests in reserve land (*Guerin*) and rights under s. 35 of the *Constitution Act, 1982 (Sparrow)* satisfy the requirement of an “independent legal interest”: *Guerin*, at p. 385. In *Manitoba Metis Federation*, on which the Tribunal relied, it was found that the children’s grant in s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3, fell short of establishing a specific or cognizable Aboriginal interest capable of grounding a *sui generis* fiduciary duty. It fell short because it was not held by the Métis as a collective:

. . . [the claimants did] not establish that the Métis held either Aboriginal title or some other Aboriginal interest in specific lands as a group. An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, legislation. Rather, it is predicated on historic use and occupation. As Dickson J. stated in *Guerin*:

The “political trust” cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive or legislative provision. [Emphasis added; p. 379.]

(*Manitoba Metis Federation*, at para. 58 (emphasis added); see also *Elder Advocates*, at paras. 51-52.)

[54] Where the alleged interest is in land subject to the reserve creation process, the process need not have been finalized for the interest to be “cognizable”: *Ross River*, at paras. 68 and 77; *Wewaykum*, at paras. 88-90; T.R., at para. 189. The Tribunal also explained that an interest in land asserted on the basis of use and occupation does not have to be an Aboriginal title: T.R., at para. 239; see also

Wewaykum, at paras. 77, 91 and 95; *Guerin*, at p. 379; *Manitoba Metis Federation*, at para. 53.

[55] The circumstances in which a fiduciary obligation arises shape its content: *Wewaykum*, at para. 92; *Ermineskin*, at para. 72, quoting *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 149. The content of the Crown's *sui generis* fiduciary duty varies to take into account its broader public obligations: *Wewaykum*, at para. 96; *Haida Nation*, at para. 18. Prior to the acquisition of a "legal interest" in land that is subject to the reserve creation process, the Crown's *sui generis* fiduciary duty is "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries": *Wewaykum*, at para. 97; T.R., at paras. 224 and 319. In such circumstances, though, the Crown's fiduciary duty is limited by its obligation to "have regard to the interest of all affected parties" and to be even-handed among competing beneficiaries: *Wewaykum*, at paras. 96-97; T.R., at para. 233. Fulfilling this flexible equitable obligation entails consideration of the nature and importance of the beneficiary's interest and competing interests; although the Crown cannot ignore the reality of conflicting demands, neither does the existence of such demands absolve it altogether of its fiduciary duty in its efforts to reconcile them fairly: *Wewaykum*, at paras. 96-97 and 103-4; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at para. 53; T.R., at para. 339.

[56] Working within this framework for the purposes of both s. 14(1)(b) and s. 14(1)(c) (at paras. 268-69 and 315), the Tribunal found that, before and after Confederation, the Crown owed the band a *sui generis* fiduciary obligation of the type recognized by this Court in *Wewaykum* in relation to the band's interest in the Village Lands.

(2) The Crown's Fiduciary Obligation Before British Columbia's Entry Into Confederation and the Breach of That Obligation Under Section 14(1)(b)

[57] The Tribunal found that the duty of ordinary prudence described in *Wewaykum* required, at a minimum, that Nind take steps to inquire into the extent of the band's settlement so that it could be protected, as he had been specifically instructed to do. That Nind did not take even these most basic steps put the Crown in breach of the *sui generis* fiduciary obligation it owed to the band in relation to the Village Lands: T.R., at paras. 234-35.

[58] It is not in dispute that, if the Crown owed the band a *sui generis* fiduciary obligation in relation to the Village Lands, it was in breach of that obligation. The question is whether, prior to British Columbia's entry into Confederation, such an obligation arose at all. Canada argues that the Tribunal misapprehended the applicable legal principles. It impugns the Tribunal's findings on both of the requirements that underpin a *sui generis* fiduciary obligation: whether there was a specific or cognizable Aboriginal interest; and whether, in relation to that

interest, the Crown assumed discretionary control sufficient to ground a fiduciary obligation.

[59] With regard to discretionary control, Canada argues that it was unreasonable for the Tribunal to find a *sui generis* fiduciary obligation for two reasons. First, the Crown's degree of control fell short of the exclusive, trust-like arrangement at issue in *Guerin*. Second, the band was not deprived of the power to protect its own interest using the dispute resolution process contemplated in *Proclamation No. 15*.

[60] I disagree. First, it was open to the Tribunal to look, not to the particular form or extent of the Crown's discretionary power to affect the beneficiary's interest, but to the vulnerability of that interest to "the risks of [the alleged fiduciary's] misconduct or ineptitude": *Wewaykum*, at para. 80, cited in T.R., at para. 176; see also *Galambos*, at paras. 68-70 and 83-84; *Hodgkinson*, at p. 406; *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 137, per Wilson J. (dissenting). Second, the Tribunal's position is consistent with La Forest J.'s observation in *Hodgkinson* that vulnerability sufficient to give rise to a fiduciary duty does not depend on the presence or absence of "some hypothetical ability to protect one's self from harm": pp. 412-13.

[61] With respect, as I will now explain, I am also of the view that the Tribunal's determination that the band had a specific or cognizable Aboriginal interest in the Village Lands, in relation to which the Imperial Crown assumed discretionary control sufficient to ground a fiduciary obligation, was reasonable.

[62] The Tribunal found that, by *Proclamation No. 15*, the Crown had assumed discretionary control over the band's interest in the Village Lands and that that interest was a specific or cognizable Aboriginal interest. The Tribunal's conclusion that the Crown therefore owed a *sui generis* fiduciary obligation in relation to the band's interest in the Village Lands depended on its resolution of the following question: Was an interest in land that would have qualified as an "Indian settlement" in the Colony of British Columbia a "specific or cognizable Aboriginal interest", such that the Crown's exercise of discretionary control over that interest was subject to its *sui generis* fiduciary obligation?

[63] Under colonial law and policy, "Indian settlements" were protected from pre-emption for the use and benefit of the Indians: T.R., at paras. 189-90. "Indian settlements" were to be identified based on habitual and historic use and occupation. This was to be ascertained, where necessary, by consulting with the Indians themselves: T.R., at paras. 50-51. The Tribunal applied this approach and reasonably concluded on the facts that the Village Lands would have qualified as an Indian settlement under *Proclamation No. 15* and that the colonial policy governing its implementation ought to have led to measures reserving them from pre-emption: T.R., at para. 136.

[64] The band's specific claim pertains to the reserve creation process, but, unlike in *Ross River* or *Wewaykum*, no formal steps were ever taken to set apart the lands as a reserve. Indeed, the very basis of the band's specific claim is that the

Village Lands ought to have been protected and that, as a consequence of the Crown's failure to meet its responsibilities as a fiduciary, they were not. Canada's position was that the Crown's fiduciary obligation stopped at the line between interests in land that *had been* provisionally set aside as a reserve, pending the steps necessary to create it, and interests in land that *ought to have been* so set aside. The corollary to Canada's position is that in these prior cases, it was the executive act of setting aside land that established a specific or cognizable Aboriginal interest.

[65] The Tribunal disagreed. It has now consistently held that *recognition* as an Aboriginal interest in land under the law and policy governing reserve creation is the defining feature of a cognizable Aboriginal interest for the purpose of identifying the fiduciary duties of Crown officials carrying out their functions within that process: T.R., at paras. 174, 189-90, 232-33 and 237-39; *Kitselas First Nation v. Canada (Indian Affairs and Northern Development)*, 2013 SCTC 1, at paras. 8, 135 and 143 (CanLII), *aff'd Kitselas (F.C.A.)*; *Lake Babine Nation v. Canada (Indian Affairs and Northern Development)*, 2015 SCTC 5, at para. 170 (CanLII); *Akisq'nuk First Nation v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 3, at paras. 224-39 (CanLII). The Tribunal thus defines cognizable interests in respect of which the Crown may owe a *sui generis* fiduciary duty as encompassing acknowledged Aboriginal interests in land whose protection was provided for in legislation and policy (see *Wewaykum*, at para. 95) — whether or not Crown officials took the appropriate action to secure this protection.

[66] The Tribunal dealt with the earliest stage of the reserve creation process: the point at which Crown officials ascertained the land that was to be reserved (see *Wewaykum*, at paras. 22-24 and 97). This is an earlier stage than the one at which the breaches of fiduciary duty considered by this Court in *Wewaykum* were alleged to have occurred. Still, the Tribunal concluded that the Crown's fiduciary duty existed from the outset of the reserve creation process and for the duration of its exercise of discretionary control, with only the content of the duty shifting to reflect the nature of the interest at stake: paras. 267 and 314. This approach to identifying the interests in relation to which the exercise of discretionary control will attract scrutiny was premised on the nature of the interest in land that government intervention sought to preserve for the use and benefit of Indigenous peoples in the face of an influx of newcomers, not on the administrative acts and records of Crown officials. Such an approach will be reasonable provided that there was an Aboriginal interest at stake in the early stages of the reserve creation process that was sufficiently specific or cognizable for the assumption of "discretionary control in relation thereto . . . to ground a fiduciary obligation": *Wewaykum*, at para. 83.

[67] In the Tribunal's view, Indigenous peoples in the Colony of British Columbia held just such an interest in land that would have qualified as an "Indian settlement" based on use and occupation. This conclusion reflects a reasonable understanding of the kinds of Aboriginal interests capable of grounding a fiduciary obligation. It meets the requirement that the interest at stake be "specific or cognizable" in the sense that the alleged fiduciary — the Crown, acting through its

colonial officials — would have been in a position to identify specific land in which Indigenous peoples had an interest, and in respect of which its duties as a fiduciary when dealing with that land were owed: *Manitoba Metis Federation*, at para. 51.

[68] The Tribunal’s conclusion also meets the requirement that the interest at stake be sufficiently independent of the Crown’s executive and legislative functions to “invok[e] responsibility ‘in the nature of a private law duty’”: *Wewaykum*, at para. 85; see paras. 52-53, above. The band’s interest in the Village Lands was not *created* by *Proclamation No. 15* and the orders issued to implement it. Rather, it was *recognized* by enactments and policies as an independent interest in land — described by Governor Douglas as an “equitable title” — anchored in collective use and occupation: T.R., at paras. 22, 37-38, 50, 197 and 238.

[69] To the extent that the independence of this interest falls short of that on which this Court relied in *Guerin* to distinguish the “political trust” cases, *Wewaykum* reasonably supports the Tribunal’s view that variation in the nature of the interest goes to the content of the duty rather than its existence: T.R., at paras. 233 and 267; see also Elliott, at pp. 30-31 and 36-37. It was therefore reasonable for the Tribunal to conclude that a fiduciary obligation could arise in respect of the band’s interest in the Village Lands.

[70] This alone was not sufficient to validate the band’s claim under s. 14(1)(b). The Tribunal also found that the Imperial Crown came within the extended meaning of “Crown” in s. 14(2) for the purposes of that obligation. The Tribunal’s

interpretation of s. 14(2) is best understood in the context of its reasons as a whole, and specifically in light of its application of fiduciary principles in relation to the Village Lands both before and after British Columbia's entry into Confederation. I will therefore return to this issue after considering the Tribunal's treatment of the post-Confederation fiduciary obligation of the Crown in right of Canada.

C. *Breach of a Fiduciary Obligation of the Crown After British Columbia's Entry Into Confederation (Section 14(1)(c))*

[71] The band's post-Confederation claim involves the same extended federal-provincial wrangle over the creation of Indian reserves that was considered by this Court in *Wewaykum*. The Tribunal concluded that, in these circumstances, the honour of the Crown gave rise to a *sui generis* fiduciary obligation on the part of officials acting on behalf of the federal Crown and that this obligation was breached. The Tribunal observed that the Province would also have been bound by the honour of the Crown in these circumstances: TR, at para. 337. Its analysis does not exclude the possibility that the discretionary power exercised by the provincial Crown may also have been subject to a fiduciary obligation.

[72] The Tribunal reached its conclusion that the Crown owed, and breached, a fiduciary obligation in three steps. First, it identified the specific or cognizable Aboriginal interest that was "vulnerable" to the adverse exercise of federal Crown discretion: the band's interest in the Village Lands. Second, to determine the content of the duty, the Tribunal looked to the nature of the interest at stake. It was an interest

in the land on which the band had had its settlement — land with which the band had a “tangible, practical and cultural connection”: T.R., at para. 342. The Crown had to fulfil the fiduciary duties described in *Wewaykum* with respect to *that land*. Third, the Tribunal found that the Crown had failed to discharge its fiduciary duty with respect to the Village Lands. Federal officials with knowledge of the circumstances surrounding the Williams Lake pre-emptions and the band’s situation did nothing to challenge the pre-emptions. When O’Reilly arrived to resolve matters in 1881, he refused to countenance any interference with the pre-emptions, at the band’s expense. This conduct, the Tribunal reasoned, fell below the standard imposed by the Crown’s fiduciary duty: paras. 327-40.

[73] The Tribunal did not find that the Crown owed the band a fiduciary duty “at large”. The interest that grounded the Crown’s fiduciary duty was more specific: it was an interest *in the Village Lands*. Therefore, in determining whether the Crown had discharged its fiduciary duty, the Tribunal was required to consider the Crown’s actions (and omissions) in relation to that land — not in relation to other land or to the band’s best interest in general. The Tribunal identified the allotment of the Village Lands as a reserve as being in the band’s best interest *as beneficiary*. In so finding, the Tribunal was not saying that the band was entitled to the allotment of the Village Lands as a reserve. Nor was it saying that the federal Crown was duty-bound to deliver that result. It found that the band, as beneficiary, was entitled to expect the Crown to act with a view to its best interest when exercising discretionary power that would affect the preservation of its interest in the Village Lands. The Tribunal

concluded that the Crown had breached its fiduciary duty because of the manner in which its officials conducted themselves by failing to take any available measures to secure the beneficiary's interest and by improperly giving priority to the wrongful pre-emptions. The Tribunal took issue with the *process* by which the Crown resolved the conflicting interests, not the *result* at which it arrived.

[74] As I explain below, the Tribunal's conclusion was reasonable. I will discuss each step in the Tribunal's analysis to explain why this is the case.

(1) The Crown's Fiduciary Obligation After British Columbia's Entry Into Confederation

[75] The Tribunal relied on *Wewaykum* for the proposition that, after British Columbia's entry into Confederation, the discretion of the Crown in right of Canada in relation to Aboriginal land interests in British Columbia flowed from its position as the exclusive intermediary with the Province in relation to those interests for the purposes of the reserve creation process: *Wewaykum*, at paras. 89-91, 93 and 97; *Kitselas* (F.C.A.), at para. 67; T.R., at paras. 317-18.

