FILE NO.: SCT-2004-11 **OFFICIAL TRANSLATION**
CITATION: 2016 SCTC 6
DATE: 20160520

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
ATIKAMEKW D'OPITCIWAN FIRST NATION	)	Paul Dionne and Marie-Ève Dumont, for the Claimant
	)	
Claimant	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Éric Gingras, Dah Yoon Min and Ann Snow, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** From September 9 to 12, 2013, from January 13 to 24, 2014, from May 20 to 23, 2014, from March 17 to 26, 2015, from March 30 to April 1, 2015, from April 23 to 30, 2015, and May 11, 2015.

REASONS FOR DECISION

Honourable Johanne Mainville

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

Cases Cited:

Wewaykum Indian Band v Canada, 2002 SCC 79, 4 SCR 245; *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911; *Beardy's & Okemasis Band #96 and 97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; A*lberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *St. Catherine's Milling and Lumber Company* (1888), 14 App Cas 46, 10 CRAC 13; *Canada (AG) v Ontario (AG)*, [1897] AC 199, 11 CRAC 308; *Ontario Mining Co v Seybold*, [1903] AC 73, 13 CRAC 75; *Quebec (AG) v Canada (AG)*, 56 DLR 373, [1921] 1 AC 401; *Canada v Anishnabe of Wauzhushk Onigum Band*, [2003] 1 CNLR 6; *R v Mason*, 2008 NSPC 3; *Montana Band v Canada*, 2006 FC 261, [2006] 3 CNLR 70; *White Bear First Nations v Canada (Minister of Indian Affairs and Northern Development*, 2012 FCA 224, [2012] 4 CNLR 332; *Musqueam Indian Band v British Columbia (Assessor of Area No. 9 – Vancouver Sea to Sky Region*), 2012 BCCA 178, 30 BCLR (5th) 211; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3; *Moulton Contracting Ltd v British Columbia*, 2013 SCC 26, [2013] 2 SCR 227.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 2, 13, 14, 15, 17, 22, 35.

An Act for the better protection of the Lands and Property of the Indians in Lower Canada, 1850, 13 & 14 Vict, c 42.

An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada, 1851, 14 & 15 Vict, c 106.

The Constitution Act, 1867, 30 & 31 Vict, c 3, ss 91, 92, 109.

An Act to authorize the appointment of a commission to submit rules for the management of running waters, SQ 1910, c 5.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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

An Act respecting lands set apart for Indians, SQ 1922, c 37.

An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, SC 1868, c 42.

An Act respecting the sale and management of the Public Lands, 32 Vict, c 11.

Indian Act, RSC 1906, c 81, ss 4, 92.

Indian Act, SC 1911, c 14, s 37.

Headnote:

The claim involves the flooding of the Opitciwan Reserve lands and the surrounding area from which the Atikamekw of Opitciwan drew part of their livelihood, following the impoundment of the Gouin reservoir in 1918, which was caused by the construction of the La Loutre dam (also known as the Gouin dam), and the damage and inconvenience suffered by them as a result of that event.

The Claimant alleges that the damage and inconvenience suffered by the Atikamekw of Opitciwan as a result of the impoundment of the Gouin reservoir in 1918 and the subsequent elevation of the water levels are attributable to the federal Crown, as is the delayed, incomplete and inadequate compensation for the damage and inconvenience. It argues that the federal Crown's liability stems from its breach of or failure to honour its legal, statutory and fiduciary duties.

The Respondent challenges and denies the claim on the grounds that there exists no binding legal obligation on the federal Crown that could arise from the facts of this case, and there is no binding legal obligation on the federal Crown to compensate the Claimant in any way in connection with these facts. The Respondent also alleges that the La Loutre dam, which led to the 1918 Flood, was a project that was entirely created, managed and maintained by the Province of Quebec, and that if the Tribunal were to find that compensation is owed to the Claimant, the Province of Quebec would be solely liable.

The Respondent also filed a motion to have certain paragraphs of the Further Amended Declaration of Claim dated November 8, 2012, struck on the grounds that that part of the file is based on asserted Aboriginal hunting and fishing rights.

The Respondent also asked the Tribunal to declare inadmissible the report of Claude Marche and several parts of the report of Jacques Frenette, Dr. Marche and Mr. Frenette being experts called by the Claimant. The Tribunal allowed them both to testify and took the objection under advisement to be determined in the decision on the validity of the claim.

Facts:

In the late 19th and early 20th centuries, the Atikamekw, then known as the Têtes-de-boule, formed a homogeneous group. The Atikamekw were made up of four groups: Wemotaci, Coucoucache, Manawan and Kikendatch (now known as the Atikamekw of Opitciwan). Of the four groups, the Opitciwan group was the most populous.

On August 10, 1850, the Legislative Assembly of United Canada enacted *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1850, 13 & 14 Vict, c 42 (the "1850 Act"). This statute was intended to prevent encroachments upon and injury to the lands appropriated to the use of the several tribes in Lower Canada and to defend their rights and privileges.

On August 30, 1851, the Legislative Assembly of United Canada enacted *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106 (the "1851 Act"), which provided that certain tracts of land not exceeding

230,000 acres could be described, surveyed and set out by orders in council and appropriated to and for the use of the "several Indian Tribes" in Lower Canada.

On August 9, 1853, Order in Council 482 (the "1853 Order in Council") arising under the 1851 Act was made. It approved a schedule dated June 8, 1853 (the "Schedule"), apportioning the 230,000 acres of lands and providing for the creation of 11 reserves, including their location, area and beneficiaries. The Atikamekw, then called Têtes-de-boule, were designated therein.

For various reasons, the sites indicated in the 1853 Order in Council did not suit the Atikamekw. In response to applications from the various Atikamekw tribes, the federal Crown agreed to create the reserves near their hunting grounds rather than in the sites designated in the 1853 Order in Council. This led to the creation of the Wemotaci, Coucoucache and Manawan Reserves.

The Atikamekw of Kikendatch (Opitciwan) also applied for a reserve in Kikendatch in 1908 and for a reserve in Opitciwan in 1912. The application was received favourably by the federal Crown, which entered into negotiations with the Province of Quebec.

A few years earlier, on June 4, 1910, *An Act to authorize the appointment of a commission to submit rules for the management of running waters,* SQ 1910, c 5 (the "QSCA"), was assented to. That statute created the Commission for the Management of Running Waters in Quebec (also known as the Quebec Streams Commission (the "QSC")) and placed it under the responsibility of Quebec's Minister of Lands and Forests. In December 1912, the QSCA was amended to enable the provincial government to authorize the QSC to build water storage dams on the Saint-Maurice River to regulate its flow, subject to the jurisdiction of the Parliament of Canada.

The two levels of government entered into talks for the purpose of creating a reserve for the Atikamekw of Opitciwan.

In 1912, the Atikamekw moved to Opitciwan.

In November 1912, Quebec's Department of Lands and Forests ("DLF") informed the Department of Indian Affairs (the "DIA") that it could not consider the DIA's request for a reserve at Opitciwan at that time because the Government of Quebec was then studying the possibility of building a dam at the outlet of Lake Opitciwan.

In December 1912, the QSCA was amended to allow the provincial government to authorize the QSC to build water storage dams on the Saint-Maurice River to regulate its flow, subject to the jurisdiction of the Parliament of Canada over navigable rivers.

Despite this, in the summer of 1914, DIA surveyor W.R. White was sent to Opitciwan to survey the premises occupied and desired by the Atikamekw for the purposes of establishing a reserve.

On November 4, 1914, the Governor in Council authorized the plans for and construction of the La Loutre dam (the "Gouin dam") on the condition that the QSC assume responsibility for any damage caused by its work or actions in connection with this dam ("Condition No. 7").

In January 1915, the DIA informed the DLF that it wished to use the parcel of land at Opitciwan, for which Mr. White's survey plan was sent to the DLF, for the reserve and asked that no other disposition be made of it.

The construction of the dam was completed in 1917, and the impoundment began in 1918. In 1919 and 1920, following the impoundment of the reservoir, the entire former village of Kikendatch was flooded, and the parcel of land surveyed by Mr. White, including the village of Opitciwan, was part of it. According to the DLF, 542 of the 2,290 reserve acres surveyed by Mr. White were flooded. The Atikamekw of Opitciwan lost their property.

Following the flooding, the QSC submitted a compensation proposal for the Atikamekw, and the DIA undertook to consult the latter about the proposal. No consultation took place. An agreement (the "1920 Agreement") was eventually reached. The QSC having been negligent in carrying out its duties, the Atikamekw asked the DIA to rescind the Agreement. Instead, the DIA ordered the QSC to perform its obligations. The compensation was delayed, and several of the claims of the Atikamekw of Opitciwan were never compensated or only partially compensated.

Held:

The legislative package consisting of the 1850 and 1851 Acts and the 1853 Order in Council, considered in light of subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, formed the framework for the federal Crown's legal obligation to create reserves.

The adoption of the 1853 Order in Council approving the Schedule that allocated the 230,000 acres of lands created an obligation for the Crown to create reserves for the bands identified therein, since the areas mentioned in the Schedule had been "set apart" and "appropriated" to and for their use and benefit. This legal obligation took the form of the launching of the reserve creation process.

