**Case brief – Canada v. Kitselas First Nation, 2014 FCA 150**

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The case may be of interest to First Nations in British Columbia with outstanding specific claims relating to historical reserve allotment.  The case confirms that the federal Crown had a fiduciary duty during certain reserve allotments when British Columbia entered Confederation in 1871, and explains how this duty was to be exercised.

This case was the judicial review of a Specific Claims Tribunal (the “Tribunal”) decision. The Kitselas First Nation (“Kitselas”) had commenced a proceeding under the *Specific Claims Tribunal Act*, alleging that Canada had breached its fiduciary duty when it excluded 10.5 acres of land from one of Kitselas’ reserves, “IR No. 1”, in 1891.

Upon entering Canada in 1871, the *British Columbia Terms of Union’s* Article 13 provided for the transfer of land from BC to the federal government for “the trusteeship and management of the lands reserved for [the Indians’] use and benefit.” The Joint Indian Reserve Commission (the “Commission”) was set-up to establish reserves for each Aboriginal Nation in British Columbia. Commissioner O’Reilly, the head of the Commission, established Kitselas IR No. 1, but excluded from it 10.5 acres, on part of which stood a Hudson’s Bay Company storehouse.

The Chairperson of the Tribunal (the “Judge”) ultimately found that Canada had a fiduciary duty to the Kitselas during the reserve allotment process and that Canada breached this duty.  The Judge made the following important findings of fact: (1) the excluded land in question contained an ancient village that was of significance to the identity of the Kitselas; (2) Commissioner O’Reilly would have seen Indian dwellings on the land in question in 1891; (3) there were no claims of white settlers on the land in question and the Hudson’s Bay Company would not have required more than one acre for their storehouse; and (4) there was nothing to support finding that the land in question would not form part of Kitselas’ IR No. 1 if Commissioner O’Reilly had not excluded it.

The Judge applied the fiduciary duty test from *Wewaykum Indian Band v. Canada* to find that there was a congnizable Indian interest, and that there was discretionary control on the part of the Crown. He found that Commissioner O’Reilly had no authority to exclude the land from reserve once it was established that the land was used and occupied by the Kitselas, and that O’Reilly, on behalf of Canada, failed to act reasonably and with diligence towards the best interests of the Kitselas.

On judicial review, Canada argued that (1) it did not owe a fiduciary duty to Kitselas during the reserve allotment stage; (2) the Judge made unreasonable determinations of fact and of mixed fact and law in reaching his decision; and (3) the Judge erred in finding that Canada was solely liable for breaches of its alleged duty with respect to the excluded land.

The Federal Court of Appeal held that the questions of law in this case should be reviewed on a standard of correctness. The Court relied heavily on the fact that claims involving fiduciary duty may be brought to either the Tribunal or to the superior courts – and that applying a different standard of review to decisions of the Tribunal than to those of a court of first instance would be inconsistent [para. 30]. It also cited the “deep underlying constitutional underpinnings” at play when assessing issues regarding the fiduciary relationship between the Crown and aboriginal peoples [para. 34].

Addressing the first issue, the Court applied the fiduciary duty test from *Wewaykum* and found that Canada did indeed owe a fiduciary duty during the reserve creation stage. It rejected the Crown’s arguments that “habitual use” is not a cognizable interest, and that Canada did not take discretionary control over the excluded land. The Court found that Article 13 of the *British Columbia Terms of Union* could, in appropriate circumstances, give rise to a fiduciary duty with respect to the provision or non-provision of reserve lands [para. 48]. The Court cited the Judge’s appropriate attention to the “unique context of reserve creation history in British Columbia”, differentiating the unilateral nature of the process from other provinces which involved negotiation [para. 51].

On the issue of whether Canada breached its fiduciary duty, the Court upheld the Judge’s finding that Canada, through Commissioner O’Reilly, had breached its fiduciary duty by failing to disclose the exclusion of the 10.5 acres to Kitselas [para. 55].  The Court held that the Judge’s decision was within a range of possible, acceptable outcomes and that it was also reasonably open to him to conclude that the 10.5 acres were not excluded for public transportation purposes.

Regarding the last issue of apportionment of liability, Canada argued that British Columbia should share in liability. However, the Court found that due to the Judge’s decision to bifurcate the two stages of the specific claim process, the decision under review only dealt with the validity of the claim. As the compensation stage of the proceedings would be dealt with at a subsequent hearing, the Court was unable to decide this issue.

The Federal Court of Appeal dismissed Canada’s application for judicial review. This case confirms that there may be a fiduciary duty found in cases of historical reserve allotment, and acknowledges the unique position of British Columbia First Nations, due to the approach of the Joint Indian Reserve Commission in its dealings with Aboriginal people in the late 19th century.