[76] The Tribunal openly acknowledged that Canada's discretionary power was limited by the need for provincial cooperation and that Canada could not unilaterally create a reserve: paras. 258, 263 and 326; see also *Kitselas* (S.C.T.), at para. 146; *Akisp'nuq* (S.C.T.), at para. 240. But it was open to the Tribunal to find that a fiduciary obligation arose in the absence of complete or exclusive control,

provided that the federal Crown's position as exclusive intermediary conferred a degree of control that left a cognizable Aboriginal land interest "vulnerable" to the adverse exercise of its discretion: see para. 60, above.

[77] As Cromwell J. observed in *Galambos* (at para. 84), the nature of the discretion or power in the hands of the alleged fiduciary that will suffice to attract a fiduciary obligation may be controversial in some cases. To the extent that the power wielded by officials acting on behalf of the federal Crown at the earliest stages of the reserve creation process in British Columbia gives rise to any such controversy, the Tribunal has resolved it in a manner that aligns with general principles of fiduciary law. The essential requirement is that the alleged fiduciary have scope for the exercise of some discretion or power to affect the beneficiary's interests; this is the discretion or power that is restricted by the fiduciary obligation: *Frame*, at p. 136. It is also the discretion or power whose misuse the band must still prove resulted in a compensable loss. The extent to which the claimed loss is attributable to Canada's breach, as opposed to provincial intransigence, raises questions of causation that the Tribunal has not yet had the opportunity to consider.

[78] To find a *sui generis* fiduciary obligation in relation to the Village Lands after Confederation, the only further question the Tribunal had to resolve was whether the band held an interest in the Village Lands capable of grounding one.

[79] The Tribunal reviewed the reserve creation policy implemented by federal officials under Article 13 of the *Terms of Union*. It concluded that, as under

the Colony's policy, proposed reserves were to be identified and surveyed on the basis of use and occupation, to be ascertained by the Indian Reserve Commissioners in consultation with the affected Nation: paras. 237, 279-92, 300 and 308-9; see also *Wewaykum*, at paras. 24 and 65.

[80] The Tribunal's approach to these circumstances has been to ground the Crown's fiduciary duty in interests in land "capable of being known or recognized": *Lake Babine*, at para. 172, quoting *Black's Law Dictionary* (10th ed. 2014), *sub verbo* "cognizable". The Tribunal found that the band's use and occupation of the Village Lands had established a form of Aboriginal interest in land that would have been — and was — apparent as such to the officials charged with implementing the policy: para. 237. The band's interest was therefore sufficient for the exercise of discretion by federal officials to be subject to the Crown's fiduciary duty: T.R., at para. 317; see also *Kitselas* (S.C.T.), at paras. 153-55, *aff'd Kitselas* (F.C.A.), at paras. 49, 52-54 and 67; *Akisq'nuk*, at paras. 231-38; *Lake Babine*, at para. 170.

[81] The interest at stake was "cognizable", on the Tribunal's approach, because Crown officials were in a position to know of an Aboriginal land interest and of their discretionary power to affect it as they "carr[ied] out various functions imposed by statute or undertaken pursuant to federal-provincial agreements": *Wewaykum*, at para. 91. The interest at stake also reasonably met the requirement of an independent legal entitlement. The band's collective Aboriginal interest in the land it had habitually and historically used and occupied at the time decisions about

reserve creation were being made, though *recognized* in legislation and policy, had not been created by executive or legislative action.

[82] Next, the Tribunal characterized the nature and importance of that interest. By nature, it was akin to a property interest — that is, an interest *in the land* on which the band had had its settlement: T.R., at para. 321. In *Ross River* and *Wewaykum*, the interests to which the Crown’s fiduciary duty in the reserve creation process attached were interests in land: *Ross River*, at paras. 68 and 77; *Wewaykum*, at paras. 93 and 97. The question before the Tribunal was whether the interest in land flowed from the administrative act of provisionally allocating a reserve or from the collective use and occupation of the land. In light of the emphasis on land in those cases, as well as the principles in *Guerin* and *Manitoba Metis Federation*, the Tribunal reasonably found that the band’s interest was anchored in the latter and that the subject matter of the fiduciary obligation was not a general interest in obtaining a reserve.

[83] As for the importance of the interest asserted, the Tribunal noted that it was an interest in the land from which the band had sustained itself, to which it had a “tangible, practical and cultural connection” and that formed part of its traditional territory: paras. 267, 317 and 342. The Tribunal compared these circumstances to those in *Wewaykum*, where the bands had no prior interest in the land in issue. Indeed, as relative newcomers, they had no greater interest than the settlers with whom they came into conflict: *Wewaykum*, at paras. 95-96. The Tribunal tailored the content of

Canada's fiduciary duty to the strength of the band's interest in the Village Lands. This reflects a reasonable understanding of the relationship between the interest at stake and the content of the duty. It was open to the Tribunal to consider the differences between the band's interest in the Village Lands and other interests previously recognized by this Court at the stage of determining the duty's content.

[84] My colleague Justice Brown and I part company over whether it was reasonable for the Tribunal to identify the specific Aboriginal interest at stake, in relation to which the Crown's duties as fiduciary were owed, as the band's interest in the Village Lands: Brown J.'s reasons, at para. 175. The basis for Justice Brown's objection is that the words "policy as liberal" are to be interpreted flexibly such that Article 13 obliged Canada only to meet a benchmark of liberality, combined with the need to accord the Crown a measure of latitude in reconciling competing interests during the reserve creation process: *Wewaykum*, at paras. 96-97; see also *Jack v. The Queen*, [1980] 1 S.C.R. 294.

[85] I gather that, in Justice Brown's view, the Tribunal ought to have characterized the subject matter of the Crown's duty more broadly: the Crown had a duty to create a reserve in a manner and place that were consistent with a general assessment of the band's best interests. Perhaps the Tribunal could have reconciled this characterization of the underlying interest with the principle that the interest at stake must not be created by either executive or legislative action. However, the question on judicial review is not whether it was open to the Tribunal to identify and

characterize the interest at stake differently. The question is whether the approach the Tribunal adopted was reasonable.

[86] Justice Brown suggests that it was not. The need for flexibility forecloses both the Tribunal's identification of an Aboriginal interest in specific lands as the subject matter of the Crown's fiduciary duty and its resulting determination that the "best interest" of the band as *beneficiary* lay in the preservation of that interest through its allotment as a reserve.

[87] I respectfully disagree with the suggestion that the Tribunal did an end-run around this Court's jurisprudence and the distribution of powers and responsibilities under the *Terms of Union* when it found that the band had a cognizable Aboriginal interest in the Village Lands and defined Canada's fiduciary obligation in relation to that interest. I appreciate Justice Brown's concern that Canada should not be obliged to carry out a policy it never committed itself to carry out. However, I stress that neither Canada's constitutional obligation to create reserves according to a particular policy, nor the Province's obligation to convey land for that purpose, is before us. The question is not whether the band was entitled to the allotment of the Village Lands as a reserve — either under the *Terms of Union* or as a consequence of Canada's fiduciary obligation. The breach of fiduciary obligation at issue in this appeal is not Canada's failure to deliver that particular result: Brown J.'s reasons, at para. 169.

[88] The question before us concerns the Crown's common law fiduciary duties, which the Tribunal found to arise out of its relationship with the band. Officials were obliged to ensure that their actions, decisions and judgments that would affect the band's interest met "the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples": *Wewaykum*, at para. 80. The relevant breach here is the failure of Crown officials to meet the applicable standard of conduct in exercising their discretionary power to affect the beneficiary's interest. I agree with Justice Brown that the assessment of the fiduciary's conduct and decisions must take into account the Crown's competing obligations. However, in *Wewaykum*, this Court indicated that flexibility is to be given effect in determining the *content* of the Crown's fiduciary obligation, not in identifying the beneficiary's interest in relation to which it is owed: *Haida Nation*, at para. 18.

[89] The band either had a "cognizable" interest in the Village Lands, over which the Crown had discretionary control, or it did not. If it did, then the Crown was obliged to meet the prescribed fiduciary standard of conduct *in relation to that interest* — not some other interest. It is certainly true that, prior to reserve creation, the Crown's actions may need to take account of competing interests in relation to the land. But if we accept that the Tribunal reasonably identified the interest at stake as an interest in specific land, a reviewing court cannot intervene on the basis that the band's best interest lay in the allocation of a reserve elsewhere. To do so would disregard the nature and importance of the specific interest the Tribunal identified at the first step of its analysis.

(2) The Content of the Crown's Fiduciary Obligation and the Breach of That Obligation

[90] To determine what the content of the Crown's fiduciary obligation was and whether it was breached, the Tribunal considered all of the circumstances, including by: (1) identifying the band's "best interest", not writ large, but as beneficiary of a fiduciary duty owed in relation to an Aboriginal interest in specific lands (T.R., at paras. 320-21); (2) considering the conflicting interests that stood to be adversely affected by the pursuit of the beneficiary's best interest (the unlawful pre-emptions) (T.R., at paras. 327, 331 and 338-39); and (3) ascertaining whether the Crown as fiduciary acted with reference to the beneficiary's best interest, reasonably reconciled with its public obligations (T.R., at para. 339; *Wewaykum*, at paras. 96-97).

[91] In my view, the Tribunal's findings on each of these points provide a reasonable basis for concluding that the inaction of Crown officials prior to 1881 and the judgment O'Reilly displayed when he eventually allotted a reserve to the band elsewhere fell short of fulfilling the Crown's fiduciary obligation. As I will now explain, the suggestions that have been raised to the contrary fail to show the Tribunal appropriate deference.

[92] First, I note Justice Brown's suggestion that the Tribunal unreasonably required Canada to "have exhausted all avenues — whether they really existed or not — of securing the Village Lands as a reserve": para. 173. The lengths to which federal officials were duty-bound to go in an effort to have the pre-emptions set aside

is a heavily fact-based inquiry. With respect, reweighing the evidence to fill in gaps in the Tribunal's analysis by imputing this position to it is not in keeping with an attitude of "respectful attention".

[93] Second, and more fundamentally, the Tribunal's assessment of the Crown's conduct is impugned on the grounds that it was premised on an unsubstantiated view of the band's best interest — one that was unreasonably divorced from the band's own view of its interests at the time, the reality of uncooperative provincial officials and the band's urgent need for arable land. If not for this flawed starting premise, it is suggested, the Tribunal would have had to consider O'Reilly's allocation of the Bates Estate to the band in 1881, as well as other measures taken in accordance with the band's wishes, to determine whether the Crown had discharged its fiduciary obligation: Brown J.'s reasons, at paras. 176-77. Had it done so, it would have found that Canada, in its dealings with the band relating to the Village Lands, met the required standard of fiduciary conduct by any reasonable measure.

[94] These criticisms of the Tribunal's decision share a common starting point: that the focus of the Tribunal's assessment should have been the band's best interest writ large. Regardless of the validity of such an approach, the Tribunal saw the matter differently: the "subject matter" of the fiduciary obligation was a specific type of interest (an interest in land based on use and occupation) in specific land (the Village Lands).

[95] In the Tribunal's view, the band was the beneficiary of a fiduciary obligation owed in respect of an interest in land. As stated above, for the purpose of applying the fiduciary duties described in *Wewaykum* to these circumstances, the Tribunal had to identify the band's best interest, not writ large, but as beneficiary of a fiduciary obligation owed in relation to a specific interest in the Village Lands. That is precisely what it did. This explains why the proposition that the best interest of the band lay in the allotment of those lands as a reserve was not a "bald statement": F.C.A. reasons, at para. 99; see also Brown J.'s reasons, at para. 168. That characterization implies that the Tribunal made a factual assessment without any evidentiary basis.

[96] On the contrary, the Tribunal's proposition that the band's best interest lay in the allotment of the Village Lands as a reserve was one step in its legal analysis — a corollary of its determination that the interest at stake was in the Village Lands specifically, not in the provision of a reserve generally. In other words, it followed from the Tribunal's finding that the band had an interest in land that was vulnerable to the exercise of a discretion that, if used improperly, would result in a grant of fee simple title overtaking the band's independent legal entitlement to use and occupation of that land.

[97] The method available to Crown officials to protect the beneficiary's interest in land from that fate was, on a more permanent basis, to seek to have the land allotted as a reserve: T.R., at para. 322. On an immediate basis, it was to seek

enforcement of provincial protection for Indian settlements: T.R., at para. 326. Crown officials knew that the pre-emptions contravened the applicable legislation. Having received assurances from the Province that a “sure and speedy remedy” was available, they did not attempt to make use of that remedy to preserve the band’s interest in land. Since the alternative was for the band to be permanently deprived of that interest, it was reasonable for the Tribunal to conclude that ordinary prudence required federal Crown officials to do so: para. 328.

[98] Because the beneficiary does not hold a full legal interest in the lands, the *sui generis* fiduciary duty described in *Wewaykum* is limited, as the Tribunal acknowledged: paras. 264-67. This limit exists to take into account the Crown’s broader obligations: *Wewaykum*, at para. 96; see also *Haida Nation*, at para. 18. The question is whether the Tribunal failed to give effect to it by finding a breach based on O’Reilly’s refusal to countenance any interference with “white men’s rights”.

[99] The Tribunal recognized that O’Reilly was obliged to take into account the interests of settlers when selecting land to be allotted for a reserve. However, the only competing interests for which O’Reilly had to account were interests in the land that was the subject of the Crown’s discretionary control and fiduciary duty — the Village Lands. These interests were, on the one hand, the band’s “tangible, practical and cultural” interest in the Village Lands, recognized under colonial and provincial law as protected, and, on the other, Pinchbeck’s interest in his unlawful pre-emptions.

[100] The Crown's fiduciary duty was to reconcile those interests fairly: *Osoyoos Indian Band*, at para. 53; *Wewaykum*, at paras. 96-97 and 103-4. Each instance in which settlers and Indigenous peoples looked to the Crown for "a fair resolution of their dispute" (*Wewaykum*, at para. 96) will be different. The Tribunal is well positioned to familiarize itself with the historical context as a whole, including the conditions under which pre-emptions were vacated elsewhere in the new province. It will also be better acquainted with individual circumstances — which, in this case, included the association between Nind and Pinchbeck and the fact that Pinchbeck had acquired at least some portion of his interest in contravention of the colonial law that, as constable, he was responsible for enforcing. The Tribunal was of the view that, although O'Reilly was obliged to consider settler interests, he ought not to have given Pinchbeck's interest the decisive weight he did: para. 339. Either the band was going to be deprived of a form of interest in the land at issue, or Pinchbeck was. I would not disturb the Tribunal's conclusion that the Crown, in its fiduciary capacity, ought to have decided that it should be Pinchbeck and acted accordingly.