The process of creating the Opitciwan Reserve began in 1853 with the identification in the Schedule of the Atikamekw as beneficiaries of certain acres for the purpose of creating a reserve, moved forward in 1908 with the application of Chief Awashish, crystallized in 1914 with the survey by Mr. White and ended with the creation of the reserve in January 1944 (see decision 2016 SCTC 7 in File No. SCT-2005-11 for the reserve's date of creation).

Therefore, by 1914, the Atikamekw of Opitciwan had a cognizable and acknowledged Aboriginal interest in the Opitciwan lands forming the provisional reserve, and the federal Crown had a discretionary power to ensure the implementation of the reserve creation process. There are enough similarities between the reserve creation processes in British Columbia and in Quebec for Opitciwan to be characterized as a "provisional reserve".

These facts gave rise to a fiduciary duty on the part of the federal Crown owed to the Atikamekw of Opitciwan. The evidence also demonstrates that the Department of Indian Affairs constituted itself as the exclusive intermediary for the Atikamekw of Opitciwan with the Province of Quebec with respect to the lands from which their reserve was to be created.

In accordance with the jurisprudence of the Supreme Court of Canada (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 86, 89, 94, 97, [2002] 4 SCR 245), prior to the creation of the Opitciwan Reserve, so before January 14, 1944, the federal Crown's fiduciary duty included fulfilling the basic obligations of loyalty, good faith in the discharge of its mandate, providing

full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the Aboriginal beneficiaries. The evidence establishes that the Crown failed to respect these obligations.

Also, in undertaking to consult the Atikamekw of Opitciwan about the compensation proposal submitted by the QSC following the adoption of Condition No. 7 of the federal Order in Council authorizing the plans for and construction of the La Loutre Dam, the federal Crown gave rise to an *ad hoc* fiduciary duty to act in the best substantial, practical interests of the Atikamekw of Opitciwan. Moreover, by requiring the QSC to perform its obligations, the federal Crown took responsibility for the claim of the Atikamekw against the QSC. The Crown therefore assumed the administration of the band's collective assets.

The federal Crown's objections regarding the admissibility of the reports and testimony of experts Mr. Frenette and Dr. Marche were rejected. The reasons in support of this decision were set out in decision 2016 SCTC 9 in File No. SCT-2007-11.

The Tribunal lacks jurisdiction to rule on the Claimant's Declaration of Claim regarding the damage caused to the territory surrounding the provisional reserve, except with respect to the camps, equipment and furniture located there.

The provincial Crown is partially liable for the damage and inconvenience suffered by the Atikamekw of Opitciwan, but these are also attributable to the federal Crown. There is insufficient evidence to allocate a percentage of liability to each, an issue that must be debated at the second stage.

The quantum of damages for losses found to be admissible by the Tribunal will be determined at the second stage.

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I. CLAIM

[1] The claim involves the flooding of the Opitciwan Reserve lands and the surrounding area from which the Atikamekw of Opitciwan drew part of their livelihood, following the impoundment of the Gouin reservoir in 1918, which was caused by the construction of the La Loutre dam (also known as the Gouin dam), and the damage and inconvenience suffered by them as a result of that event (the "1918 Flood"). (The documentation and proceedings contain the words "Opitciwan", "Obiduan", "Obidjuan" and "Obedjiwan". These words refer either to the same group during different time periods or to the territory that has since been designated a reserve, formerly or presently occupied by the Atikamekw of Opitciwan. Opitciwan is the name in the Atikamekw language. In this decision, except within quotations, for ease of reading, the term Opitciwan will be used to describe, depending on the context, either the Aboriginal group "Atikamekw of Opitciwan" or the territory of the reserve.)

[2] On October 16, 2008, the Claimant filed a claim with the federal Minister of Indian Affairs regarding the 1918 Flood. In a letter dated September 30, 2011, it was informed of the Minister's refusal to negotiate the settlement of its specific claim. On March 20, 2012, it filed a Declaration of Claim with the Specific Claims Tribunal (the "Tribunal").

[3] At paragraph 125 of its Further Amended Declaration of Claim, the Claimant alleges that the federal Crown breached or failed to honour the following legal, statutory and fiduciary duties:

> [TRANSLATION]
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> a. by not insisting that Quebec, prior to the 1914 survey of the future reserve, provide more specific information about the maximum water levels that could result from the impoundment planned by the QSC [the Quebec Streams Commission];
>
> b. by not making the provision of this specific information and the mitigation of the negative effects of the work a condition for its approval of the site and the plans for the work;
>
> c. by failing to warn the Atikamekw of Opitciwan of the danger of flooding that awaited them and failing to survey the planned reserve beyond the maximum elevation point of the reservoir;

d. by leaving the reserve, after surveying it, to the mercy of the as yet uncertain rise in water levels, instead of taking measures to protect it;

e. by knowing that the reserve it had just surveyed and the surrounding territory were going to be flooded, and

    (i) failing to warn the Atikamekw;

    (ii) failing to make, prior to the flood, an inventory of the houses, camps and chattels possessed by the Atikamekw of Opitciwan on the reserve and the surrounding territory;

    (iii) neglecting or refusing to select another site for the reserve "unless the Indians find that their hunting and fishing have been adversely affected by the raising of the waters";

f. once the reserve was flooded,

    (i) by failing to send an inspector to the site to evaluate the disaster and consult the Atikamekw on the relocation of the reserve and full compensation for their damage and inconvenience and by failing to act as a go-between between the Atikamekw and the QSC on these issues;

    (ii) by accepting, despite the QSC's invitation to express its point of view, to have the compensation of the Atikamekw governed by an abusive contract made by the QSC and a few Atikamekw before the flooding was even finished;

    (iii) by taking no concrete measures to rescind this contract, despite the request from the Atikamekw that the QSC fully compensate them for the damage and inconvenience caused by its "works and actions in connection with the construction of said dam";

    (iv) by failing to closely monitor the work of the QSC and failing to require the Government of Quebec to be involved.

[4] The Claimant alleges that the damage and inconvenience suffered by the Atikamekw of Opitciwan as a result of the impoundment of the Gouin reservoir in 1918 and the subsequent elevation of the water levels are attributable to the federal Crown, as is the delayed, incomplete and inadequate compensation for the damage and inconvenience. It argues that the federal Crown's liability stems from its breach of or failure to honour its legal, statutory and fiduciary duties.

[5] The Respondent challenges and denies the validity of the claim on the following grounds:

a. The federal Crown is not bound by any legal duty that could arise from the facts in this case.
b. The federal Crown is not bound by any legal duty to compensate the Claimant in any way whatsoever as a result of the facts set out in the claim.

[6] The Respondent also alleges that the La Loutre dam (Gouin dam), which led to the 1918 Flood, was a project that was entirely created, managed and maintained by the Province of Quebec, and that if the Tribunal were to find that compensation is owed to the Claimant, the Province of Quebec would be solely liable.

[7] The evidence in this claim was filed jointly with File Nos. SCT-2005-11, SCT-2006-11 and SCT-2007-11. This judgment relates only to File No. SCT-2004-11. The three other files were decided in separate Tribunal decisions involving the following:

- SCT-2005-11: the delay in creating the Opitciwan Reserve and the damage and inconvenience suffered by the Atikamekw as a result, including the loss of income from logging and from the establishment in the community of non-Aboriginal traders without a right of occupation.

- SCT-2006-11: the area of the Opitciwan Indian Reserve to which the Atikamekw of Opitciwan were entitled and which they did not receive, and the damage and inconvenience suffered by the Atikamekw of Opitciwan as a result of this.

- SCT-2007-11: the flooding of the Opitciwan reserve following the raising of the crest of the Gouin dam authorized in 1941 and 1955–56 and the damage and inconvenience suffered as a result of these events.

[8] In a notice dated June 22, 2012, in accordance with subsection 22(1) of the *Specific Claims Tribunal Act*, SC 2008, c 22 (the "SCTA"), the Tribunal informed the Attorney General of Quebec that it was of the view that the decision it would render in this file and in File No. SCT-2007-11 might significantly affect the interests of Quebec. The latter declined the opportunity to intervene or participate in the debate.

[9] The Respondent also filed a motion to strike in this file. It is seeking to have paragraph 6 and subparagraphs 121(d), 121(g), 121(k), 125(1)(e), 126(h), 126(i) and 126(j) of the Further Amended Declaration of Claim dated November 8, 2012, struck on the grounds that that part of the file is based on asserted Aboriginal hunting and fishing rights. The Tribunal decided to hear the motion during the hearing on the validity of the claim.

[10] The Respondent also asked the Tribunal to declare inadmissible the report of Claude Marche and several parts of the report of Jacques Frenette, Dr. Marche and Mr. Frenette being experts called by the Claimant. The Tribunal allowed them both to testify and took the objection under advisement to be determined in the decision on the validity of the claim.

[11] After 35 days of hearings, having analyzed the evidence and submissions and for the reasons below, I find as follows:

(a) The federal Crown's objections regarding the admissibility of the reports and testimony of experts Jacques Frenette and Claude Marche are dismissed. The reasons for this decision with respect to Dr. Marche are explained in decision 2016 SCTC 9 in File No. SCT-2007-11.

(b) The reserve creation processes in British Columbia and Quebec have enough similarities that Opitciwan may be characterized as a "provisional reserve".

(c) The federal Crown had a legal and fiduciary duty to ensure that the process for creating the Opitciwan Reserve was implemented.

(d) In this respect, the federal Crown failed to honour its obligations of loyalty, full disclosure appropriate to the subject matter and acting with ordinary prudence in the interest of the Atikamekw of Opitciwan.