[101] The Tribunal did not find that the Crown's fiduciary obligation could be met only if the Village Lands were set aside as a reserve or that the Crown's *sui generis* fiduciary duty prohibited O'Reilly from considering the interests of settlers. That duty required only good faith and ordinary prudence. The Tribunal reasonably concluded that federal officials had acted with neither and that the band therefore had a valid specific claim under s. 14(1)(c).

D. *The Extended Meaning of “Crown” (Section 14(2))*

[102] The Act authorizes the Tribunal to validate specific claims based on certain wrongs committed prior to Confederation by the “Sovereign of Great Britain and its colonies”. Subject to s. 20, the Tribunal may then award compensation against the Crown in right of Canada for “losses arising from those grounds”: s. 14(1). However, for a First Nation to establish valid grounds for a specific claim on the basis of the breach or non-fulfilment of a pre-Confederation treaty, statutory or fiduciary obligation (s. 14(1)(a) to (c)), the “Sovereign of Great Britain and its colonies” — the Imperial Crown, in the Tribunal’s words — upon whom the obligation rested must also come within the extended meaning of “Crown” in s. 14(2).

[103] Section 14(2) defines “Crown” for the purposes of the Act by reference to the legal obligation whose breach or non-fulfilment forms the basis for a First Nation’s specific claim. A legal obligation of the Imperial Crown will satisfy the first branch — the “legal obligation” branch — of s. 14(2) where it “became . . . the responsibility of the Crown in right of Canada”. It will satisfy the second branch — the “liability” branch — where “any liability relating to its breach or non-fulfilment became . . . the responsibility of the Crown in right of Canada”.

[104] The Tribunal found that the Imperial Crown came within the extended meaning of “Crown” in s. 14(2) in the instant case because the fiduciary obligation it was alleged by the band to have breached was a legal obligation that “became . . . the responsibility of the Crown in right of Canada”: para. 164. This, the Tribunal

reasoned, made the fiduciary obligation owed by the Imperial Crown in relation to the band's interest in the Village Lands a legal obligation within the meaning of s. 14(2) (para. 174), permitting it to read "Crown" in s. 14(1)(b) as "Imperial Crown".

[105] To apply s. 14(2) in this manner, the Tribunal resolved a question of statutory interpretation: Which breaches by the Imperial Crown of a fiduciary obligation can be the subject of a specific claim? Because the Tribunal proceeded under the legal obligation branch of s. 14(2), it had to decide when — if ever — a fiduciary obligation of the Imperial Crown can be said to have "bec[ome] . . . the responsibility of the Crown in right of Canada" for the purposes of s. 14(2).

[106] In brief, the Tribunal held that this will be so where, as here, the fiduciary obligation in issue is a legal obligation that "became [an] obligatio[n] of Canada on confederation, and for which Canada would, if in the place of the colony, have been in breach": paras. 164 and 174. The Tribunal indicated that this interpretation of the legal obligation branch of s. 14(2) would not extend the application of s. 14(1)(b) to all potential liabilities of the Imperial Crown: paras. 162-63. However, the Tribunal considered and rejected Canada's submission that s. 14(2) was intended to confine pre-Confederation specific claims to losses that would be recoverable against Canada in the courts if not for the bars associated with delay and limitations periods: paras. 240-43.

[107] These components of the Tribunal's reasoning formed one part of its justification for validating the band's claim under s. 14(1)(b). In my view, its decision

as a whole is the appropriate frame of reference for considering “the existence of justification, transparency and intelligibility within the decision-making process”: *Dunsmuir*, at para. 47. Meeting those criteria did not require the Tribunal to make an explicit finding on each constituent element or to provide all of the detail that a reviewing court would have preferred. In light of the nature of the process and the materials and submissions before it, the Tribunal’s reasons adequately explain the bases of its decision that the band had made out valid grounds for a specific claim based on events in the Colony prior to Confederation. Though sparse on the issue of s. 14(2), the reasons taken as a whole, provide a reviewing court with an adequate account of why that decision was made that serves the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland Nurses*, at paras. 16-18, citing *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at paras. 163-64 (Evans J.A., dissenting), rev’d 2011 SCC 57, [2011] 3 S.C.R. 572.

[108] The appropriate starting point is the Tribunal’s interpretation of s. 14(2): see *Ryan*, at paras. 49-51; *Canada (Attorney General) v. Delios*, 2015 FCA 117, 472 N.R. 171, at para. 28. The question is whether the tools of statutory interpretation — including the text, context and purpose of the provision — can reasonably support the Tribunal’s conclusion: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 70; *Agraira*, at para. 64; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 34. It was for Canada to show that that conclusion was

unreasonable. Instead, Canada showed that the Tribunal failed to make the legal findings that, according to its competing interpretation, applying the extended meaning of Crown required. However, even in the face of a competing reasonable interpretation, a reviewing court should refrain from interfering where the Tribunal, with the benefit of its expertise, has “resolve[d] a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear”: *McLean*, at paras. 40-41. By expertise, I mean the Tribunal’s relative familiarity with the specialized policy context on which it relied to interpret s. 14(2): Canada’s long-standing specific claims regime and the role that the Tribunal and the Act are meant to play within it.

[109] As a matter of statutory interpretation, the disagreement over the Tribunal’s reliance on the extended meaning of “Crown” concerns whether — as Canada argued before the Tribunal and took as its starting point before this Court — the legal obligation branch of s. 14(2) can only be read as triggering an inquiry into whether or not Canada fulfilled an obligation it assumed from the Colony under the *Terms of Union*. The administrative law disagreement is about how to understand the reasoning by which the Tribunal reached the contrary view; it also concerns the related matter of whether expanding upon that reasoning constitutes permissible supplementing of the Tribunal’s reasons or impermissible substitution of a reviewing court’s reasons: *Newfoundland Nurses*, at paras. 12 and 15; *A.T.A.*, at para. 54; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, at para. 24.

[110] With that in mind, the easiest place to begin is with what the Tribunal clearly found the legal obligation branch of s. 14(2) *not* to require — the identification of a constitutional obligation of Canada under the *Terms of Union* to establish the Village Lands as a reserve:

The Claimant relies on Article 1 of the *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10 [*Terms of Union*], as the source of a constitutional obligation to establish the settlement lands as reserve after the colony became a province of Canada. . .

In its primary written submissions the Respondent argues that the *SCTA* does not impose new legal obligations on Canada: “The Act is procedural, it provides how a claim may be heard and determined but, other than removing limitations and laches defences, does not extend the scope of Crown liability for historical claims” (Written Submissions of Canada, Jan. 18, 2013, para. 247). This responds to the Claimant’s reliance on Article 1 of the *Terms of Union*. The Respondent argues at paragraph 253 that “the legal issue of whether or not Canada assumed responsibility upon confederation is a matter of constitutional law, not a matter to be determined by an implication that might be drawn from section 14.”

As I understand the Respondent’s position, it is that *SCTA*, s. 14(2) does not expand the meaning of “legal obligation” in s. 14(1)(b) to apply constitutional obligations of Canada where the claim is grounded in a breach of legal obligation of the colony. Whether or not this is correct, it has no bearing on whether the Claimant, as the Respondent says: “can file historic, pre-confederation claims pursuant to Section 14 of the Act as they could under the Specific Claims Policy” (para. 258). [paras. 240-42]

[111] These paragraphs show the Tribunal’s rejection of the legal backdrop that Justice Brown treats as a foregone conclusion: the notion that s. 14(2) can operate in this appeal only to enforce Canada’s outstanding obligations under the *Terms of Union* (see Brown J.’s reasons, at paras. 182-85 and 190). Whether s. 14(2) was an enforcement mechanism was a live issue before the Tribunal. Canada argued that the

Specific Claims Policy — and s. 14(2) with it — requires that a specific claim based on events prior to Confederation disclose an independent and outstanding obligation of Canada. The Tribunal decided that point against Canada. The Tribunal’s position was that, read in its full context, s. 14(2) operates as something other than an enforcement mechanism. In declining to apply s. 14(2) in this manner, the Tribunal did not disregard parliamentary intent. It read the provision in the context of the Specific Claims Policy. This led it to take a different view of the function Parliament intended the extended meaning of “Crown” to serve within the scheme — one that, as I will explain below, finds support in the evolution of Canada’s policy on specific claims.

[112] The Tribunal accepted what it took to be Canada’s concession that s. 14(2) is, at least in some circumstances, a potential source of liability for the Crown in right of Canada for the acts and omissions of the Imperial Crown in the former colonies: see T.R., at paras. 140, 161 and 245. I say potential because the extent to which the breach in issue in this case will result in an award against Canada remains for the Tribunal to determine in accordance with s. 20 of the Act. This appeal does not deal with liability — only with the question of whether there was a breach of a legal obligation of the Crown within the meaning of s. 14(1)(b). Even then, the Tribunal acknowledged that the words “became . . . the responsibility” limit the “legal obligations” to which s. 14(2) can apply:

[Section 14(2)] places the Crown (*SCTA*, s. 2: “Crown” means Her Majesty in right of Canada) in the same legal position as “the Sovereign

of Great Britain and her colonies,” but not for all potential liabilities of the Imperial Crown in the pre-Confederation era. [para. 163]

[113] The Tribunal interpreted the limits on Canada’s potential liability under s. 14(1)(b), read in conjunction with s. 14(2), as follows:

The legal obligations that “. . . became or would have become the responsibility of the Crown in right of Canada” are those that became obligations of Canada on confederation, and for which Canada would, if in the place of the colony, have been in breach. [Emphasis added; para. 164.]

In the Tribunal’s view, then, Canada’s post-Confederation fiduciary obligations supplied the limits contemplated by the legal obligation branch of s. 14(2). They defined the circumstances in which it found that it was entitled to place Canada in the Colony’s shoes for the purposes of s. 14(1)(b).

[114] What did the Tribunal mean by a legal obligation for which Canada would, if in the place of the Colony, have been in breach? The Tribunal described the legal obligation satisfying this interpretation as follows:

The assertion of Crown title placed the Colony in a fiduciary relationship with the aboriginal inhabitants. The enactment of legislation in relation to acknowledged interests in land, here an interest based on the occupancy recognized and protected by the legislation, brings into effect the law that may apply where, as here, the fiduciary relationship is present. This is a legal obligation within the meaning of the term in s. 14(2) when the factors necessary to ground a fiduciary duty are present. [para. 174]

[115] Justice Brown and I agree that the Tribunal read s. 14(2) so as to “effectively project the Crown in right of Canada into the place of the Imperial Crown”: Brown J.’s reasons, at para. 186. We also agree that the Tribunal treated s. 14(2) as a free standing basis on which, subject to s. 20, it could hold Canada responsible for the Colony’s failure to meet certain of its legal obligations. Justice Brown infers from the Tribunal’s reasons that it used s. 14(2) to impose “blanket responsibility” on Canada for all pre-Union specific claims: paras. 182, 187-89 and 194-95. However, the fact that the Tribunal did not limit the legal obligation branch of s. 14(2) by reference to Canada’s constitutional obligations under the *Terms of Union* does not necessarily mean that it imposed no limits at all. With respect, I would not impute the same position to the Tribunal.

[116] This disagreement over how to read the Tribunal’s reasons in the context of its decision bears directly on the disagreement over whether the analysis that follows runs afoul of the cautionary note in *A.T.A.*: supplementing a tribunal’s reasons does not give a court a “carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result” (para. 54, quoting *Petro-Canada v. Workers’ Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at para. 56). This criticism depends on the characterization of the chain of analysis that is being reformulated or replaced — namely, that it bypasses the parameters Parliament set for the extended meaning of “Crown”. As I see it, the Tribunal simply had an alternative, and defensible, understanding of what Parliament intended those parameters to be. My

reasons for coming to this conclusion do not cast the Tribunal's reasons aside; they are grounded in the Tribunal's reasons and supplement them by reference to the materials and arguments before it and the legal principles underlying the decision as a whole.

[117] At the end of its reasons, the Tribunal returned to the relationship between the Colony's fiduciary duties and those of Canada: para. 342. It noted that both Canada and the Colony had recognized the band's specific Aboriginal interest in the Village Lands. To attract fiduciary duties, that interest had to exist independently of both *Proclamation No. 15* and Article 13 of the *Terms of Union*. With that specific land interest — and its recognition as such in law and policy — came fiduciary obligations. The Tribunal found that Canada had assumed the position of exclusive intermediary — a position it had earlier observed was established by the *Royal Proclamation* of 1763 and eventually came to be reflected in the provisions of the *Indian Act*, R.S.C. 1952, c. 149, at issue in *Guerin* (T.R., at para. 172; *Guerin*, at p. 383). When it did so, the Tribunal reasoned, Canada also assumed the office of fiduciary — not necessarily to the exclusion of the Province — in relation to Aboriginal land interests in British Columbia that were subject to the reserve creation process. Among them was the band's interest in the Village Lands.

[118] This informs my view of what the Tribunal meant when it said that s. 14(2) included obligations “for which Canada would, if in the place of the colony, have been in breach”: para. 164. The Tribunal was well aware that the sources and

limits of Crown discretion varied before and after Confederation. Nevertheless, it found that the obligation that arose from the fiduciary relationship when the Colony assumed discretionary control over the Village Lands fell within s. 14(2). Asking whether Canada would have been in breach of a fiduciary obligation that it owed after British Columbia's entry into Confederation if in the Colony's place provided the Tribunal with a means of determining whether that fiduciary obligation became Canada's responsibility for the purpose of setting the parameters of the term "Crown" in validity proceedings under the Act.

[119] In other words, for the narrow purpose of extending the meaning of "Crown" in the case of a specific claim alleging a breach of fiduciary obligation under s. 14(1)(b), the Tribunal used s. 14(2) to place the Crown in right of Canada "in the same legal position as 'the Sovereign of Great Britain and her colonies'" (para. 163) for the fiduciary obligation owed in relation to the band's interest in the Village Lands. On this approach, a fiduciary obligation that "became . . . the responsibility" of the Crown in right of Canada for the purposes of s. 14(2) is one that mirrors a post-Confederation fiduciary obligation of Canada. This would encompass circumstances where, as here, pre- and post-Confederation fiduciary obligations required the Crown to act with reference to the best interest of the same beneficiary in exercising a discretionary power to affect the same Aboriginal interest in the context of the same fiduciary relationship.

[120] The Tribunal interpreted a legal obligation that “became . . . the responsibility of the Crown in right of Canada” *not* as a legal obligation that the Colony of British Columbia transferred to Canada under the *Terms of Union*, but *instead* as a legal obligation “for which Canada would, if in the place of the colony, have been in breach”: para. 164. The Tribunal’s more passive reading of “became” involves looking backwards from Canada’s fiduciary obligations to identify the colonial fiduciary obligations in respect of which either Crown will simply be “the Crown” for the purposes of s. 14(1)(b) of the Act, regardless of whether a colonial or a federal official was responsible for discharging the Crown’s fiduciary duties at a given point in time.

[121] My colleague Justice Brown is of the view that this interpretation was unavailable to the Tribunal. In his view, s. 14(2) establishes as a plain and unambiguous statutory precondition requiring the identification of an outstanding obligation or liability of Canada under the *Terms of Union*. Understood in this manner, s. 14(2) forecloses the possibility of the Imperial Crown’s original fiduciary obligation becoming Canada’s responsibility for the purposes of the legal obligation branch of that provision: Brown J.’s reasons, at paras. 191-92.

[122] However, consideration of the context and purpose of a provision may introduce the possibility of other reasonable interpretations: *McLean*, at paras. 43-44. The Tribunal’s reasons indicate that this was the case here. As I have explained, the Tribunal read the provision in the context of the specific claims regime under which it

operates. Both parties had urged the Tribunal to do so, and the specific claims policy material referenced below was before it. It decided not to interpret s. 14(2) as an enforcement mechanism. We have the benefit of the Tribunal's justification for rejecting that vision of s. 14(2). It refused to adopt a statutory construction that would exclude the band's specific claim, which it believed would have been permitted to proceed under Canada's Specific Claims Policy.

[123] Prior to 1991, that policy recognized outstanding lawful obligations *of the federal government*. However, it barred specific claims based on events prior to 1867 “unless the federal government specifically assumed responsibility therefor”: Indian and Northern Affairs, *Outstanding Business: A Native Claims Policy* (1982), at pp. 20 and 30. The bar on pre-Confederation claims was removed as part of a series of reforms that came on the heels of the rejection of the specific claim of the Mohawks of Kanesatake and the violent confrontation that followed in Oka, Quebec, in the summer of 1990: *RCAP*, at p. 549; see also Library of Parliament, *Bill C-30: The Specific Claims Tribunal Act*, Legislative Summary LS-592E, by Mary C. Hurley, January 14, 2008, at pp. 4-5.

[124] Before the Tribunal, Canada took the position that the scope of pre-Confederation claims had remained unchanged since the release of *Outstanding Business* in 1982. *Outstanding Business* had never “barred” them; such claims had been accepted for negotiation before 1991 on the basis that Canada had assumed responsibility for them. They continued to be accepted afterwards on the same basis.

In support of this view, Canada pointed to the statement that “[a]s with all other specific claims, pre-Confederation claims must still demonstrate a lawful obligation of the government”, meaning “an obligation on the part of the federal government derived from the law”: Indian and Northern Affairs, *Federal Policy for the Settlement of Native Claims* (1993) (“1993 Policy”), at pp. 19, 22 and 23. On Canada’s reading of the policy’s history, the restriction in *Outstanding Business* on entertaining pre-Confederation specific claims “unless the federal government specifically assumed responsibility therefor” continued through the requirement in the *1993 Policy* that claims “demonstrate a lawful obligation of the government”, despite the band’s insistence that the bar had been removed.

[125] In 2007, the Government of Canada adopted *Specific Claims: Justice at Last*, which proposed to resolve longstanding problems with the Specific Claims Policy. It featured the introduction of the Act and an updated policy to parallel it, *The Specific Claims Policy and Process Guide*, Indian and Northern Affairs (2009). This policy guide maintained the fundamental principles of *Outstanding Business* but further modified the grounds for a specific claim, including by expressly recognizing fiduciary obligations and colonial legislation among the available grounds. It also replaced the references to the federal government in *Outstanding Business* and the *1993 Policy* with references to the “Crown” and introduced the extended definition of that term.

[126] Recognizing that the specific claims landscape had changed significantly in the 1990s, the Tribunal could reasonably have found that, if a pre-Confederation claim could be validated before that time on the basis that Canada had assumed responsibility for the specific obligation in issue, it could be validated on a broader basis afterwards, particularly in light of the shift from “federal government” to “Crown”.

[127] The Tribunal did not see the purpose of s. 14(2) as being to limit the scope of pre-Confederation specific claims by reference to the outstanding legal obligations that would be enforceable against Canada in the courts if not for the evidentiary impediments to proving centuries old-claims and the legal consequences of delay and the passage of time. Instead, the Tribunal viewed s. 14(2) as giving effect to a substantive policy decision by Parliament to recognize specific kinds of injustices committed against Indigenous peoples by the Crown, be it the Imperial Crown or the Crown in right of Canada. This purpose aligns with the Tribunal’s approach, which has the effect of defining *the* Crown as a single, continuous and indivisible entity for the narrow purpose of validating the specific claims of First Nations arising from breaches by *a* Crown of a specific type of fiduciary obligation.

[128] It was also reasonable for the Tribunal to accept in principle that the legal obligation branch of s. 14(2) can apply to fiduciary obligations. If Parliament had intended only the liability branch of s. 14(2) to be operative for fiduciary obligations, it could have drafted a separate extended meaning of “Crown” applicable to s.

14(1)(c), which expressly refers to fiduciary obligations. It did not do so. It follows from this structure of s. 14 that the legal obligation branch should be interpreted in a manner that can encompass fiduciary obligations of the former colonies despite the distinct constitutional regimes under which such obligations arose. The nature of fiduciary obligations militates against an interpretation of the legal obligation branch that requires the transfer of the obligation itself. A fiduciary relationship — here, the relationship between the Crown and Indigenous peoples in British Columbia — imposes a fiduciary obligation as a consequence of the transfer of a discretionary power to affect the beneficiary’s interests: *Galambos*, at para. 83. For the purpose of applying s. 14(2), it was therefore reasonably open to the Tribunal to read “became . . . the responsibility” so as to give effect, not to the assumption of a specific obligation, but instead to the assumption of a discretionary power to affect the beneficiary’s interests in the context of an established fiduciary relationship.

[129] The choice between these two readings — the forward-looking “enforcement mechanism” on the one hand, and the backward-looking “projection” of Canada’s obligations for the purpose of identifying fiduciary obligations falling within s. 14(2) on the other — also engages the interpretive principle in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36. That principle provides for a large, liberal and purposive interpretation of legislation relating to Aboriginal peoples, with uncertainty to be resolved in their favour. As part of the jurisprudential backdrop to the Tribunal’s field of specialization, this principle would have informed the Tribunal’s stance on the interpretation of s. 14(2).

[130] Within the confines of an administrative scheme designed to remedy historical injustices, treating the Crown as a continuous entity (defined by Canada's fiduciary obligations and, by necessary implication, the specific or cognizable Aboriginal interests in respect of which they were owed) is consistent with an Indigenous perspective on the ongoing fiduciary relationship between Indigenous peoples and the Crown. In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, Dickson C.J. explained the importance of considering the Aboriginal perspective in interpreting statutory references to the Crown:

While this appeal does not involve the interpretation of a treaty, I find it helpful to consider the aboriginal perspective in illustrating the ambiguity of "Her Majesty" in s. 90(1)(b). *Nowegijick* dictates taking a generous liberal approach to interpretation. In my opinion, reference to the notion of "aboriginal understanding", which respects the unique culture and history of Canada's aboriginal peoples, is an appropriate part of that approach. In the context of this appeal, the aboriginal understanding of "the Crown" or "Her Majesty" is rooted in pre-Confederation realities. The recent case of *Guerin* took as its fundamental premise the "unique character both of the Indians' interest in land and of their historical relationship with the Crown" (At p. 387, emphasis added.) That relationship began with pre-Confederation contact between the historic occupiers of North American lands (the aboriginal peoples) and the European colonizers (since 1763, "the Crown"), and it is this relationship between aboriginal peoples and the Crown that grounds the distinctive fiduciary obligation on the Crown. On its facts, *Guerin* only dealt with the obligation of the federal Crown arising upon surrender of land by Indians and it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. [pp. 108-9]

[131] In the face of a statutory definition of “Crown” developed in collaboration with First Nations, it was reasonable for the Tribunal to adopt a view of the circumstances in which a fiduciary obligation may be said to have “become” Canada’s responsibility for the purposes of s. 14(2) that reflected the continuity of the fiduciary relationship between Indigenous peoples and the “Crown” described by Dickson C.J. in *Mitchell*.

V. Disposition

[132] I would allow the appeal and restore the Tribunal’s decision, with costs to the band in this Court and in the Federal Court of Appeal. The matter of costs before the Tribunal will be for the Tribunal to determine as part of the compensation phase of its proceedings.

The reasons of Côté and Rowe JJ. were delivered by

ROWE J. —

I. Overview

[133] First, I agree with the majority that the Specific Claims Tribunal reasonably found that the Imperial Crown owed and breached a fiduciary duty to the Williams Lake Indian Band. With respect to the actions of the Colony of British

Columbia prior to 1871, the Tribunal found that the Imperial Crown failed to redress the unlawful pre-emption of the band’s Village Lands by settlers.³ This was contrary to both the *Proclamation relating to acquisition of Land, 1860* (reprinted in R.S.B.C. 1871, App. No. 15) (“*Proclamation No. 15*”) and to the fiduciary duty that flowed from its stated policy with respect to land already occupied by an “Indian Reserve or settlement”: Tribunal Reasons, 2014 SCTC 3 (“T.R.”), at para. 148 (CanLII) (emphasis deleted), quoting *Proclamation No. 15*. Pursuant to s. 14(1)(b) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, the Tribunal concluded that this amounted to breach of a legal obligation of the Imperial Crown under legislation “pertaining to Indians or lands reserved for Indians”.

[134] Second, I also agree with the majority that the Tribunal reasonably found that the federal Crown owed and breached a *sui generis* fiduciary duty to the band following the entry of British Columbia into Confederation. According to the Tribunal, this duty flowed from the role of the federal Crown as “the exclusive intermediary [in dealings] with the Province” for the purpose of reserve creation after 1871: paras. 264 and 318. As the majority notes (at para. 73), the fiduciary duty of the federal Crown was not owed “at large”. It was owed in relation to a specific and cognizable interest in land over which the federal Crown exercised discretionary control: specifically, the band’s interest in the Village Lands at the foot of Williams Lake (T.R., at paras. 187 and 317). This duty required the federal Crown to act with

³ In these reasons, I adopt the term “Village Lands” to refer to the land that is subject to the band’s specific claim. As set out by the Tribunal (at para. 4), the claim covers an area that “includes Williams Creek, Scout Island, the Stampede Grounds, the downtown core of the City of Williams Lake, and a plateau north of the downtown core”.

“loyalty, good faith, full disclosure appropriate to the subject matter and with ‘ordinary’ diligence in what it reasonably regarded as the best interest” of the band: T.R., at para. 264 (emphasis deleted), citing *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 97. To be clear, this imposed a *standard of conduct* on the federal Crown in its dealings with the interest of the band in the Village Lands. The fact that the federal government could not unilaterally set aside reserve land without provincial cooperation does not diminish the standard of conduct required of the federal Crown. It was reasonable for the Tribunal to find that, in failing to take adequate “measures to clear away the impediment to the allotment of a reserve at the Village Lands”, the federal Crown fell below the standard of conduct mandated by its fiduciary duty to the band: para. 328. Pursuant to s. 14(1)(c) of the Act, the Tribunal concluded that this breach also provided the band with a valid claim.

[135] With respect to the contrary opinion of Justice Brown, I add that the Tribunal did not err in rejecting the submission of the federal Crown relative to the 1881 allotment of the Bates Estate as a reserve. This land was unrelated to the specific and cognizable interest underlying the fiduciary duty of the federal Crown. Its allotment by Commissioner O’Reilly could not discharge the duty of Crown officials to act with loyalty, good faith, full disclosure appropriate to the subject matter, and ordinary diligence with respect to the band’s interest *in the Village Lands*. That said, the 1881 allotment may have mitigated the damage suffered by the band; as

the last sentence of the Tribunal's decision suggests, this is potentially significant at the compensation stage.

[136] Third, I agree with the majority that the Act allows the Tribunal to validate specific claims based on certain wrongs committed by the "Sovereign of Great Britain and its colonies" prior to Confederation: s. 14(2). In this case, the band has such a claim pursuant to s. 14(1)(b) of the Act based on the fiduciary breach by the Colony of British Columbia prior to 1871. For the Tribunal to hold the federal Crown *liable* for this claim, however, it must have found that the Colony of British Columbia came within the extended meaning of "Crown" pursuant to s. 14(2) of the Act. With respect, this is where I part ways with the majority.

[137] Section 14(2) of the Act provides that the federal Crown can be held liable for a pre-Confederation claim only to the extent that the obligation or liability underlying such a claim *became* an obligation or liability of the federal Crown upon Confederation. This requires the Tribunal to identify whether and — more importantly — *how* the obligation or liability of the Colony *became* that of the federal Crown upon Confederation. Given the near-total silence of the Tribunal on this pivotal question, I would remit the matter to the Tribunal for further consideration rather than adopt the supplementary reasons set out by the majority. This remedy constitutes a principled application of a reasonableness review and respects the analytical framework set out in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, and

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708, with regard to when reviewing courts can (and should) supplement deficient reasons.

II. The Requirements of Reasonableness

[138] The standard of review is reasonableness, as the decision under review falls within the category of cases where deference will presumptively be owed to the relative expertise of decision-makers who interpret and apply their home statutes: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta Teachers*, at para. 34; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 21; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22.

[139] An exception to reasonableness review in this appeal would be that noted by Justice Brown (at para. 160) with regard to the *British Columbia Terms of Union* (reprinted in R.S.C. 1985, App. II, No. 10). As the *Terms of Union* are part of the *Constitution Act, 1982*, I agree with Justice Brown that their interpretation must be “subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution”: *Dunsmuir*, at para. 58. That said, the Tribunal did not apply the *Terms of Union* in discussing the validity of the band’s pre-Confederation claim under s. 14(1)(b); rather, it held that a decision under Article 1 of

the *Terms of Union* was not required to dispose of the claim: para. 243. As the *Terms of Union* do not feature in the Tribunal's brief discussion of s. 14(2), I proceed on the basis that its reasons relative to s. 14(2) should be reviewed for reasonableness and will say no more about the *Terms of Union* in this analysis.