(e) In undertaking to consult the Atikamekw of Opitciwan about the compensation proposal submitted by the QSC following the adoption of Condition No. 7 of the federal order in council authorizing the plans for and construction of the La Loutre dam, the federal Crown gave rise to an *ad hoc* fiduciary duty to act in the best

substantial, practical interests of the Atikamekw of Opitciwan, which included a duty to protect their assets located on a territory affected by the project.

(f) The Tribunal lacks jurisdiction to rule on the Claimant's claim regarding the damage caused to the territory surrounding the provisional reserve, except with respect to the camps, equipment and furniture located there.

(g) The provincial Crown is partially liable for the damage and inconvenience suffered by the Atikamekw of Opitciwan, but these are also attributable to the federal Crown. There is insufficient evidence to allocate a percentage of liability to each, which must be done at the second stage.

(h) The compensation for losses found to be admissible by the Tribunal will be determined at the second stage.

[12] My finding regarding the fiduciary duty is based on the following:

(a) The legislative package made up of (1) *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1850, 13 & 14 Vict, c 42 (the "1850 Act"), (2) *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106 (the "1851 Act") and (3) Order in Council 482 (the "1853 Order in Council") approving a schedule dated June 8, 1853 (the "Schedule"), considered in light of subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (the "Constitution Act, 1867"), formed the framework for the federal Crown's legal obligation to create reserves.

(b) The adoption of the 1853 Order in Council arising under the 1851 Act and approving the 1853 Schedule distributing the 230,000 acres of lands gave rise to an obligation on the part of the Crown to create reserves for the bands identified therein, since the areas mentioned in the Schedule had been "set apart" and "appropriated" to and for their use.

(c) This legal duty arose out of the launching of the reserve creation process.

(d) As for the Opitciwan Reserve, the process for its creation was launched in 1853 with the designation in the Schedule of the Atikamekw as beneficiaries of certain acres for the purposes of creating a reserve, further developed in 1908 with the application from Chief Awashish and the positive response from the Department of Indian Affairs (the "DIA"), crystallized in 1914 with the survey by Mr. White and completed with the creation of the reserve in January 1944 (see decision 2016 SCTC 7 in File No. SCT-2005-11 for the reserve's date of creation).

(e) Therefore, (1) by no later than 1914, the Atikamekw of Opitciwan had a cognizable and acknowledged Aboriginal interest in the Opitciwan lands forming the provisional reserve, and (2) the federal Crown had a discretionary power to ensure that the reserve creation process was implemented.

(f) These facts gave rise to a fiduciary obligation on the part of the federal Crown towards the Atikamekw of Opitciwan. The evidence also demonstrates that the DIA constituted itself as the exclusive intermediary for the Atikamekw of Opitciwan with the Province of Quebec with respect to the lands from which their reserve was to be created.

(g) Also, in undertaking to consult the Atikamekw of Opitciwan prior to approving the compensation proposal submitted by the QSC regarding Condition No. 7 imposed by the federal Order in Council as a condition of authorization for the Gouin dam and then approving the agreement in fact and requiring the QSC to perform its obligations, the federal Crown took responsibility for the Atikamekw claim against the QSC. The Crown therefore assumed the administration of the band's collective assets and undertook to act in the best substantial Aboriginal interests of the Atikamekw of Opitciwan.

(h) In accordance with the jurisprudence of the Supreme Court of Canada (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 86, 89, 94, 97, [2002] 4 SCR 245 [*Wewaykum*]), prior to the date of creation of the Opitciwan Reserve, so before January 14, 1944, the federal Crown's fiduciary duty included the basic obligations of

loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter and acting with ordinary prudence with a view to the best interest of the beneficiaries of the obligation.

(i) As part of a reserve creation process, the acts performed by the federal Crown with respect to the lands occupied by the Atikamekw of Opitciwan in the "provisional reserve" were governed by the fiduciary relationship between them and the Crown.

[13] The evidence establishes that the Crown failed to honour its obligations.

II. SEVERANCE OF THE CLAIM

[14] At the outset of the proceedings, the Parties asked that an order be issued to sever the four claims into two stages. An amended severance order was rendered in each file on March 20, 2013, by Justice Geoffroy, which approved a draft order jointly submitted by the Parties, which included the following provisions:

> [TRANSLATION]
>
> [1] In accordance with the order dated October 2, 2012, issued by the Chairperson of the Tribunal regarding claims SCT-2004-11, SCT-2005-11, SCT-2006-11 and SCT-2007-11, and subject to this order, these claims may be administered within a single investigation and hearing that will, however, be conducted in two (2) separate stages:
>
> - the first, on the validity of each claim, including a determination of whether or not the Claimant has suffered losses that can be compensated under the claim in which such losses are alleged; and
> - the second, if necessary, to determine the amount of compensation (losses).
>
> [2] In the first stage, the Tribunal will hold a single investigation and hearing but will render a separate decision for each claim.
>
> [3] Despite the above, the Tribunal will, as of the first stage
>
> - allow for the presentation of some evidence regarding compensation, to be filed and transferred as necessary to the second stage on the terms and conditions it will determine, to avoid having the same person testify twice, for example;
> - rule on any motion brought by the Respondent to have a claim rejected in whole or in part, particularly on the basis that the claim is

> for damage of a personal and individual nature (inadmissible according to the Respondent but admissible according to the Claimant), or that it is based on, or alleges, Aboriginal rights or title;
>
> - may, however, at the request of a Party, refuse to rule on any issue that it considers premature or improper to decide in the first stage, including the issue of whether the losses suffered by the Claimant must be compensated by the federal Crown.
>
> . . .
>
> [5] At the second stage, if applicable, the Tribunal will determine the amount of the compensation to be awarded to the Claimant for each claim held to be well founded.
>
> [6] The Tribunal will schedule a case management conference for the investigation and hearing of the second stage, during which the Parties will discuss issues relating to the amount of compensation, including the need for expert evidence, the amount of preparation time required by the Parties and the possibility of mediation. . . .

[15] During the Respondent's oral arguments, and with the Tribunal's approval, the Claimant filed, on May 6, 2015, an application in writing asking that no decision be rendered during the first stage on the issue of whether the federal Crown was wholly or partly at fault for its losses or whether a third party caused or contributed to its losses within the meaning of subparagraph 20(1)(i) of the SCTA (the "Application of May 6, 2015"). This was filed in all four cases (SCT-2004-11, SCT-2005-11, SCT-2006-11 and SCT-2007-11).

[16] This motion was rejected for lateness and for inconsistency with the evidence presented.

III. EVIDENCE

A. Introduction

[17] The relevant facts took place over a long period of several decades.

[18] The documentary evidence includes 421 documents filed jointly by the Parties plus about 50 more documents produced during the testimony of the various witnesses.

[19] The Claimant presented oral history evidence and called five witnesses to this effect. It also called two expert witnesses, one on the history of the Atikamekw of Opitciwan and the other on issues involving the area of the Opitciwan Reserve following the flooding caused by the dam.

The Respondent called four expert witnesses, two historians and two who addressed the issues relating to the dam and the area of the reserve.

[20] That said, the factual background that follows cannot be exhaustive without dedicating an inordinate number of paragraphs to it. Its primary objective is to provide a general picture of the relevant facts, with further details to be provided in the course of the analysis of specific aspects of the case.

B. The Atikamekw of Opitciwan

[21] The Opitciwan Indian Reserve is located in the province of Quebec in the Haute-Mauricie, within the traditional territory of the Atikamekw (the subject of a comprehensive claim by the Atikamekw), corresponding to the territory within the watershed of the Saint-Maurice River upstream from the city of La Tuque.

[22] In the late 19th and early 20th centuries, the Atikamekw, then known as the Têtes-de-boule, formed a homogeneous group (to avoid confusion, I will refer to them here as the "Atikamekw" rather than as the "Têtes-de-boule"). Certain researchers have called this group a "nation" (Jacques Frenette, *Les Atikamekw d'Opitciwan (1880-1950), Bilan de la littérature scientifique*, April 2013, Exhibit P-3 at pp 47–52).

[23] According to the literature, the traditional territory of the Atikamekw was well defined. In his report, Mr. Frenette provides the following description:

> [TRANSLATION]
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> From the west, it began at the Megiscane River, where the Atikamekw met the Algonquins, and extended to the east, as far as the Trenche River, where the Atikamekw encountered the Montagnais. From the north, the Atikamekw territory began and occasionally fell outside of the highlands where the Crees lived, and stretched about 240 km to the south, with the southern border constantly retreating on account of Euro-Canadian trappers. [Exhibit P-3, at pp 52–53]

[24] The Atikamekw were made up of four groups: Wemotaci, Coucoucache, Manawan and Kikendatch (now known as the Atikamekw of Opitciwan).

[25] Of the four groups, the Opitciwan group was the most populous. The Atikamekw in that group were dependent on the trading economy and resources from the traditional territory (game, fish, plants) to feed themselves and make a living. In times of scarcity, they received [TRANSLATION] “direct assistance” paid from the amounts allocated under section II of the 1851 Act.

[26] The social structure of the Atikamekw of Opitciwan was based on the nuclear family: two parents and three to four children on average, and sometimes the spouses’ parents.

[27] The customary pattern of occupation and use of the traditional territory was the system of family hunting grounds.