[140] The requirements of reasonableness were set out by this Court in *Dunsmuir*. These requirements are built on two principles: the democratic principle, which demands respect for the choices of the elected legislature to confer decision-making authority, and the rule of law, which ensures that the conferred authority is exercised within legal boundaries (paras. 27-30; see also *Edmonton (City)*, at para. 21). In giving effect to these two principles, courts reviewing for reasonableness must defer to administrative decisions taken within the bounds of the conferred authority whenever the process by which they are reached provides for "justification, transparency and intelligibility" and whenever their outcome falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para. 47.

[141] Both process and outcomes are considered in a reasonableness review. As this Court held in *Newfoundland Nurses*, a reasonableness review entails an "organic exercise" in which "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": para. 14. In other words, reviewing courts must look to "the qualities that make a

decision reasonable, referring both to the process of articulating the reasons and to outcomes”: *Dunsmuir*, at para. 47; *Newfoundland Nurses*, at para. 14.

[142] Where they are provided, reasons are an essential focus for reviewing courts as they describe both the result and — crucially — the justificatory process used to reach that result. Reasons are the roadmap to understanding both how and why a decision under review was reached. Where they are required by statute or proffered as a matter of practice, they often demonstrate the reasonableness of the decision in question. Conversely, as stated in *Edmonton (City)*, “[w]hen a tribunal does not give reasons, it makes the task of determining the justification and intelligibility of the decision more challenging”: para. 36. This is why deficient or insufficient reasons will often cast doubt on the reasonableness of the decision under review. As the goal of reasonableness review is to “understand why the tribunal made its decision” and “determine whether [its] conclusion is within the range of acceptable outcomes”, reasons that allow for neither will be hard pressed to meet the requirements of justification, transparency and intelligibility: *Newfoundland Nurses*, at para. 16.

[143] It is not that reasons need attain a uniform standard of perfection. In many cases, reviewing courts will have a certain latitude to uphold administrative decisions that would, under stricter scrutiny, be deficient in their justification. In so doing, reviewing courts pay “respectful attention to the reasons offered or which could be offered in support of a decision”: *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, “The

Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. As the Court explained in *Newfoundland Nurses*, many “decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist”: para. 13. Because of this, “[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis”: *ibid.*, at para. 16. With this in mind, rather than engage in “a line-by-line treasure hunt for error”, reviewing courts may look beyond the words of the reasons to consider the decision as an “organic whole”: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54.

[144] Thus, in certain circumstances, reviewing courts will supplement the reasons under review: *Newfoundland Nurses*, at para. 12; *Alberta Teachers*, at paras. 53-54. Courts do so in a number of ways: they may read between the lines for an implied justification consistent with the statutory mandate of the decision-maker (as in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 57-58); they may look to the record and the parties’ submissions (as in *McLean*, at paras. 71-72); or they may consider other decisions rendered by the same decision-maker in which a more detailed justification is provided (as in *Alberta Teachers*, at para. 56).

[145] The power of reviewing courts to supplement deficient reasons in this way, however, is not limitless. In *Alberta Teachers*, Justice Rothstein warned against the risk of excessive deference in the face of reasons “which could be offered in support of a decision”: para. 54; see also *Dunsmuir*, at para. 48. Writing for a majority of the Court, he stated:

I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons “which could be offered in support of a decision” is not a “carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result” (*Petro-Canada v. Workers’ Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not “be taken as diluting the importance of giving proper reasons for an administrative decision” (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. [Emphasis added; para. 54.]

[146] In other words, there must be a sufficient basis in the reasons themselves to which can be added supplementary justification by a reviewing court. The wisdom of this cautionary approach was most recently reaffirmed by the majority in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, which held that, “while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided”: para. 24. Although reviewing courts may sometimes build upon insufficient reasons, they are not entitled to rewrite them in order to uphold the underlying decision. Indeed, to hold otherwise would be to

“undermine, if not negate, the vital role of reasons in administrative law”: *ibid.*, at para. 27. In my respectful view, this approach should have prevailed in the present appeal.

III. Section 14(2) of the *Specific Claims Tribunal Act*

[147] The crux of the disagreement in this appeal relates to the Tribunal’s interpretation — or, rather, its lack thereof — of s. 14(2) of the Act, which reads:

Extended meaning of *Crown* — obligations

(2) For the purpose of applying paragraphs (1)(a) to (c) in respect of any legal obligation that was to be performed in an area within Canada’s present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

[148] Based on the words of the Act, for the Tribunal to hold the federal Crown liable for any obligation or liability of the “Sovereign of Great Britain and its colonies”, the Tribunal must find that such an obligation or liability “became” (or “would . . . have become”) the obligation of the federal Crown. The question, then, is whether the Tribunal reasonably concluded that the obligation incurred by the Colony relative to the band “became” the responsibility of the federal Crown for the purposes of s. 14(2) of the Act. As Justice Brown points out, “s. 14(2) is not a self-contained, stand-alone source of liability that may be imposed upon Canada. Liability under s.

14(2) is conditioned upon *something else* — that is, something other than s. 14(2) itself — which made the obligation or liability *become* Canada’s responsibility”: para. 182 (emphasis in original). I agree, and would add that the majority does not appear to disagree on this point; indeed, a significant part of its reasons address how, in its view, the Tribunal implicitly found that the Colony came within the extended meaning of “Crown” per s. 14(2). Based on this finding, the majority concludes that the Tribunal reasonably held Canada liable for the band’s pre-Confederation claim under s. 14(1)(b).

[149] By contrast with the analysis set out by the majority, the Tribunal itself largely limited its discussion of s. 14(2) to the following:

The legal obligations that “. . . became or would have become the responsibility of the Crown in right of Canada” are those that became obligations of Canada on confederation, and for which Canada would, if in the place of the colony, have been in breach. [para. 164]

[150] In response to arguments made by the federal Crown on the meaning of s. 14(2), the Tribunal then added:

As I understand the Respondent’s position, it is that *SCTA*, s. 14(2) does not expand the meaning of “legal obligation” in s. 14(1)(b) to apply constitutional obligations of Canada where the claim is grounded in a breach of legal obligation of the colony. Whether or not this is correct, it has no bearing on whether the Claimant, as the Respondent says: “can file historic, pre-confederation claims pursuant to Section 14 of the Act as they could under the Specific Claims Policy” (para 258). [para. 242]

[151] Beyond these conclusory statements, the Tribunal was virtually silent on the operation of s. 14(2) of the Act. This is all the more puzzling given that, in all other respects, the reasons were exhaustive. The near-total silence of the Tribunal with respect to s. 14(2) can be seen in two ways: either the Tribunal saw the operation of s. 14(2) as so obvious as not to require interpretation or — more likely — as being wholly irrelevant to the validation of pre-Confederation claims. Given the pivotal role played by s. 14(2) in the scheme of the Act, however, this lack of justification — this absence of reasons — is untenable. The majority implicitly accepts this by setting out at great length and in considerable detail what the Tribunal *might have given as reasons* relative to the operation of s. 14(2).

[152] In supplementing — or, one might suggest, substituting — the Tribunal’s sparse reasons on the subject of s. 14(2), the majority sets out an analysis based on the common law of fiduciary obligations: paras. 117-20. Its reasons are offered on the basis that “they are grounded in the Tribunal’s reasons and supplement them by reference to the materials and arguments before it and the legal principles underlying the decision as a whole”: majority reasons, at para. 116. While its reasons lead to the same conclusion as the Tribunal, this is the extent of their commonality. Having said nothing about the interplay between s. 14(2) and the common law of fiduciary obligations, the Tribunal did no more than state a bald conclusion about the operation of the Act relative to pre-Confederation claims. The reasons of the majority, thus, are “supplementary” in that they supply the entirety of the analysis.

[153] I acknowledge that *Alberta Teachers* allows reviewing courts to supplement reasons that are silent on certain issues that may have been implicitly decided: para. 53. They may only do so, however, if they are persuaded that the issue was not raised by the parties, which accounts for the decision-maker's silence on the issue. In these circumstances, a reviewing court can provide a supplementary justification to elucidate the implied reasoning. In this appeal, it is clear from the record that the interpretation of s. 14(2) was raised by the parties. This bars the reviewing court from implying its preferred interpretation in the bald conclusion of the Tribunal relative to s. 14(2).

[154] In my view, the cautious standard set out in *Alberta Teachers* requires more than a bald conclusion on a crucial point of law before reviewing courts embark upon the task of supplementing reasons. While an administrative “decision-maker is not required to make an explicit finding on each constituent element, however subordinate” (*Newfoundland Nurses*, at para. 16), administrative decision-makers must nonetheless provide a certain basis of analysis on essential questions of law. Given its pivotal role in imposing liability on the federal Crown, s. 14(2) is such an essential element. On this point, the comments of Justice Rennie in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, are apposite:

Newfoundland Nurses is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical

issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page. [Emphasis added; para. 11.]

[155] A clear proposition can be drawn from the interplay of *Alberta Teachers* and *Newfoundland Nurses*. When the implied line of reasoning is obvious — in light of the record or similar decisions, for example — supplementing may well be an appropriate means of paying “respectful attention to the reasons offered or which could be offered in support of a decision”: *Dunsmuir*, at para 48. However, when faced with an absence of analysis on an essential element such that the implied line of reasoning is inconclusive or, as here, completely obscure, the reviewing court should not impute its *own* justification as a means of upholding the decision: *Delta Air Lines*, at para. 27. Supplementary reasons must build upon those actually provided by the legislature’s chosen decision-maker. They should not spring from the judicial imagination *ex nihilo*.

IV. Remedy

[156] When faced with reasons that are deficient for their failure to explain or justify an essential element of their analysis, reviewing courts should typically remit the matter for further consideration. This does no more than call upon decision-makers to carry out the task assigned to them by statute. One exception relates to

instances where remitting would serve no useful purpose, as the range of reasonable outcomes only allows for a single result, which the reviewing court provides. This exception does not apply here.

[157] Accordingly, I would remit the matter to the Tribunal for further reasons on whether — and how — the obligations and liabilities of the Colony pursuant to s. 14(1)(b) of the Act “became” those of the federal Crown pursuant to s. 14(2). I would not do so, however, on the same basis as Justice Brown. With respect, while the *Terms of Union* may account for the manner in which Canada “became” liable for the breaches of the Colony under s. 14(2), it is for the Tribunal to answer this question.

[158] As a final note, the Tribunal chose to bifurcate its proceedings into two stages — the first dealing with validation, the second, with compensation. It was not required to do so; rather, it chose to do so as a matter of convenience. I am aware of no reason why the Tribunal could not provide additional reasons relative to the operation of s. 14(2) at the outset of the compensation stage in this matter.

The reasons of McLachlin C.J. and Brown J. were delivered by

BROWN J. —

[159] I agree with the majority's conclusion that the Specific Claims Tribunal reasonably found that, prior to Union with Canada, the Crown Colony of British Columbia breached its fiduciary duty to the Williams Lake Indian Band. With respect, however, I am not persuaded of the reasonableness of the Tribunal's decision that Canada breached its fiduciary duty to the band. Further, my conclusion on this point requires that I proceed to consider the Tribunal's treatment of the legal question of Canada's liability for the Colony's pre-Union breach. Regrettably, I also find this aspect of the Tribunal's decision to be unreasonable. For the reasons that follow, I would remit this matter to the Tribunal for determination of whether, pursuant to s. 14(2) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, the legal obligation that was breached or liability relating to its breach became the responsibility of Canada. This will entail, as I explain below, the Tribunal deciding:

- whether Canada continued a policy regarding reserve lands as liberal as that pursued by British Columbia prior to Union;⁴ and
- whether the breach by the Colony of its fiduciary duty to the band was a “debt” or “liability” of British Columbia existing at the time of Union.⁵

I. Standard of Review

⁴ *British Columbia Terms of Union* (reprinted in R.S.C. 1985, App. II, No. 10), Article 13.

⁵ Article 1 of the *Terms of Union*.

[160] I agree with the majority that the Tribunal’s decision is reviewable for reasonableness, subject to the caveat that the Tribunal’s interpretation of the *British Columbia Terms of Union* (reprinted in R.S.C. 1985, App. II, No. 10) is reviewable for correctness. The *Terms of Union* form part of the Constitution of Canada (*Constitution Act, 1982*, s. 52(2); *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41), and — notwithstanding the majority’s views to the contrary — questions regarding their interpretation “are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 58; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 16 and 62; *Canadian Artists’ Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22.

II. The Tribunal’s Finding That Canada Breached a Legal Obligation Under Section 14(1)(c) Was Unreasonable

[161] The Tribunal found that, after Union of British Columbia and Canada, Canada committed “a breach of a legal obligation arising from the Crown’s provision or non-provision of reserve lands” under s. 14(1)(c) of the *Specific Claims Tribunal Act*. This conclusion was rooted in the Tribunal’s findings that Canada’s conduct after Union amounted to breaches of *ad hoc* (also known as “general”) and *sui generis*

fiduciary duties owed to the band. In my respectful view, these findings were unreasonable.

A. *Ad Hoc Fiduciary Duty*

[162] An *ad hoc* fiduciary duty arises where there is (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries; (2) a defined class of beneficiaries vulnerable to the fiduciary's control; and (3) a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 50; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36. The last two conditions are not controversial here. As to the first condition, the Tribunal found that Canada had, by Article 13 of the *Terms of Union*, adopted the Colony's prior unilateral undertaking to act in the best interests of the band: Tribunal Reasons, 2014 SCTC 3 ("T.R."), at para. 320 (CanLII).

[163] The Tribunal's finding contradicts this Court's statements on the nature of Canada's fiduciary duty in the context of implementing Article 13. The *ad hoc* fiduciary duty is "one of utmost loyalty to the beneficiary", whereby the fiduciary undertakes to secure the paramountcy of the beneficiary's interest: *Elder Advocates*, at para. 43. Generally speaking, the Crown's responsibility for the public interest means that circumstances in which the Crown can be taken to have assumed a paramount obligation to one particular group at the expense of all others will be rare:

Elder Advocates, at paras. 44 and 48; *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49; *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178. Indeed, and as the Court explained in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, in connection with the Crown’s fiduciary obligations in relation to Article 13, the Crown — far from owing a duty of utmost loyalty to any one group — must balance between the competing interests of different groups (including those of Indigenous groups and settlers):

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, “[t]he Crown’s position as fiduciary is necessarily unique” (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were “vulnerable” to the adverse exercise of the government’s discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. [Emphasis added; emphasis in original deleted.]