[28] Among the Atikamekw of Opitciwan, as among the Atikamekw more broadly, individuals and families would meet for a few weeks or months each summer in a location with a commercial establishment, usually a Hudson’s Bay Company (“HBC”) post. This association of families at a single commercial establishment was considered a [TRANSLATION] “trading post band”. The Atikamekw of Opitciwan met fur traders and missionaries there; they reunited with family and friends; they celebrated baptisms and marriages and participated in other activities. A chief spoke on behalf of the group; he was the band’s designated intermediary with the traders and missionaries.

[29] Thomas Awashish became the first elected chief of the Atikamekw of Opitciwan in 1886.

[30] The Atikamekw of Opitciwan alternated the HBC trading posts they frequented depending on which were closing or reopening. They frequented the first post at Opitciwan from 1827 to 1840, the first post at Kikendatch from 1840 to 1884, the second post at Kikendatch from 1884 to 1912 and the second post at Opitciwan from 1912 to 1925, and the third post at Opitciwan from 1925 to 1950. They identified themselves or were identified with these trading establishments. The Opitciwan Indian Reserve was eventually created on the site of the Opitciwan trading post.

[31] Kikendatch was located 20 km upstream from the current Gouin dam. Starting in 1912, the Atikamekw of Kikendatch (now the Atikamekw of Opitciwan) began gradually moving to Opitciwan, where the HBC had installed its post by the end of the summer of 1912.

[32] They also had relationships with the missionaries who began visiting the Haute-Mauricie in 1837, building a chapel at Kikendatch in 1898 and another at Opitciwan in 1916.

[33] Euro-Canadian trappers began to appear in the territory used by the Atikamekw of Opitciwan in 1870. Their numbers grew in 1930. Wood harvesting through forest concessions did not begin until the 1940s.

C. History of the creation of the Opitciwan Reserve

1. The creation of reserves for the benefit of the Atikamekw of the Saint-Maurice

(a) The 1850 and 1851 Acts and the 1853 Order in Council

[34] On August 10, 1850, the Legislative Assembly of United Canada enacted the 1850 Act. This statute was intended to prevent encroachments upon and injury to the lands appropriated to the use of the several tribes in Lower Canada and to defend their rights and privileges.

[35] On August 30, 1851, the Legislative Assembly of United Canada enacted the 1851 Act, which provided that certain tracts of land not exceeding 230,000 acres could be described, surveyed and set out by orders in council and appropriated to and for the use of the "several Indian Tribes" in Lower Canada.

[36] On August 9, 1853, Order in Council 482 (the "1853 Order in Council") arising under the 1851 Act was made. It approved a schedule dated June 8, 1853 (the "Schedule"), apportioning the 230,000 acres of lands and providing for the creation of 11 reserves, including their location, area and beneficiaries. A total area of 59,750 of the 230,000 acres was granted to the two groups of Atikamekw (the 1853 Order in Council indicates a total of 230,000 acres, but adding the areas listed gives a total of 229,000 acres) (Exhibit D-4, at p 31).

[37] I will provide further details about the legislative framework in the course of the analysis of the fiduciary duty.

(b) The Maniwaki and La Tuque reserves

[38] The Schedule provides for, among other things, the creation of a reserve of 45,750 acres at Maniwaki, for the benefit of the Atikamekw, the Algonquins and the Nipissingues, the tribes hunting in the territory located between the Saint-Maurice and Gatineau Rivers and residing mainly in the mission of the Lake of Two Mountains (Joint Book of Documents ["JBD"] at tab 31: *Appendix 21, Report of the Special Commissioners Appointed on the 8th of September, 1856, to Investigate Indian Affairs*). It also provides for a reserve of 14,000 acres located in La Tuque for the benefit of the Atikamekw, the Algonquins and the Abenakis of Bécancour. (Order in Council 1853 indicates 14,000 acres. However, correspondence between Mr. Sinclair, a senior official from the DIA, and his deputy minister, indicates that 14,000 acres is an error and that it should read 16,000 acres. This amount of 16,000 acres was ultimately distributed. See Exhibit D-4, at p 35.)

[39] However, the Atikamekw did not live on the Maniwaki or La Tuque Reserves.

[40] The Maniwaki Reserve was too far from the Atikamekw hunting grounds, and they were not welcome there, because the other tribes, particularly the Algonquins, were of the view that the Atikamekw had no rights in what they considered to be their territory.

[41] The La Tuque Reserve, on the other hand, was never created. The cohabitation of the Abenakis and Atikamekw in the same reserve was desired by neither tribe.

[42] On March 1, 1882, invited by the DIA to provide information about the preferences of the Saint-Maurice Indians, the Rev. Fr. Guéguen, a missionary to the Saint-Maurice Indians of Wemotaci, wrote the following:

> But in regard to the number of families of St Maurice Indians wishing to locate themselves at La Tuque I think I told you that I do not know of any of the upper St Maurice Indians wishing to locate themselves in that place. They want a little to locate themselves there that they want to give up altogether that Reserve at

> La Tuque and ask in return the new Reserve requested at Coucoucache and Weymontaching. [JBD, at tab 39]

[43] In a letter dated December 28, 1882, the Rev. Fr. Guéguen, in response to a letter from the Superintendent General of the DIA, told him that he had learned the previous summer that none of them wanted a reserve at La Tuque. He concluded by stating that "if Abenakis of St Francis have a Reserve on the St Maurice anywhere at all, that will be to create great disturbance" (JBD, at tab 41).

(c) The Wemotaci and Coucoucache reserves

[44] In the early 1880s, faced with this situation, the Indian Affairs administration began considering replacement solutions and required that information be obtained about the number of Atikamekw individuals and families and where they were located to situate their reserves.

[45] On December 6, 1881, the DIA told the Rev. Fr. Guéguen that it had received a document signed by four chiefs on behalf of all of the Saint-Maurice Indians at Wemotaci, Coucoucache and Kikendatch who wanted their reserves to be located at Wemotaci and Coucoucache. Hoping to satisfy the Indians in this regard, the DIA pressed the Rev. Fr. Guéguen to let it know the number of Indian families wishing to settle in each location where reserves were planned (La Tuque, Wemotaci and Coucoucache), to be able to continue its talks with the Quebec Department of Crown Lands (JBD, at tab 37).

[46] On March 1, 1882, the Rev. Fr. Guéguen, invited by the DIA to provide it with information about the preference of the Atikamekw for the upper Saint-Maurice River, informed the Superintendent of the DIA that they would prefer to settle at the Coucoucache and Wemotaci sites (JBD, at tab 39).

[47] On April 28, 1882, the Superintendent of the DIA told Assistant Commissioner Taché of Quebec's Department of Crown Lands the number of Indians residing on the Saint-Maurice territory, in Bécancour and in St. François. He asked that instructions be given to Mr. Bignell, surveyor, to survey the Coucoucache and Wemotaci Reserves based on the number of individuals, which Mr. Bignell could verify on location (JBD, at tab 40).

[48] On July 8, 1885, Mr. Reynolds, representing the HBC in Coucoucache, wrote to the Chief Commissioner of the HBC to inform him of the whereabouts of the Atikamekw population. He counted 5 families in Coucoucache, 8 in Wemotaci, 15 in Manawan and 30 in Kikendatch (JBD, at tab 43).

[49] In 1886, new steps were taken by the DIA to establish the number of Atikamekw. They would be counted two years later during a mission by the Rev. Fr. Guéguen to Wemotaci, where the Atikamekw of the four groups concerned were gathered, namely, the Wemotaci, Coucoucache, Manawan and Kikendatch.

[50] In December 1892, Mr. Sinclair, a senior official with the DIA, submitted a report with his recommendations to his deputy minister about the distribution of the lands allocated to the Saint-Maurice Indians. He noted that according to the 1853 Order in Council, a reserve of 16,000 acres was to be created at La Tuque for the Atikamekw, the Algonquins and the Abenakis of Bécancour. He wrote that since 1878, the DIA had made ongoing efforts to delimit land for the Indians to prevent encroachment but that it was difficult to identify lands in locations that they found satisfactory. He explained that both the Atikamekw and the Abenakis were opposed to La Tuque, the former because of its distance from their hunting grounds, and the latter because of the poor soil quality at La Tuque and its distance from the centres of civilization. According to Mr. Sinclair, the DIA had to take the initiative of finding locations for the reserves for these Indians.

[51] Mr. Sinclair also noted that the most recent census had established the population of Indians concerned at 844 individuals, namely 378 Abenakis at St. François, 62 at Bécancour, 261 Atikamekw and Algonquins, Champlain census division, 123 from the unorganized territory and 20 at Coucoucache. According to Mr. Sinclair, before surveying the Wemotaci and Coucoucache Reserves, the surveyor had to consult the Indians to ensure that they were satisfied with the lands being granted to them. In conclusion, he added the following:

> The area of land appropriated for the joint use of all those Indians is 16,000 acres, which would give approximately 19 acres to each, probably 75 acres to a family of 4, and a distribution proportionate to the numbers would give the following areas to be included in each of the three Reserves, namely:

Weymontachingue----------7,396 acres
Coucoucache----------380 “
For the Abenakis----------8,360 “

> [JBD, at tab 55: The note from the Archives indicates that the letter was dated December 26, 1888, but it could not possibly have been 1888, since the letter refers to an event that occurred in 1889. The Claimant submits that the letter was probably written in 1892, which is plausible in light of the correspondence.]

[52] On August 22, 1894, Assistant Commissioner Taché of the Quebec Department of Crown Lands instructed Mr. Duberger, surveyor, to delimit a reserve of 380 acres at Coucoucache and another of 7,396 acres at Wemotaci. He indicated that the area within the limits of the reserve would be equal to the area (7,396 acres) of the land reserved for the Indians plus that of the land occupied by the HBC (JBD, at tab 70).

[53] The Wemotaci and Coucoucache Reserves were created in August 1895.

(d) The Manawan Reserve

[54] In August 1893, two years before the process leading to the creation of the Wemotaci and Coucoucache Reserves, and after the DIA had taken into account the individuals of Manawan in its calculation of the area of the Wemotaci Reserve, an application was made to the DIA by Chief Louis Nawashish of Manawan to obtain a reserve at Manawan near his band’s traditional hunting grounds (JBD, at tab 58).

[55] The DIA replied that it had no lands in the desired location and invited the Atikamekw of Manawan to travel to the Maniwaki Reserve (JBD, at tab 58; Exhibit D-4, at pp 36–37).

[56] Despite this, the Chief persisted in his application, and the DIA took steps to this effect.

[57] On June 28, 1898, Mr. MacRae, a DIA inspector, wrote to his superiors to recount his visit to Manawan. He reported that the Manawan Indians did not belong to the Desert River Band to which the Maniwaki Reserve had been appropriated, but rather to the Atikamekw Band of the Saint-Maurice. He counted 74 individuals at the Manawan site (JBD, at tab 83).

[58] Following the DIA’s interventions with Quebec, a reserve was created at Manawan in 1906 with an area based on the remaining areas set out in the 1851 Act.

2. Application for a reserve in Kikendatch or north of Kikendatch

[59] On July 24, 1908, Chief Gabriel Awashish of Kikendatch applied to the DIA on behalf of the band to obtain a reserve:

> I take the liberty of writing to you with regard to the establishment of an Indian reservation at Kickendach. I regret that I have not asked for this sooner.
>
> There is a reservation at Weymontachingue, at Manuan and at Coocoocache, and we would like one for our own people near the Hudson's Bay Company's post at Kickendach. We would be satisfied to have the reservation at Kickendach or up to any point not over forty miles NORTH, but <u>not</u> east, west, or south of Kickendach.
>
> Trusting that the government will give our request their favorable consideration. [Emphasis in original; JBD, at tab 97]

[60] In a letter dated August 22, 1908, the Assistant Deputy Superintendent of the DIA, Mr. McLean, asked Chief Awashish to inform him as soon as possible of the number of individuals making up the band and the names of the heads of each family. He concluded with, "On the receipt of this information <u>an effort will be made</u> to have a reserve laid out for you" (emphasis added; JBD, at tab 98).

[61] In this manner, the DIA recognized that the Atikamekw of Kikendatch formed a group that was distinct from the other Atikamekw bands and undertook to make an effort to satisfy their application for a separate reserve.

[62] On August 1, 1909, Chief Awashish sent to the DIA a list of the individuals belonging to the Atikamekw of Kikendatch Band (JBD, at tab 103).

[63] On September 10, 1909, taking into account a census of 151 people, Deputy Superintendent Pedley of the DIA wrote to Deputy Minister Taché of Quebec's Department of Lands and Forests ("DLF") to find out whether the province was willing to grant an area of approximately 5,120 acres at Kikendatch or not more than 40 miles to the north of there (JBD, at tab 104).

[64] In response to that letter, on October 5, 1909, Deputy Minister Taché informed Mr. McLean of the DIA that the requested area of 5,120 acres exceeded the quantity of 581 acres

remaining of the 230,000 acres to be granted to the Indians of Lower Canada under the 1851 Act (JBD, at tab 105).

[65] On December 8, 1909, Mr. McLean proposed to Deputy Minister Taché the purchase of a 3,000-acre tract of land a short distance north of Kikendatch, and asked whether the DLF would be interested in such a purchase and at what price (JBD, at tab 107).

[66] On March 16, 1910, Deputy Minister Taché replied that based on information obtained from a provincial surveyor, the Atikamekw of Wemotaci and Coucoucache wished to surrender their reserves to obtain one further north. Mr. Taché indicated that the DLF would be willing to agree to such an exchange, as the replacement lands could be located at Kikendatch or further north on the Saint-Maurice (JBD, at tab 109). The DIA did not seek the opinion of the Atikamekw of Wemotaci and Coucoucache about this until September 27, 1912 (JBD, at tab 113).

3. Application for a reserve in Opitciwan

[67] In about the summer of 1912, the HBC closed its Kikendatch post to open a new one at Lake Opitciwan. In an internal memorandum dated May 7, 1912, Inspector Parker of the DIA wrote that a majority of the Kikendatch Indians were in favour of the move because the new post would be closer to their traditional hunting and trapping grounds (JBD, at tab 110). The same year, the Atikamekw began leaving Kikendatch to settle on the northern shore of Lake Opitciwan.

[68] On August 22, 1912, District Manager Wilson of the HBC wrote to the DIA on behalf of Chief Awashish, who wanted an update on the progress of the creation of a reserve at Opitciwan (JBD, at tab 113).

[69] On September 12, 1912, Mr. Wilson, at Mr. McLean’s request, sent a list of 26 heads of family residing in Opitciwan at the time. He suggested an allocation of no less than 60 acres of land per family, except for Chief Awashish, for whom he proposed an allocation of 75 acres (JBD, at tab 111). It can be inferred from another document in the record that Mr. Wilson had not yet visited Opitciwan as of that date (JBD, at tab 114).

[70] In an internal memorandum dated October 5, 1912, Forest Inspector Chitty of the DIA noted, among other things, that according to Father Guinard, missionary to the Kikendatch Indians, about 40 families living in Kikendatch wished to move and obtain a reserve on the northern shore of Lake Opitciwan, about 1,200 feet from the HBC post (JBD, at tab 113).

[71] On October 7, 1912, Mr. Wilson wrote two letters to Mr. McLean of the DIA. In one, he informed the latter that the Atikamekw of Wemotaci did not wish to move to Kikendatch or further north. It appears from the letter that the idea for the move did not come from the Atikamekw, but rather from Father Guinard, who was opposed to the Wemotaci Reserve's proximity to the railroad track (JBD, at tab 115).

[72] In another letter, Mr. Wilson informed Mr. McLean that he had visited the Opitciwan post since his previous letter and that several Indians wished to settle there. He added a second list of names representing 31 families wishing to settle there, indicating that each family would need 60 acres, plus a portion of acres for shared use (JBD, at tab 114).

[73] On October 15, 1912, Assistant Secretary Stewart of the DIA informed the Deputy Minister of the DLF of the false rumour of the potential move by the Atikamekw of Wemotaci and Coucoucache and the fact that several Atikamekw families in Kikendatch wished to settle in Opitciwan. He reiterated the request to the DIA to obtain an area of 3,000 acres for the creation of a reserve at Opitciwan (JBD, at tab 116).

[74] On October 19, 1912, Mr. Girard, the DLF's Director of Surveys, asked the Minister whether he would consent to granting a tract of 3,000 acres for a reserve at Opitciwan and, if yes, whether it would be necessary to authorize by a legislative act the concession of 2,419 acres, representing the difference between the 3,000 acres sought and the 581 unused acres from the area already established by the 1851 Act, or whether an order in council would suffice (JBD, at tab 117).

[75] On October 22, 1912, Mr. Stewart of the DIA wrote to Mr. Wilson in response to his letter of October 7, 1912. He told him that an effort would be made to obtain a reserve of about 3,000 acres for those Atikamekw wishing to settle in Opitciwan (JBD, at tab 118).

4. Quebec's response to the application for the creation of a reserve in Opitciwan

[76] On November 4, 1912, Deputy Minister Dechêne of the DLF replied to the letter dated October 15, 1912, from Mr. Stewart of the DIA. He informed him that the DIA's request could not be considered for the moment because the Government of Quebec was studying the possibility of building a dam at the outlet of Lake Opitciwan, which it planned to use for water storage (JBD, at tab 119).

[77] On November 23, 1912, Mr. McLean of the DIA took note of the Government of Quebec's position regarding the creation of a reserve at Opitciwan, and concluded his letter as follows:

> I shall be obliged if you will be good enough to note the application for consideration at a future convenient date. [JBD, at tab 122]

D. The proposed dam and its authorization by the federal government

[78] A few years earlier, on June 4, 1910, *An Act to authorize the appointment of a commission to submit rules for the management of running waters*, SQ 1910, c 5 (the "QSCA"), was assented to. That statute created the Commission for the Management of Running Waters in Quebec (also known as the Quebec Streams Commission (the "QSC")) and placed it under the responsibility of Quebec's Minister of Lands and Forests.

[79] The QSC's first annual report, dated November 14, 1912, reported its intention to build a dam on the Saint-Maurice River, and estimated the elevation of the high water level of the dam at full capacity to be 1,324 feet. A map is attached indicating the extent of the body of water constituted by the planned reservoir dam. The map also indicates that summary levels were taken, that possible locations for the dam were noted and that high water marks were measured with water gauges in various locations, including Opitciwan. It defines the area of water that would be affected by the establishment of the dam (JBD, at tab 120).

[80] The report also states that the old HBC post at Kikendatch and the current post at Opitciwan were [TRANSLATION] "above the water line". The QSC estimated the value of the five

old HBC buildings at Kikendatch to be affected by the flooding at $1,000, that of the old HBC post at Opitciwan at $800 and that of the new store in Opitciwan at $2,000. It indicates that the store could be moved back a few hundred feet, as shown on the map, or that a new location could be selected. It therefore estimates the actual damage caused to the HBC at about $1,000. There is no mention of the existence of the Atikamekw.