(*Wewaykum*, at para. 96)

[164] The Tribunal’s finding that an *ad hoc* fiduciary duty of utmost loyalty was owed to the band by operation of Article 13 is therefore contrary to binding authority and is, as such, unsustainable: *Dunsmuir*, at para. 47.

B. *Sui Generis Fiduciary Duty*

[165] The Tribunal also found that Canada owed, and breached, a *Wewaykum*-like *sui generis* fiduciary duty to the band in relation to the Village Lands: paras. 267 and 319. Such a duty arises where the Crown assumes discretionary control over specific or cognizable Aboriginal interests: *Manitoba Metis*, at para. 49; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18; *Wewaykum*, at paras. 79-81. In particular, it has been found to arise in the reserve creation process in British Columbia where Canada acts as the “exclusive intermediary” to deal with others on the behalf of Aboriginal groups: *Wewaykum*, at para. 97. This form of fiduciary duty imposes a less stringent standard than the duty of utmost loyalty incident to an *ad hoc* fiduciary duty. It requires Canada to act — in relation to the specific Aboriginal interest — with loyalty and in good faith, making full disclosure appropriate to the subject matter and with ordinary diligence: *Wewaykum*, at paras. 81 and 97. It allows for the necessity of balancing conflicting interests: *Wewaykum*, at para. 96.

[166] In the Tribunal’s view, Canada breached a *sui generis* fiduciary duty by failing to pursue the best interests of the band — which, the Tribunal concluded, lay in the allotment of the Village Lands as a reserve: para. 322. In particular, Canada ignored the band’s best interests when Dominion officials failed to challenge the unlawful pre-emption of the Village Lands and when Indian Reserve Commissioner Peter O’Reilly expressed himself unwilling to countenance interference with the

“white men’s rights” in his negotiations with the band: paras. 326, 328, 331-32 and 338-39.

[167] The Tribunal’s starting premise, however, that the band’s best interests could lie only in securing the Village Lands as a reserve, which underlies the Tribunal’s finding that Canada breached its fiduciary obligations, is misguided in three respects.

[168] First, the Tribunal’s bare assertion that the band’s best interests lay in the allotment of the Village Lands as a reserve is neither justified in the Tribunal’s reasons nor supported by the evidentiary record. The evidence suggests that, by the late 1870s,⁶ the band’s priority was not recovering the Village Lands specifically, but rather securing “proper land” that could support it without delay. In 1879, Chief William drew the Commissioner’s attention to the dire circumstances of the band, threatening to take the Village Lands back by force if “proper land” were not given: T.R., at para. 305. Chief William and the band would ultimately express satisfaction with the lands which were allotted in 1881: Letter from O’Reilly to the Superintendent General of Indian Affairs John A. Macdonald, September 22, 1881, A.R., vol. II, at p. 152. While it does appear that parts of the Village Lands actually remained un-pre-empted and therefore available at the time of that allotment, it also appears that the band requested, and was granted, only the grave sites located thereon:

⁶ It was not until 1876 that agreement was reached between Canada and British Columbia on the implementation of Article 13 of the *Terms of Union*, that the Joint Indian Reserve Commission was established, and that the process of setting apart reserves pursuant to Article 13 began: T.R., at paras. 296 and 299.

T.R., at paras. 132 and 311; Letter dated September 22, 1881, A.R., vol. II, at pp. 151-52.

[169] Second and contrary to the majority's views on the matter (paras. 75 et seq.), Canada's failure to deliver the Village Lands to the band could not reasonably support a finding of a breach of its fiduciary duty, since such a finding fails to account for the limits of Canada's responsibilities and powers under the *Terms of Union*, and in particular, under Article 13, which provides:

13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

The majority does not explain how the fiduciary obligation it describes can stand in the face of a legal obligation confined to pursuing a policy "as liberal" as that of the Colony. While the majority restricts that obligation to particular lands, that nonetheless misconceives the obligation which Canada had assumed.

[170] Relatedly, the majority does not reconcile the posited fiduciary obligation with the limits of Canada's powers under the *Terms of Union*, to which any fiduciary obligation must also be confined, and with which no fiduciary duty can be inconsistent. It says (at para. 76) that the Tribunal "openly" acknowledged that Canada could not operate alone. It insists, however, that it was somehow open to the Tribunal to find that a fiduciary duty arose notwithstanding "the absence of

[Canada's] complete or exclusive control", provided that Canada retained "a degree" of control which left cognizable Aboriginal interests "vulnerable" to the adverse exercise of federal Crown discretion: para. 76. It is, of course, true that Indigenous people in post-Union British Columbia were vulnerable to the exercise of discretion by the Crown in right of Canada. But the exercise of that discretion was confined by the country's federal structure and the *Terms of Union*. So long as that legal context remains unaccounted for, the argument that "a degree" of control is sufficient is not so much an answer as a peremptory conclusion. Just what "degree" of control is necessary to hold Canada responsible by way of fiduciary law for failing to resolve comprehensively such matters which lie beyond its constitutional powers to resolve comprehensively is left unstated. One hopes the Tribunal will know it when it sees it.

[171] As this Court explained in *Wewaykum* (at paras. 15-16), Canada could not — despite its obligation to set out reserves pursuant to Article 13 — unilaterally mark out provincial land as reserves. Article 13 and s. 92(5) of the *Constitution Act, 1867* contemplated, rather, that the Province retain jurisdiction over the management and sale of the public lands belonging to the Province, meaning that Canada could establish an Indian reserve only where the Province agreed to transfer the requisite land to Canada. In other words, the Province, whose contemporary views on the reservation of lands for Indians were at variance (to put it mildly) from those of the Dominion government (*Wewaykum*, at para. 17; see also P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989*

(1990), at p. 44), effectively held a veto over the setting apart of provincial Crown lands as a reserve.

[172] Further, it is evident from the record that the Province had exercised that effective veto. Gilbert Sproat, an earlier Indian Reserve Commissioner, raised the band's circumstances with the provincial government, to no avail. As a result, Sproat wrote to his superiors in Ottawa that he believed the Dominion government had done everything "which a humane Government could be expected to undertake" in the circumstances, but had encountered unwillingness on the part of the Province to work towards a solution: Letter to the Superintendent General of Indian Affairs John A. Macdonald, November 26, 1879, A.R., vol. II, at p. 143. The provincial government's inertia, in his view, was rooted in local political sentiment:

The explanation [for the provincial government not responding to the Dominion proposals] of course is that in this, and some other cases, it would be necessary to compensate the white settler who perhaps by no fault of his own has been so unfortunate as to be the instrument of wrongdoing to the Indians, and this compensation would have to be the subject of a vote in the Provincial Assembly which owing to the state of feeling in this country with respect to Indians would not pass. [p. 143]

[173] Despite these dismal prospects, the Tribunal saw Canada's fiduciary duty as requiring it to press the matter even further: para. 336. While recognizing that Canada could not act unilaterally, the Tribunal found that Canada was nonetheless required to take steps to have the pre-emptions set aside: paras. 326, 328, 334 and 336. Canada could, the Tribunal suggested, have sought to "challenge" the illegal pre-

emptions,⁷ or otherwise have “pressed” the Province to resolve the situation: paras. 328 and 336. Just what sort of “challenge” or how it might have “pressed” the matter further, or what other unpromising legal or political avenue Canada should have pursued as a means to securing the reservation of the Village Lands, are not recounted in the Tribunal’s reasons. As the majority says, the lengths to which federal officials were to go in order to have the pre-emptions set aside is a “heavily fact-based inquiry”: para. 92. Unfortunately, it is also a heavily fact-based inquiry which the Tribunal did not undertake. The most that one can divine from its reasons is that the Tribunal seemed to think it somehow significant that Sproat had once managed, albeit under a vastly different set of circumstances, to vacate illegal pre-emptions of Indian land in the Okanagan: T.R., at paras. 303 and 336; Letter to the Superintendent General of Indian Affairs, October 3, 1877, A.R., vol. IV, at pp. 824-25. The unstated implication is that, had he also “press[ed]” the matter at Williams Lake, he could have achieved similarly favourable results. But such reasoning is both highly speculative and coated with the gloss of hindsight. Sproat’s own opinion, preserved clearly in his letter to the Superintendent General of Indian Affairs, was that there was nothing more to be done in relation to the Village Lands in the face of provincial intransigence. The Tribunal does not explain its discounting of that evidence in arriving at the conclusion that Canada should have exhausted all avenues — whether they really existed or not — of securing the Village Lands as a reserve.

⁷ The *Land Act, 1875*, S.B.C. 1875, c. 5, exempted Indian settlements from lands available for pre-emption similar to the *Proclamation relating to acquisition of Land, 1860* (reprinted in R.S.B.C. 1871, App. No. 15) (“*Proclamation No. 15*”).

[174] And, of course, the foregoing assumes the validity of the proposition that the best interests of the band were served by the reservation and allotment of the Village Lands. As explained above, however, the record suggests otherwise — specifically, that the band’s wish and priority was securing “proper land” without delay. The Tribunal’s conclusion that Canada ought to have prioritized an unpromising and potentially futile challenge to decades old pre-emptions over the immediate fulfilment of the band’s wish for proper land in order to address its dire circumstances was unreasonable.

[175] Third, the Tribunal’s premise that the band’s best interests lay in one single outcome — namely the allotment of Village Lands as reserve — does not cohere to this Court’s jurisprudence, which calls for a measure of flexibility, grounded in the historical context of a matter, in relation to the creation of reserves under Article 13 of the *Terms of Union*. Canada was entitled — indeed, obliged — to take competing interests into account. It follows that just what the fulfilment of Canada’s fiduciary obligations entailed cannot be considered in absolute terms but, rather, must “have regard to the context of the times”: *Wewaykum*, at para. 97. For the same reason, the Tribunal’s decision to proceed on the basis that Canada had assumed discretionary control over the band’s cognizable interest in the Village Lands (majority reasons, at paras. 80-81) was unreasonable. The obligation assumed by the Crown in relation to the conveyance of land for reserves must be considered in light of Article 13, which imposed upon Canada *not* an obligation to continue *the Colony’s* policy regarding the creation of Indian reserves, but rather to pursue a policy that is *as*

liberal as that pursued by the Colony. Whether it met that obligation is a question the Tribunal has yet to answer. My point here, however, is that Canada owed no obligation arising from cognizable interests in specific lands.

[176] This brings me to O'Reilly's meeting with the band in 1881. The Tribunal found that O'Reilly's refusal to countenance any interference with "white men's rights" was a breach of Canada's fiduciary obligations: para. 338. Certainly, O'Reilly's statement, taken acontextually, suggests that he was unwilling to compromise settler interests. But this must be considered in light of the considerations driving O'Reilly's action, including two decades of settler presence, provincial intransigence and the band's desperate circumstances prompting its immediate need and wish for proper land. Further, the specific evidence as to his actions — for which the Tribunal, again, gave no account — tells a different story: that he was willing, where possible (given the limitations imposed by the provincial government's inaction), to consider the wishes of the band, notwithstanding the settler presence. For instance, at the request of Chief William he arranged for the reservation of several of the band's graveyards located on the Village Lands: Letter dated September 22, 1881, A.R., vol. II, at p. 152. This is not to suggest that O'Reilly devised a perfect solution to the band's circumstances. Indeed, in these circumstances, no perfect solution could conceivably have been arrived upon. But the *sui generis* fiduciary duty does not demand a perfect solution. Rather, it requires loyalty, good faith, full disclosure, and ordinary diligence. When its actions and the evidentiary record are taken into account, there is no basis for concluding that Canada

failed to meet any of those requirements in its dealings with the band relating to the Village Lands.

[177] Finally, the Tribunal declined to consider the significance of the allotment of land to the band in 1881 at the claims validity stage, viewing it instead as a matter solely of significance to the compensation phase of the proceeding: para. 343. In my view, this was unreasonable. I take the majority's point that the fiduciary obligations at stake were not owed at large, but only in relation to the Village Lands. But it does not follow that the Tribunal could account for actions taken directly in pursuit of securing alternative lands only when considering compensation. The 1881 allotment was central to the analysis of whether Canada discharged its fiduciary duty because it was the principal means by which Canada sought to do so. While one might see those efforts as having been unsuccessful, that is not the same thing as seeing them as irrelevant to the question at hand.

[178] Again, context is important. Dominion officials were aware of the band's urgent need and desire for proper land. Faced with provincial intransigence and the presence of settlers on the Village Lands, they were presented with an immediate opportunity to provide nearby familiar lands to the band — a solution which the band welcomed. Seen in this light, the 1881 allotment did not simply go towards whether Canada had remedied an earlier breach committed by the Colony, but to whether — as between Canada and the band — a breach had even occurred. By confining the significance of these events to the compensation stage, the Tribunal unduly narrowed

its focus, thereby truncating its analysis of Canada's efforts to discharge its fiduciary duty.

III. The Tribunal's Finding That Canada Is Liable for the Colony of British Columbia's Breach of a Legal Obligation Under Section 14(1)(b) of the Specific Claims Tribunal Act Is Unreasonable

[179] I agree with the majority that the Tribunal reasonably found that the Colony owed, and breached, a *sui generis* fiduciary duty to the band in relation to the Village Lands. As to its reasons for that conclusion (at paras. 39-70), it suffices in my respectful view to observe that this duty arose from the *Proclamation relating to acquisition of Land, 1859* (reprinted in R.S.B.C. 1871, App. No. 13) and the *Proclamation relating to acquisition of Land, 1860* (reprinted in R.S.B.C. 1871, App. No. 15) ("*Proclamation No. 15*"), by which the Colony — in the language of *Wewaykum* — undertook discretionary control over specific or cognizable Aboriginal interests. In this case, the Colony undertook to reserve settlement lands, and to restrict non-Indigenous settlement to lands which were "unoccupied and unreserved and unsurveyed . . . not being the site of an existent or proposed town, . . . , or an Indian reserve or settlement": Clause 1 of *Proclamation No. 15*. In short, the Colony's duty was grounded in its policy to identify Indian settlements and to reserve them for the band's use.

[180] I am unconvinced, however, that the Tribunal reasonably held Canada responsible for the Colony's breach of this duty.

[181] The specific claim based on the Colony's conduct was brought under s. 14(1)(b) of the *Specific Claims Tribunal Act*. The relevant provisions state:

Definitions

2 The following definitions apply in this Act.

...