[81] The QSCA was amended in December 1912 to enable the provincial government to authorize the QSC to establish reservoir dams on the Saint-Maurice River to regulate its flow, [TRANSLATION] "subject to the jurisdiction of the Parliament of Canada over navigable rivers".

[82] On April 17, 1913, Mr. Wilson of the HBC explained to Mr. McLean of the DIA that the Atikamekw of Opitciwan had requested that he contact the DIA about the creation of the reserve before they began building and planting, which they intended to do the following summer (JBD, at tab 127).

[83] A few weeks later, on May 2, 1913, Mr. Stewart of the DIA replied to Mr. Wilson that the Government of Quebec was planning to build a dam at the outlet of Lake Opitciwan and that a reserve on the lake shore could therefore not be considered at that time. He added that "[t]he attention of the Provincial Government has again been brought to the matter" (JBD, at tab 128).

[84] Despite everything, on July 8, 1913, Deputy Minister Dechêne of the DLF wrote to Assistant Secretary Stewart of the DIA that he did not have the necessary information to enable the DLF to make a decision about the issue of the lands requested for a reserve in Opitciwan (JBD, at tab 129).

[85] Time passed, and in its annual report of March 31, 1914, the DIA indicated that the Kikendatch Band had a population of 168, the Coucoucache Band a population of 19 and the Wemotaci Band a population of 79 (JBD, at tab 134).

[86] On May 7, 1914, Father Guinard was authorized by the Bishop of Haileybury to build a chapel and sacristy at Opitciwan and to choose the location of the cemetery (JBD, at tab 136).

[87] A delegation of Atikamekw then travelled to Ottawa to reiterate the band's request for a reserve at Opitciwan (JBD, at tab 147).

[88] On November 4, 1914, in Order in Council No. P.C. 1432, the Governor in Council authorized the plans for and construction of the La Loutre dam on the following condition: "That the Commission [QSC], or its successors or assigns, shall assume all responsibility for any damage whatsoever, which may be caused by the Commission's works or actions in connection with the construction of the said dam" ("Condition No. 7") (JBD, at tab 145).

E. Survey by W.R. White in 1914

[89] A short time earlier, under the oral instructions from DIA Superintendent Duncan C. Scott, DIA surveyor W.R. White was sent to Opitciwan from August 28 to September 6, 1914, to survey the premises occupied and desired by the Atikamekw for the purposes of establishing a reserve (JBD, at tab 146).

[90] A few months later, on December 5, 1914, Mr. White reported to Mr. McLean of the DIA about the selection and survey of the lands and explained the difficulties created by bad weather and the late shipment of his instruments (JBD, at tab 146).

[91] Mr. White's report mentioned that the reserve was situated on the northern shore of Lake Opitciwan and that it contained 2,247 acres on the mainland plus 43 acres on Big Obiduan Island, which the Indians had asked for on account of the wood found there and its relative invulnerability to forest fires. He specified that the total area surveyed was 2,290 acres. Referring to an attached list of families prepared by Chief Awashish and translated by Mr. Webster, an HBC clerk, Mr. White stated that there were 163 members of that band residing in Opitciwan. Finally, beneath his signature there appears a handwritten statement, followed by his initials, which reads as follows: "The Indians were advised at the time of the survey that they should build their houses on high land as I had heard that the water might be raised as much as twelve feet".

[92] A few days later, on December 10, 1914, Mr. McLean wrote to Deputy Minister Dechêne of the DLF. He explained, ". . . I beg to say that in response to the urgent request of the Chief

and principal members of the Band of Indians settled at Obiduan Lake, Quebec, who sent a deputation here, a surveyor was sent from this Department to select and survey a suitable reserve for that band". After explaining the work conducted by Mr. White and the difficulties encountered, he added: "It is urgently requested that your Government be good enough to have these lands granted as an Indian Reserve and transferred to the Crown, as represented by the Superintendent General of Indian Affairs, to be held in trust for these Indians". Finally, he stated that a certified copy of Mr. White's original survey plan was being sent to the DLF under separate cover (JBD, at tab 147).

[93] On December 28, 1914, Deputy Minister Dechêne of the DLF responded, reiterating that he could not yet approve the application for lands for a reserve at Opitciwan on account of the high probability that all of the territory surrounding the lake would be flooded following the construction of the dam. He also stated that only 581 acres remained to be distributed to the Indian bands and that the DLF was unwilling to grant more within the provincial limits, as they appeared prior to the annexation of Ungava (JBD, at tab 149).

[94] However, he added, if his predecessor's suggestion from March 16, 1910, regarding the surrender of the Wemotaci and Coucoucache Reserves in exchange for the creation of two reserves of equivalent area were acceptable to the DIA, he would be prepared to provide the remaining 581 acres still available in addition.

[95] He concluded his letter by noting that the reserve plan had been prepared by a Dominion land surveyor and that true bearings had not been provided. He specified that under Quebec law, the DLF could accept only plans prepared by surveyors certified for Quebec and that it was necessary for astronomical bearings to be provided. He added that, in any case, no survey should be carried out until after the rendering of a decision in the matter.

[96] In response, on January 13, 1915, Mr. McLean informed Deputy Minister Dechêne of the DLF that the parcel of land at Opitciwan, a plan of which had been sent to the DLF, ". . . is desired by this Department, in order that no other disposition be made of it". He added that once the planned dam was built and the extent of the flooding was known, it could be determined

whether that parcel would be useful as an Indian reserve. If so, ". . . application will be renewed with the view of obtaining the lands on such terms as may be agreed upon" (JBD, at tab 150).

[97] That said, on May 28, 1925, in a report addressed to the Deputy Minister of the DIA, Surveyor General Robertson of the DIA wrote that in 1914, Mr. White travelled to Opitciwan to survey the reserve, but that upon his arrival, he discovered that the public utility companies were in the process of raising the water level of the lakes. Lacking sufficient information to determine how much of the lakeshore would be affected by the rising water levels,

> [Mr. White], therefore, laid out land boundaries on compass bearings, of a parcel which would be sufficient to cover the principal area occupied by the Indians, in order to protect merely their most important interests. [Emphasis added; JBD, at tab 251]

[98] Mr. Robertson added that an application had been made to the province for a reserve on that location, but that because of the companies' activities at the time, he did not believe that a reserve had been granted yet. As far as the DIA was concerned, he continued, he did not believe there would be any objection to having the HBC erect its buildings near those of the Indian village, given that it would probably be beneficial to the Atikamekw of Opitciwan, on the condition that a majority of the Indians consented.

[99] Finally, in 1915, the Atikamekw of Kikendatch were all resettled in Opitciwan. They built a chapel there in 1916. The village was built north of the strait of Lake Opitciwan, which separated it by about 800 feet from the HBC post built on the strait's southern shore. Opitciwan was located 60 miles upstream from the proposed dam.

F. The impoundment of the Gouin reservoir and the resulting damage

1. Concerns over the dam

[100] The construction of the dam was completed in 1917, and the impoundment began in 1918.

[101] On July 24, 1917, Commissioner Bacon of the HBC told the DIA that Chief Awashish of Opitciwan wished to draw his attention to the fact that when the gates of the La Loutre dam

(Gouin dam) were closed, it was highly likely that the Opitciwan Indian Reserve would be flooded. Mr. Bacon supposed that it would be necessary to choose another site for the reserve and asked that inquiries be made about the possibility, for the site of the HBC post depended on it (JBD, at tab 169).

[102] A few days later, Mr. Bacon wrote to Quebec's Minister of Public Works to obtain assurances that the Government of Quebec would be covering the cost to the HBC of moving its buildings to Opitciwan (JBD, at tab 170).

[103] The next day, July 28, 1917, Mr. McLean replied that the DIA did not know to what extent the flooding of the lands following the construction of the dam would affect the Indians at Opitciwan, and that nothing had yet been done to acquire another site. He added that it was unlikely that any steps would be taken to do so, unless the Indians discovered that their hunting and fishing activities had been negatively affected by the rising waters (JBD, at tab 171).

[104] On August 9, 1917, the president of the QSC, to whom Mr. Bacon's letter of July 24, 1917, had been forwarded, wrote to Deputy Minister Dechêne of the DLF to alert him to the fact that in the first QSC report [TRANSLATION] "it was mentioned that the buildings at Kikendatch and Obijuan would be flooded" (JBD, at tab 172). Also, on November 16, 1917, the Chair of the QSC wrote to Mr. Bacon of the HBC to confirm that the HBC buildings at Opitciwan would be flooded, that they should be moved and that moving costs would be covered by the QSC if he submitted his claim to them (JBD, at tab 173).

[105] In the spring of 1918, the filling of the reservoir began and, following the impoundment, Kikendatch was completely flooded and the village of Opitciwan was partly flooded. According to the DLF, 542 acres of the 2,290 acres of the reserve surveyed by Mr. White were flooded (JBD, at tab 416, at p 24).

[106] Following the flooding that occurred in the spring of 1918, the Atikamekw of Opitciwan moved to occupy the village in its current site (Exhibit D-4, at p 19).

[107] On June 21, 1918, the QSC's Chief Engineer wrote to the HBC to inform it that the QSC did not know how high the waters would rise and that it would be more prudent for the HBC to

move its Opitciwan buildings. The QSC did specify that Father Guinard's chapel was "above the high water mark" (JBD, at tab 178).