Crown means Her Majesty in right of Canada.

...

Grounds of a specific claim

14(1) . . .

...

(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;

...

Extended meaning of *Crown* — obligations

(2) For the purpose of applying paragraphs (1)(a) to (c) in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

[182] The text of s. 14(2) makes clear that the Act does not impose blanket responsibility upon Canada for all colonial obligations and liabilities that are the subject of a specific claim under s. 14(1)(b). Rather, s. 14(2) describes two circumstances in which the Crown in right of Canada must answer for the Imperial Crown: (i) where *the legal obligation* that was breached became the responsibility of Canada; or (ii) where *liability relating to the breach* or non-fulfilment of the legal obligation became the responsibility of Canada. In short, s. 14(2) is not a self-contained, stand-alone source of liability that may be imposed upon Canada. Liability under s. 14(2) is conditioned upon *something else* — that is, something other than s. 14(2) itself — which made the obligation or liability *become* Canada's responsibility.

[183] In other words, s. 14(2) is an enforcement mechanism which compels Canada to answer for the Imperial Crown where Canada has by some other means acquired responsibility for an obligation or a liability relating to Indians or lands reserved for Indians.

[184] And, in this case, determining whether Canada acquired such responsibility requires examining the legal instrument by which it might have done so: the *Terms of Union*.

[185] With this legal backdrop in place, I now turn to consider the Tribunal's treatment of s. 14(2).

[186] The majority takes the Tribunal to have interpreted s. 14(2) so as to effectively project the Crown in right of Canada into the place of the Imperial Crown for the purpose of pre-Union specific claims. I agree that this is how the Tribunal appears to have viewed the matter, although it initially recognized that s. 14(2) places Canada in the same legal position as the Imperial Crown “but not for all potential liabilities of the Imperial Crown in the pre-Confederation era”: para. 163. It then, however, incongruously concluded this discussion by stating:

The legal obligations that “. . . became or would have become the responsibility of the Crown in right of Canada” are those that became obligations of Canada on confederation, and for which Canada would, if in the place of the colony, have been in breach. [para. 164]

The Tribunal raised the topic again later, stating that the fiduciary relationship between the Colony and the band was a “legal obligation within the meaning of the term in s. 14(2) when the factors necessary to ground a fiduciary duty are present”: para. 174. This point, however, seems to have been directed towards Canada’s argument that the reference in s. 14(2) to “legal obligation” could refer only to a purely statutory obligation, and not a fiduciary obligation: T.R., at paras. 161 and 175.

[187] In short, the Tribunal’s reasoning on s. 14(2) is unclear. Assuming, however, as the majority does that it interpreted s. 14(2) as meaning that Canada assumed all colonial obligations regarding pre-Union, specific claims, this interpretation is unreasonable. As I have already observed, s. 14(2) creates an

enforcement mechanism that is triggered in limited and delineated circumstances, and is not itself a basis for imposing liability upon Canada. Indeed, the “careful wording” of s. 14(2) has been taken by commentators as demonstrating that Canada did not intend by its enactment to accept responsibility for *all* claims precipitated by the actions of the Imperial Crown: P. Salembier et al., *Modern First Nations Legislation Annotated* (2016 ed.), at p. 811. This view of Parliament’s intention as being to disclaim liability for matters falling under provincial responsibility is, moreover, consistent with statements made by the Minister of Indian Affairs and Northern Development during Committee deliberations on the enactment of the *Specific Claims Tribunal Act*:

While we respect the jurisdiction of the provinces and territories, I realize that there may be some uneasiness about tribunal decisions where Canada has been found not to be wholly responsible for the losses of the claimant first nation. I wish to make it clear that if the province or territory has not volunteered to become a party to the proceedings, the tribunal has no jurisdiction to rule on provincial or territorial liability. In the absence of the province or territory, the tribunal will determine federal liability only. However, first nations will continue to be able to pursue their claims against provinces and territories through the courts or negotiations with those parties. [Emphasis added.]

(Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, No. 12, 2nd Sess., 39th Parl., February 6, 2008, at p. 2 (Hon. C. Strahl))

[188] Contrary to that carefully expressed intention in s. 14(2), the Tribunal’s placement of Canada “in the place of the [C]olony” for the purpose of claims under s. 14(1)(b) would effectively make Canada the automatic successor to *all* colonial actions that could ground a specific claim. While several intervenors urge this very

reading of s. 14(2), it fails to account for the text of s. 14(2). Had Parliament intended, as the Tribunal appears to have supposed, to assume responsibility for all colonial obligations and liabilities with respect to specific claims, it would have been a simple matter for it to do so.

[189] I also observe that the Tribunal provides *no justification whatsoever* for its conclusory statement that Canada is responsible under the Act for all the Colony's breaches of legislation and fiduciary duty: paras. 164 and 245. While I do not rule out the possibility that s. 14(2) may be properly invoked here to impose liability upon Canada for the Colony's failure to protect Indian settlements, in order to arrive at that conclusion the Tribunal would have to account for the basic statutory preconditions to imposing responsibility upon Canada under s. 14(2) which I have already discussed. A reasonable decision must be "defensible in respect of the facts and law": *Dunsmuir*, at para. 47 (emphasis added).

[190] Moreover, and bearing in mind that s. 14(2) can only be triggered in this appeal by an obligation or liability acquired by Canada under the *Terms of Union*, it is worth recalling that Article 13 of the *Terms of Union* did not impose an obligation upon Canada to continue *the Colony's policy* in respect of reserve creation. Rather, it merely required Canada to pursue "a policy as liberal as that hitherto pursued by the British Columbia Government", which was to entail the Province's conveyance "from time to time" of "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose", which Canada

would then keep “in trust for the use and benefit of the Indians”. While the phrase “a policy as liberal as that hitherto pursued by the British Columbia Government” connotes a benchmark of liberality, it does not suggest (as the Tribunal saw it as suggesting, at para. 320) a commitment to the Colony’s particular policy of protecting Indian settlements such as the Village Lands from pre-emption.

[191] I acknowledge that, from the time of Union, Canada owed a fiduciary obligation to the band in relation to the reservation of land. That obligation differed markedly, however, both in content and form, from that which had been owed by the Colony by operation of *Proclamation No. 15*, such that it cannot be said that the Colony’s original fiduciary obligation *became* the responsibility of Canada within the meaning of s. 14(2).

[192] Two considerations support this view. First, and as I have already explained, Canada’s fiduciary obligations to the band respecting reserve creation must account for the text of Article 13 of the *Terms of Union*, which contemplates a measure of flexibility in Canada’s policy choices. The necessity of doing so is affirmed by the mutually distinct constitutional regimes under which the Colony’s obligations and Canada’s obligations were assumed. When Governor Douglas issued *Proclamation No. 15* and undertook at Cayoosh and Lytton to protect Indian settlements from pre-emption, he had full authority to implement that policy, having “had complete control of the colony’s administration” (Tennant, at p. 26). After Union, however, and as Article 13 expressly contemplates, Canada’s obligation to set

out reserves could be fulfilled only with provincial cooperation, due to the vesting of provincial lands in the provincial Crown: *Wewaykum*, at paras. 15-16. (This may have been what the Tribunal itself contemplated in its description of Canada having “assumed, with limits, the unilateral undertaking previously made by the [C]olony”: para. 320, emphasis added.) In a similar vein, both colonial legal obligations that formed the basis of the claim were, in keeping with the text of s. 14(1)(b), rooted in legislation (specifically the protection of Indian settlements from pre-emption under *Proclamation No. 15*: T.R., at paras. 160 and 166). The Tribunal does not explain how these legal obligations can be said to have become the responsibility of Canada where the statutory protection of Indian settlements from pre-emption subsisted in *provincial law* after Union: see e.g. *Land Act, 1875*, c. 5, s. 3.

[193] Secondly, and turning to the second prong of s. 14(2), the Tribunal did not establish Canada’s *liability* for the Colony’s breach. On this point, the parties drew the Tribunal’s attention to the *Terms of Union* and, in particular, to Article 1, by which Canada agreed to be “liable for the debts and liabilities of British Columbia existing at the time of the Union”. This, the band argued before the Tribunal, embraces the Colony’s liability for its failure to protect the Village Lands from pre-emption: A.R., vol. XV, at pp. 3823-24.

[194] Regrettably, the Tribunal did not consider it necessary to address this argument: paras. 243 and 248. Instead, as I have already recounted (at paras. 186-187), the Tribunal equated pre-Union colonial obligations and liabilities with post-

Union Canadian obligations and liabilities. And, as I have explained, this is not remotely defensible by any standard of review. It skates over the plain and unambiguous text of its enabling statute (despite the useful submissions of both parties on this issue).

[195] I am mindful of the “respectful attention to the reasons offered or which could be offered in support” of the Tribunal’s decision that reasonableness review entails: *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. In my view, however, the Tribunal’s treatment in its reasons of s. 14(2) lacks each of the principal hallmarks of a reasonable decision: justification, transparency, and intelligibility (*Dunsmuir*, at para. 47). This was, so far as I am aware, the Tribunal’s first opportunity to interpret the extended meaning of “the Crown” in s. 14(2). Its failure to do so is particularly unfortunate in light of the unique role this provision plays in resolving claims arising from pre-Union events. Further, statutory text remains both the starting point of the exercise of statutory interpretation and the focal point of the analysis: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. No clear explanation is offered for the Tribunal’s evident reading of s. 14(2) as “defin[ing] the Crown as a single, continuous, and indivisible entity”: majority reasons, at para. 127. This is in no sense anchored to the words actually chosen by Parliament. Had such indiscriminate “Crown” liability been Parliament’s intended result, the provision could easily have been drafted accordingly.

[196] In sum, the Tribunal's reasons for finding that Canada was liable for breaches by the Colony pursuant to s. 14(2) find no support in, and indeed are entirely untethered from, the applicable statutory scheme which it was bound to apply. Its decision was therefore unreasonable.

[197] It may well be that the *Terms of Union*, correctly understood and interpreted, *do* support the Tribunal's conclusions regarding Canada's liability under s. 14(2). But whether that is so, and why, cannot be ascertained from the Tribunal's reasons. Those reasons should therefore not be the last word on the matter. I would return this matter to the Tribunal for determination of whether, pursuant to s. 14(2), the legal obligation that was breached or the liability relating to its breach became the responsibility of Canada. This would entail accounting for whether, as required by Article 13 of the *Terms of Union*, Canada continued, in respect of lands reserved for Indians, "a policy as liberal as that [prior to Union] pursued by the British Columbia Government".

[198] Further, I note the arguments of the joint interveners the Cowichan Tribes, the Stz'uminus First Nation, the Penelakut Tribe and the Halalt First Nation that Canada may have assumed liability for outstanding breaches of colonial fiduciary obligations under Article 1 of the *Terms of Union*, inasmuch as those breaches might qualify as "debts and liabilities of British Columbia existing at the time of the Union". On that point, the respondent counters that the language of Article 1 connotes only recorded public debt known at the time of Union: R.F., at para. 127. As I have

already noted, the Tribunal chose not to address the effect of Article 1. Remitting this matter back to the Tribunal would allow it to also consider whether, by operation of Article 1 of the *Terms of Union*, s. 14(2) can be said to impose responsibility upon Canada on the basis that “liability relating to [the breach of a legal obligation] became . . . the responsibility of the Crown in right of Canada”.

IV. Supplementing the Tribunal’s Reasons

[199] Although its reasons all but concede that the Tribunal’s interpretation of s. 14(2) is wrong, the majority seeks to supplement the Tribunal’s deficient reasons regarding s. 14(2).

[200] More particularly, the majority seeks to account for “what the Tribunal meant when it said s. 14(2) included obligations ‘for which Canada would, if in the place of the colony, have been in breach’”: para. 118, quoting T.R., at para. 164. And, we are told, the solution to the puzzle is found in the Tribunal’s conclusion that Canada owed a fiduciary duty in relation to the Village Lands when it assumed discretionary control in respect thereof. Both Canada and the Colony had “recognized the band’s specific Aboriginal interest” in those lands, the majority says: para. 117. Meaning, at the time of Union, Canada “assumed the office of fiduciary”: para. 117. “On this approach”, the majority says, “a fiduciary obligation that ‘became . . . the responsibility’ of [Canada] for the purpose of s. 14(2) is one that mirrors a post-Confederation fiduciary obligation of Canada”: para. 119.

[201] In other words, the *sui generis* fiduciary duty which the majority has found Canada to have owed and breached after Union is now doing double-duty: it is not only the basis for a finding under s. 14(1)(c) that *Canada* breached a legal obligation, but also the automatic trigger for finding that Canada is liable for *the Colony's* breach of a legal obligation under s. 14(1)(b) and s. 14(2). On this understanding of s. 14(2), a finding of a post-Union breach of a legal obligation under s. 14(1)(c) would appear to be determinative of Canada's liability in respect of pre-Union breaches as well. Parliament, *ex hypothesi*, need not have bothered to legislate s. 14(2) — or, at least, s. 14(2) is superfluous where a related post-Union breach by Canada is made out.

[202] The majority describes this as a “backward-looking ‘projection’ of Canada's obligations for the purpose of identifying fiduciary obligations falling within s. 14(2)” (para. 129), which it argues is reasonable because it is consistent with Indigenous views as to the continuity of fiduciary relationships with the Crown, and with Canada's growing acceptance of responsibility for remedying historical wrongs. All this may be so. But none of it justifies the Tribunal's reading out of clear statutory text. The Tribunal is no more constitutionally empowered than this Court to aim for a result consistent with its own policy preferences by holding fast to the bits of statutory text that it likes while ignoring the bits that it does not. The proper focus when interpreting legislation is, and must always be, on what the legislator actually said, not on what one might wish or pretend it to have said: *Williams v. Canada*

(Public Safety and Emergency Preparedness), 2017 FCA 252, at paras. 48-50 (CanLII).

[203] It is therefore worth reviewing the terms upon which Parliament conditioned the extended definition of “the Crown” in s. 14(2). A legal obligation of the Imperial Crown, or the Imperial Crown’s liability for the breach of a legal obligation, may form the subject of a claim against the Crown *to the extent that such obligation or liability became the responsibility* of the Crown in right of Canada. While the fact of a legal obligation or of liability relating to its breach is significant in that it raises the issue to be decided by applying s. 14(2), it is not determinative. That legal obligation or liability relating to its breach must still be shown to have otherwise *become* the responsibility of Canada. It is no answer to the Tribunal’s eliding of this key lynchpin to imposing liability upon Canada under s. 14(2) that the considerations which put s. 14(2) into play were present. All they do is raise the question of whether Canada is liable for the Colony’s breach. They do not furnish the answer.