[108] Following the flood, the HBC submitted a claim of $1,500 to cover the cost of moving its Opitciwan properties. It made no claim for its old buildings at Kikendatch. A week later, the claim was accepted by the QSC (JBD, at tab 175).

[109] In its seventh annual report dated December 31, 1918, the QSC indicated that the construction of the La Loutre dam (Gouin dam) had been completed in December of 1917 and that the water impounded by the dam would flood an area of 95 square miles. The report specified that the Kikendatch post had been completely flooded, that the buildings of the HBC's post at Opitciwan would have to be moved half a mile to avoid being flooded and that a few houses would be flooded once the reservoir was full. The report also mentioned that the HBC and the QSC had made arrangements whereby the latter would pay the HBC $1,500 for the damage caused (JBD, at tab 182).

[110] Negotiations with the Atikamekw of Opitciwan were considerably more laborious.

2. The claims, proposal and agreement

(a) The 1919 report by the QSC

[111] The village of Opitciwan was flooded in 1919 and 1920, and in the QSC's own view, it then became [TRANSLATION] "practically impossible . . . to remain in that location" (JBD, at tab 195).

[112] On July 9, 1919, before the water in the reservoir had reached its maximum level, and therefore before the full extent of the damage could be measured, a QSC representative travelled to Opitciwan and met with Father Guinard about the compensation claimed by the Atikamekw of Opitciwan. On July 15, 1919, he described his visit in a report to Chief Engineer Lefebvre of the QSC. The report included a list of claims for compensation. The list included 28 houses in Opitciwan, claimed by 20 families; some movable property; and 6 hunting camps on the territory, claimed by 3 families, namely, those claimed [TRANSLATION] "by a few Indians who

claim to have had their hunting camps flooded outside the village of Obidjuan" (JBD, at tab 183).

[113] The QSC employee also wrote that the Atikamekw had already chosen the site where the village should be reconstructed, three-quarters of a mile to the northwest of the former site. He wrote that all but three of the Atikamekw had consented, on the advice of Father Guinard, to having the QSC, rather than compensate them financially, build for each of them a house of the same size as the one they had had before, on the condition that these houses be weatherproof. He added that [TRANSLATION] "the Indians raised an issue of great importance to them: the transfer of the remains of their dead to another location; they do not wish to be responsible for the exhumation, but they are preparing the new site themselves."

[114] He added that the negotiations would take place in English with Chief Awashish, care of Mr. Mowatt, an HBC clerk.

[115] Regarding the chapel and rectory, the report indicated that Father Guinard could not make a decision without first writing to the bishop of his diocese to ask what he must do. He suggested that the QSC write to him first to ask him what compensation he was claiming.

[116] On March 12, 1920, Father Guinard informed the Provincial Reverend Father of the Oblates in Montréal that the Opitciwan mission and cemetery would be flooded by the raising of the water levels. He prepared a list of claims to be settled as quickly as possible with the QSC, in particular, the clearing of a new cemetery and transfer of the bodies, the construction of a new chapel and the digging of wells, given that [TRANSLATION] "the water has become foul" (JBD, at tab 184).

(b) The QSC's compensation proposal

[117] On May 1, 1920, in an internal memorandum sent to the DIA's surveying section, Superintendent McLean stated that Mr. Lefebvre, the QSC's Chief Engineer, had informed him that very day that the level of Lake Opitciwan had been raised about 28 feet, with the result that "the portion of the reserve occupied by the Indians has been flooded". The memorandum noted that the Atikamekw of Opitciwan would have preferred monetary compensation but that

they had apparently agreed to have the QSC build houses on another part of the reserve. Mr. McLean explained that, according to Mr. Lefebvre, Father Guinard agreed with that solution, and that the QSC wished to know as soon as possible whether the DIA was satisfied with this arrangement (JBD, at tab 185).

[118] On May 7, 1920, Mr. Lefebvre of the QSC wrote to Mr. McLean of the DIA to summarize their conversation during their meeting at the DIA office. Mr. Lefebvre confirmed that "[t]he surface of lake Obidjuan, 75 miles above the dam shall be ultimately raised 28 feet (above low water)". He indicated that each building in the village had been inspected; the owner's name, dimensions and type of construction had been noted; and the information could be found in Plan B-847 attached to his letter (JBD, at tab 186). The solicitors of record were unable to find the plan, which seems to have disappeared.

[119] Mr. Lefebvre summarized the measures proposed by the QSC to settle the claims of the Atikamekw, which were to provide each Indian family of Opitciwan with a house as solid and as comfortable as the one it had before the waters had been raised, ". . . to be located within the reserve, at a point above the raised water surface and about ¾ mile from the present village". He added that the chapel, cemetery and a few houses would not be flooded, since an island would be formed, and that the QSC would replace the chapel and other buildings but should not be made to transfer bodies to the new cemetery. There were 63 bodies, mostly those of children.

[120] Regarding drinking water, Mr. Lefebvre wrote the following:

> DRINKING WATER- The Indians claim that prior to the storage being carried out, they drew their water supply from the lake, both for drinking and cooking purposes. Since the water has been raised and a large area of swamps and forests is flooded, it is claimed that the water is foul and can be used only after being filtered through the sandy banks. If the above contention be proved to be right, the Commission will have wells excavated for the use of the settlement. [JBD, at tab 186]

[121] Finally, Mr. Lefebvre indicated that Father Guinard was in agreement with the QSC's plans and asked the DIA whether it approved this approach for settling the issue.

[122] On May 10, 1920, in an internal memorandum, Surveyor General Robertson of the DIA noted that Mr. White, who had selected the lands for the purpose of a survey of the reserve, was

of the view that the new site selected should be as suitable as the original site, ". . . unless the water becomes dirty or swampy on account of the higher level of the water". Before approving the QSC's proposal, Mr. Robertson recommended writing to the HBC's district manager in Wemotaci ". . . with a view to finding out if these conditions would be acceptable to the Indians or if the Indians, as was stated last Fall, would prefer to change their location to some more distant point" (JBD, at tab 187).

[123] On May 12, 1920, Mr. McLean of the DIA informed Mr. Lefebvre of the QSC that the DIA would communicate ". . . with the Indians of Lake Obiduan and hope[d] to be able to state the attitude of the Department at an early date" (emphasis added; JBD, at tab 188). The same day, May 12, 1920, Mr. Lefebvre informed Mr. McLean that the QSC Chair had authorized him to say that the QSC would recommend to the Government of Quebec that the flooded lands on the Opitciwan Reserve be replaced by enlarging the reserve by an equivalent area (JBD, at tab 189).

[124] On May 18, 1920, Mr. McLean of the DIA responded to Chief Engineer Lefebvre of the QSC that this arrangement appeared to be quite satisfactory (JBD, at tab 190).

(c) The Agreement of July 2, 1920

[125] On July 2, 1920, handwritten minutes, in French, of a meeting [TRANSLATION] "of the principal residents and stakeholders at the Indian post of Lake Obidjuan" reported that it had been agreed that the signatories would be satisfied if the QSC were to compensate them as follows (JBD, at tab 192):

(a) The new village would be situated three-quarters of a mile from the present site and would be chosen by the Indians.

(b) The QSC would provide enough dry wood, nails and paper in the summer of 1921 to enable the Indians to have houses of the same size as their former houses.

(c) The QSC would provide three carpenters with tools to assist the Indians.

(d) The Indians would build their houses themselves, and the QSC would pay them each $120 to cover the time spent on building, clearing and moving.

(e) The Indians could keep their houses at the flooded site, without prejudice to the QSC's right to flood them.

[126] This was followed by the signatures of 13 Atikamekw in their own language, and the counter-signature of three [TRANSLATION] "witnesses", including Father Guinard, Chief Engineer Lefebvre of the QSC and Engineer Normandin of the DLF (some of the signatures are difficult to decipher, but 13 signatures can be deciphered, which Mr. Garneau also acknowledges at page 56 of his opposing expert opinion dated October 2013 (Exhibit D-4)).

[127] On July 7, 1920, Mr. Lefebvre of the QSC reported to his Chair about the meeting held on July 2, the purpose of which was to reach an agreement with the owners of the houses flooded by the Gouin reservoir. He explained that he had arrived in Opitciwan on the evening of July 1, that he had met with Father Guinard right away, that the principal residents had met the following day and that they [TRANSLATION] "had submitted the conditions they would consider satisfactory to compensate for the harm caused to them". Mr. Lefebvre reported on the five conditions listed in the minutes of the meeting of July 2 and recommended that they be approved by the QSC (JBD, at tab 194).

[128] In 1921, in its ninth annual report, the QSC noted that the level of Lake Opitciwan had risen about 28 feet and indicated that it had paid $1,500 to the HBC to have its buildings moved to higher ground. The report stated that the chapel would have to be moved, but not the cemetery, that a few of the houses in the Indian village of Opitciwan had been flooded and that most of the others were about to be. According to the QSC, it was practically impossible for the residents to remain in that location (JBD, at tab 195).