[204] Like the Tribunal’s actual reasons, the majority’s “backward-looking projection” theory fails to account for the intention of Parliament as recorded in the relevant statutory language. Far from accounting for the text of s. 14(2), the Tribunal’s analysis seems to assume that s. 14(2) is the product of poor drafting or oversight (or, as counsel for the band put it, that it was not drafted with “the utmost felicity”: transcript, at p. 34). But this Court should not endorse that assumption. Rather, it should assume that Parliament means what it says — especially here, where

the extended definition of the “Crown” in s. 14(2) is hardly accidental. As the majority itself observes (at para. 125), it was crafted concomitantly with the shift from the use of the term “federal government” to “Crown” in Canada’s specific claims policy.

[205] Respectfully, then, the majority’s theory offers no cogent rationalization of the Tribunal’s treatment of s. 14(2). Nor does the majority’s theory furnish any comprehensible guidance to the Tribunal as it adjudicates the claims brought before it, whether as to this “projected” obligation’s content, its scope, its limits, or the steps that might satisfy it in any given case. Nor does it explain how the Tribunal is to apply ss. 14(1)(b) and 14(2) where the legislative shortcut that the majority invents via its “backward-looking projection” theory is unavailable — that is, where direct liability has *not* been fortuitously imposed on Canada for breach of a related legal obligation under s. 14(1)(c).

[206] The majority, however, says that its “backward-looking projection” theory is “grounded in the Tribunal’s reasons”: para. 116. But, and with respect, it is nowhere even remotely suggested in those reasons. The majority also says that this rationale finds support in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. But, and again with respect, the majority cites to passages on resolving textual ambiguity and inconclusive statutory definitions, respectively — neither of which are present here. There is simply no support for the majority’s “backward-looking projection” theory in the law of Canada

as stated by this Court, any other court, or Parliament. Indeed, Parliament has legislated to the contrary. In my view, the majority has gone well beyond “supplementing” the reasons of the Tribunal, and has done what this Court cautioned against in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 — specifically, “to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result”: para. 54, quoting *Petro-Canada v. Workers’ Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at para. 56. In other words, the majority does what this Court has just recently warned against in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, by “replacing the reasons of administrative bodies with [the Court’s] own, [such that] the outcome of administrative decisions becomes the sole consideration”: para. 27 (emphasis added).

[207] There is much wisdom in those cautionary notes. Judicial review is not artificial resuscitation. As slow as reviewing courts ought to be to reach such a conclusion, sometimes a statutory delegate’s reasons for decision are truly indefensible by any standard. This is one of those times. The Tribunal’s reasons for finding that Canada is liable under s. 14(1)(b) for the Colony’s breach are just not amenable to judicial supplementing, and this Court should not strain to do so by insisting that, if we just look hard enough, we will be able to see what really isn’t there.

[208] I add this. The specific claims process is the product of substantial and complex consultation and carefully crafted legislation. For that reason alone, this Court should not indulge the Tribunal's distortion of the ground rules of this important project. To be sure, the Tribunal's reasons are entitled to "respectful attention". But so is Parliament's carefully expressed direction.

[209] But the stakes here are even higher. It is difficult to overstate the significance of this matter to the ongoing project of reconciliation between the Canadian state and Indigenous peoples, and of remedying historical wrongs. This is particularly so in British Columbia, as the issues under consideration at the Tribunal go to the heart of the constitutional accord represented by the *Terms of Union*. Rights and, just as importantly, responsibilities — including, I stress, responsibilities whose discharge is now of potentially central importance to achieving reconciliation in British Columbia — were assigned thereunder and constitutionally entrenched, by mutual accord, as between British Columbia and Canada. The Tribunal's reasons, and the legally dubious and unsourced theory by which the majority seeks to defibrillate those reasons, elide that constitutional division of responsibilities, and thereby risk upsetting that accord.

V. Remedy

[210] I have concluded: (1) that the Tribunal's finding of a breach by the Colony of its legal obligation within the meaning of s. 14(1)(b) of the *Specific Claims Tribunal Act* was reasonable; (2) that the Tribunal's finding of a post-Union breach of

a legal obligation on the part of Canada within the meaning of s. 14(1)(c) was unreasonable; and (3) that the Tribunal's treatment of whether Canada is liable for the Colony's breach based on s. 14(2) was unreasonable.

[211] It follows that I would, like the Federal Court of Appeal, dismiss the band's claim brought under s. 14(1)(c). I would not, however, make the order which the Federal Court of Appeal made respecting the band's claim under s. 14(1)(b). In my respectful view, it was premature to conclude that the 1881 allotment cured the Colony's breach of fiduciary duty. The extent to which that allotment truly mitigated the breach depends upon evidence which the parties might have adduced, and the factual findings which the Tribunal might have made at the compensation stage of the hearing. It was an error to pre-judge that issue without the benefit of the relevant evidence and factual findings.

[212] Of course, whether the s. 14(1)(b) claim can proceed to the compensation stage at all depends upon whether, in this case, the Crown in right of Canada comes within the extended meaning of "the Crown" in s. 14(2). Having omitted to address the submissions regarding Article 1 of the *Terms of Union*, and having failed to properly account for Article 13, the Tribunal did not adequately address this point. I would therefore remit this matter to the Tribunal for determination of whether, pursuant to s. 14(2), the legal obligation that was breached or the liability relating to its breach became the responsibility of Canada. In the case of Article 13, this would entail consideration of whether Canada failed to continue a policy regarding reserve

lands as liberal as that pursued by British Columbia prior to Union; and, regarding Article 1, the Tribunal would have to consider whether the breach of the Colony's fiduciary obligation to the band qualified as a "debt" or "liability" of British Columbia existing at the time of Union. If the band succeeds on either question, the matter may then proceed to the compensation stage.

VI. Summary

[213] In summary, I would hold as follows:

1. The standard of review of the Specific Claims Tribunal's decision is that of reasonableness, except with respect to the Tribunal's interpretation of the *Terms of Union*, which is reviewable for correctness.
2. To succeed in this case, the band must establish a claim either under s. 14(1)(c) or, failing that, s. 14(1)(b) of the *Specific Claims Tribunal Act*.
3. Section 14(1)(c) provides to First Nations a claim for "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".
 - In this case, the Tribunal's finding that, post-Union, Canada breached a legal obligation under s. 14(1)(c) was unreasonable.
 - The conclusion that Canada breached an *ad hoc* fiduciary duty of utmost loyalty to the band by operation of Article 13 of the *Terms of Union* is inconsistent with this Court's decision in *Wewaykum*.
 - Further, the Tribunal's finding that Canada breached a *sui generis* fiduciary duty to allot the Village Lands as a reserve is neither supported by the record nor justified in the Tribunal's findings.

- Moreover, the Tribunal’s finding does not account for the limits to Canada’s powers under the *Terms of Union* (relative to the plenary powers held by the Colony).
4. Section 14(1)(b) provides to First Nations a claim for “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”.
 5. The federal Crown’s liability for claims under s. 14(1) that originated prior to Union of British Columbia and Canada is defined in s. 14(2). Section 14(2) contains:
 - an enforcement mechanism,
 - which compels Canada to answer for the Imperial Crown,
 - where Canada acquired responsibility for an obligation or a liability relating to Indians or lands reserved for Indians.
 6. Deciding whether Canada acquired such responsibility in this case entails analysis of Articles 1 and 13 of the *Terms of Union* — an analysis which the Tribunal failed to undertake reasonably (in the case of Article 13) or at all (in the case of Article 1).
 7. While the Tribunal reasonably found that *the Colony* breached a *sui generis* fiduciary duty to the band to set aside the Village Lands as a reserve, the Tribunal’s finding that *Canada* is liable under s. 14(1)(b) for the Colony’s breach is unreasonable. It fails to account for the requirement of s. 14(2) that for Canada to be so liable, the Colony’s duty to set aside the Village Lands as a reserve must have “bec[ome] . . . the responsibility of the Crown in right of Canada”.
 8. I do not, respectfully, accept the majority’s “backward-looking projection” theory of statutory liability as an appropriate supplement to the Tribunal’s reasons. Nor do I agree with the majority’s supposition that this theory somehow captures how the Tribunal’s non-existent justification for its conclusion regarding the operation of s. 14(2) should be understood. Nor do I accept that theory on its merits.

9. This matter should be remitted to the Tribunal for determination of whether, pursuant to s. 14(2), the legal obligation or liability relating to its breach became the responsibility of Canada. This will entail the Tribunal deciding:

- whether Canada continued a policy regarding reserve lands as liberal as that pursued by British Columbia prior to Union (in accordance with Canada's obligations under Article 13 of the *Terms of Union*), and
- whether the breach by the Colony of its fiduciary duty to the band was a "debt" or "liability" of British Columbia existing at the time of Union (within the meaning of Article 1 of the *Terms of Union*).

APPENDIX

Validity and Compensation Provisions of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22

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.

Extended meaning of *Crown* — obligations

(2) For the purpose of applying paragraphs (1)(a) to (c) in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

Extended meaning of *Crown* — illegal lease or disposition

(3) For the purpose of applying paragraph (1)(d) in respect of an illegal lease or disposition of reserve land located in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that

liability for the illegal lease or disposition became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

Extended meaning of Crown — other

(4) For the purpose of applying paragraphs (1)(e) and (f) in respect of reserve lands located in an area within Canada's present boundaries, a reference to the Crown includes the Sovereign of Great Britain and its colonies for the period before that area became part of Canada.

Basis and limitations for decision on compensation

20 (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,

(a) shall award monetary compensation only;

(b) shall not, despite any other provision in this subsection, award total compensation in excess of \$150 million;

(c) shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;

(d) shall not award any amount for

(i) punitive or exemplary damages, or

(ii) any harm or loss that is not pecuniary in nature, including loss of a cultural or spiritual nature;

(e) shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid;

(f) shall award compensation equal to the value of the damage done to reserve lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that certain of its reserve lands were damaged under legal authority, but that inadequate compensation was paid;

(g) shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;

(h) shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g); and

(i) shall, if it finds that a third party caused or contributed to the acts or omissions referred to in subsection 14(1) or the loss arising from those acts or omissions, award compensation against the Crown only to the extent that the Crown is at fault for the loss.

For greater certainty

(2) For greater certainty, in awarding the compensation referred to in subsection (1), the Tribunal may consider losses related to activities of an ongoing and variable nature, such as activities related to harvesting rights.

Deduction of benefit

(3) The Tribunal shall deduct from the amount of compensation calculated under subsection (1) the value of any benefit received by the claimant in relation to the subject-matter of the specific claim brought forward to its current value, in accordance with legal principles applied by the courts.

One claim limit for related claims

(4) Two or more specific claims shall, for the purpose of paragraph (1)(b), be treated as one claim if they

(a) are made by the same claimant and are based on the same or substantially the same facts; or

(b) are made by different claimants, are based on the same or substantially the same facts and relate to the same assets.

Equitable apportionment

(5) If claims are treated as one claim under paragraph (4)(b), the Tribunal shall apportion equitably among the claimants the total compensation awarded.

Compensation against province

(6) If the Tribunal finds that a province that has been granted party status caused or contributed to the acts or omissions referred to in subsection 14(1) or the loss arising from those acts or omissions, it may award compensation against the province to the extent that the province was at fault in causing or contributing to the loss.

Unlawful disposition

21 (1) If compensation is awarded under this Act for an unlawful disposition of all of the interests or rights of a claimant in or to land and the interests or rights have never been restored to the claimant, then all of the claimant's interests in and rights to the land are released, without prejudice to any right of the claimant to bring any proceeding related to that unlawful disposition against a province that is not a party to the specific claim.

Unlawful disposition of partial interest

(2) If compensation is awarded under this Act for the unlawful disposition of a partial interest or right of a claimant in or to reserve land, then the persons who, if the disposition had been lawful, would have had the partial interest or right in or to the land are deemed to have had that interest or right.

Notice to others

22 (1) If the Tribunal's decision of an issue in relation to a specific claim might, in its opinion, significantly affect the interests of a province, First Nation or person, the Tribunal shall so notify them. The parties may make submissions to the Tribunal as to whose interests might be affected.

Effect of failure to notify

(2) Failure to provide notice does not invalidate any decision of the Tribunal.

Restriction

23 (1) The Tribunal has jurisdiction with respect to a province only if the province is granted party status.

Party status of a province — mandatory

(2) If the Crown alleges that a province that has been notified under subsection 22(1) is wholly or partly at fault for the claimant's losses, the Tribunal shall grant the province party status provided that the province certifies in writing that it has taken the steps necessary for it to be bound by decisions of the Tribunal.

Party status of a province — discretionary

(3) If the Crown does not allege that a province that has been notified under subsection 22(1) is wholly or partly at fault for the claimant's losses, the Tribunal may, on application by the province, grant the province party status if the Tribunal considers it a necessary or proper party and provided that the province certifies in writing that it has taken the steps necessary for it to be bound by decisions of the Tribunal.

Appeal allowed with costs, CÔTÉ and ROWE JJ. dissenting in part and

MCLACHLIN C.J. and BROWN J. dissenting.

Solicitors for the appellant: Mandell Pinder, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Saskatoon.

Solicitors for the intervener the Specific Claims Tribunal: Cavalluzzo Shilton McIntyre Cornish, Toronto; Specific Claims Tribunal, Ottawa.

Solicitors for the intervener the Assembly of Manitoba Chiefs: Olthuis, Kleer, Townshend, Toronto.

Solicitors for the intervener the Federation of Sovereign Indigenous Nations: Westaway Law Group, Ottawa.

Solicitors for the intervener the Indigenous Bar Association in Canada: Nahwegahbow, Corbiere, Rama, Ontario.

Solicitors for the intervener the Assembly of First Nations: Assembly of First Nations, Ottawa; Nahwegahbow, Corbiere, Rama, Ontario.

Solicitors for the interveners the Union of British Columbia Indian Chiefs, the Nlaka'pamux Nation Tribal Council, the Stó:lō Nation, the Stó:lō Tribal Council and the Carrier Sekani Tribal Council: Mandell Pinder, Vancouver.

Solicitors for the intervener the Assembly of First Nations of Quebec and Labrador: Dionne Schulze, Montréal; Cain Lamarre, Roberval, Quebec.

Solicitors for the interveners the Cowichan Tribes, the Stz'uminus First Nation, the Penelakut Tribe and the Halalt First Nation: Woodward & Co., Victoria.