[129] With respect to the meeting held on July 2, 1920, in Opitciwan, the QSC report stated the following:

[TRANSLATION]

> Following the negotiations with the Rev. Fr. Guinard . . . and the Federal Department of Indian Affairs, an arrangement was made with the Indians on July 1 [*sic*], according to which the Commission would provide each owner with sufficient wood to build a house of the same dimensions as the house he was obliged to abandon. Each owner will build his own house. The Commission, however, will pay each an amount of $120 to compensate this labour. [Emphasis added; JBD, at tab 195]

3. The application by the Atikamekw to rescind the Agreement of July 2, 1920

[130] The following year, in the summer of 1921, the Atikamekw of Opitciwan had yet to receive the building materials and money that the QSC had undertaken to provide to them.

[131] On August 4, 1921, in a petition addressed to the Minister of the DIA, about thirty Atikamekw of Opitciwan, including Chief Awashish, identifying themselves as "we, all Indians of Obidjuan" asked that the Agreement of July 2, 1920, which they call a "species of contract", be rescinded ("request [illegible] expect that this 'contract' be broken without delay and another made which will be more advantageous to us and having all necessary conditions"). Among their complaints was the fact that the QSC had failed to honour the agreement in which they had undertaken to provide wood, paper and nails and pay them $120. They submitted that the agreement was invalid because, among other reasons (JBD, at tab 197):

(a) It was not made before a notary.

(b) They had no copy of the contract.

(c) They were minors and dependent on the DIA.

(d) The QSC had yet to send materials or carpenters.

(e) They had not been recompensed enough compared to the HBC and "because we are poor and Indians are being left to suffer".

(f) They had been "badly fooled".

(g) They were getting neither doors nor windows, things which are necessary to all human habitations.

[132] The DIA did not acquiesce to this demand. To the contrary, on August 16, 1921, the DIA informed Chief Awashish of Opitciwan that the QSC had been ordered to honour the agreement without further delay (JBD, at tab 198).

4. The delays in performance of the Agreement of July 2, 1920

[133] In 1922, in its tenth annual report, the QSC wrote that the Indian village of Opitciwan had been almost entirely flooded once the reservoir was full. The report recalled that in 1920, an agreement had been reached with the Indians, according to which the QSC had undertaken to provide the necessary wood for building houses. The QSC noted that the wood had been purchased and was supposed to have been shipped in June, but was instead shipped in part in late July, and that the rest would be shipped in October (JBD, at tab 212). Because the Atikamekw had left their village in early September, the materials arrived long after their departure for their hunting grounds (Exhibit D-4, at p 59).

[134] On April 10, 1922, Father Guinard sent a new letter to Mr. McLean, Assistant Deputy Minister of the DIA, on behalf of the Atikamekw of Opitciwan, specifying their complaints. He wrote the following:

> Besides the clauses of the contract between the Department of Indian Affairs and the Québec Stream Commission the Indians of Obedjiwan ask:
>
> 1° that their houses be not shanties but real houses;
>
> 2° that the smallest be at last [*sic*] 18 feet by 15;
>
> 3° that each house have at least 3 windows and one door;
>
> 4° that those windows and doors have frames, glasses and hinges;
>
> 5° that they be painted white and properly cemented with putty. [JBD, at tab 202]

[135] Father Guinard added that the demands of the Atikamekw of Opitciwan were reasonable and that, in his opinion, they were asking for very little, because

> 1° they are forced to quit a place were [*sic*] there was [*sic*] no flies;

2° they have no water that they can drink;

3° they are two miles further away from the store of the H.B.Co.;

4° they were left for two seasons on damp ground;

5° the La Loutre dam has flooded a very large part of their hunting grounds;

6° they have to cut down the wood to prepare a site for their new village, to dig wells..... [JBD, at tab 202]

[136] On June 7, 1922, Chief Engineer Lefebvre of the QSC noted in a report that following an interview he had had with Father Guinard and a meeting between Father Guinard and the Chair of the QSC about the reconstruction of the Indian village of Opitciwan, it was agreed that the QSC would provide the Atikamekw of Opitciwan with the materials necessary for the houses to be no smaller than 18' x 15', about 32 3' x 2.5' frames and 22 doors of about 6.5' x 3', and quality protective paper to replace what had been damaged (JBD, at tab 205).

[137] On July 11, 1922, Father Guinard wrote to the Chair of the QSC to inform him that no wood or rolls of paper had arrived in Opitciwan yet, that a single worker was present despite the QSC's undertaking to send three, that the houses were not solidly built, and that they were still drinking foul water despite the fact that two wells were supposed to be dug (JBD, at tab 206).

[138] On July 19, 1922, Mr. Lefebvre of the QSC contradicted Father Guinard's claims, stating that 132,000 feet of wood and other materials had been shipped the previous year. According to Mr. Lefebvre, the rebuilt houses were of better quality than those inhabited by the Atikamekw of Opitciwan before. He concluded that the QSC had no intention of bending to the whims of the Indians and that it would appeal to the DIA if necessary. He also concluded that the QSC would not make any further concessions because it was of the view that the demands were excessive (JBD, at tab 208).

[139] On September 25, 1922, Mr. DeLair, an HBC employee, wrote to the Chair of the QSC on behalf of Chief Awashish and the Atikamekw of Opitciwan to inform him that the construction of all but one or two of the houses in the new village was incomplete. Mr. DeLair listed the claims of the Atikamekw of Opitciwan regarding the problems with the houses' construction, the wells and the money promised for their labour. He added that their houses were

uninhabitable in the winter. He wrote that the Atikamekw were also seeking compensation for their flooded hunting grounds and for two houses in the village that had been omitted. To these were added the names of six Atikamekw claiming compensation for houses, camps and other damaged property. This letter was also sent to the DIA (JBD, at tab 214).

[140] On November 22, 1922, Mr. Lefebvre of the QSC explained to Mr. DeLair of the HBC that the work, which was to start in 1921, could not start until 1922 because of the delays in shipping the materials. He listed the materials shipped to Opitciwan for the construction of the new houses and stated that the QSC had sent three carpenters to assist the Indians. He added that the new houses were better than those that the Atikamekw of Opitciwan had previously (JBD, at tab 215).

[141] Mr. Lefebvre also stated that the claim for the new houses was unfounded and that the QSC was unaware of the claims for certain hunting camps flooded by the dam, and that before any payment could be provided for that, the sites of the camps and their mode of construction would have to be established to allow for an evaluation. Finally, in his view, the QSC had done everything possible to satisfy the Atikamekw and it would have succeeded "if some outside party had not advised them that they should demand this and demand that".

[142] On November 29, 1922, Mr. McLean of the DIA pressed Mr. Lefebvre of the QSC to provide the DIA with detailed information about each complaint or claim of the Atikamekw of Opitciwan. He added that he would have thought, given the assurances provided by Mr. Lefebvre at the beginning of the previous summer, that the work would have been completed in a satisfactory manner before the winter (JBD, at tab 216).

[143] The next day, on November 30, Mr. Lefebvre of the QSC explained to Mr. McLean of the DIA that the agreement had been that the Atikamekw would use the doors and windows of their old houses, but that when the QSC noted that some of them were in very poor condition, it sent 32 windows and 22 doors with hinges, despite the fact that it was under no obligation to do so. The QSC, he said, maintained five men in Opitciwan in 1922, including three carpenters. According to Mr. Lefebvre, the Atikamekw demanded that their houses be finished impeccably and some did not follow the carpenters' instructions and wasted the materials (JBD, at tab 217).

[144] As for the chapel, Mr. Lefebvre added, the QSC agreed to build one that was much larger than the original, complying with all of the missionary's demands. As for the wells, the QSC tried to dig some, but did not think it would be possible due to the nature of the soil. However, the QSC would try again. Finally, it was the Atikamekw of Opitciwan themselves who had determined the value of $120 for the compensation. Mr. Lefebvre concluded by asking the Deputy Minister to send an inspector to Opitciwan to assess the situation.

[145] On December 12, 1922, Mr. McLean of the DIA informed Mr. DeLair of the HBC that the matter had been referred to the QSC and that the DIA would send a government official early the following summer to assess the situation with regard to the rebuilding of houses in Opitciwan (JBD, at tab 218).

[146] In 1923, in its eleventh annual report, the QSC recalled that most of the village of Opitciwan became flooded once the reservoir was filled. The report mentioned that part of the wood for the reconstruction of the village had been shipped in 1921 and that the rest had been delivered early the previous summer. The report indicated that three QSC carpenters had assisted the Atikamekw with their labour from June 1 to October 15, that several houses had been completed and that the construction of the chapel was quite far along. The QSC admitted that it had hoped to complete the work that year, but that transportation difficulties had made it impossible and that there remained a month's worth of work to be done (JBD, at tab 219).

[147] On July 27, 1923, Mr. McLean of the DIA informed Mr. Lefebvre of the QSC that a DIA agent had inspected the houses of the Atikamekw of Opitciwan and concluded that they were uninhabitable during the cold seasons because the wood sent for their construction was not dry. Mr. McLean stated that the Atikamekw had suffered serious inconvenience over the previous five years and demanded that the QSC give the DIA assurances that measures would be taken immediately to provide them with inhabitable houses by the following winter (JBD, at tab 222).

[148] On July 31, 1923, a letter signed by Chief Awashish and several of the Atikamekw of Opitciwan was sent by the Chief to the DIA. They complained that it was late July and that they were still missing several materials to complete the construction of their houses. They asked the

DIA to take steps to ensure that the construction of their houses would be finished by the fall (JBD, at tab 223).

[149] On August 14, 1923, the QSC replied to the letter of July 27 and informed the DIA that it would immediately send "sufficient dry matched lumber so that an inner wall can be put into the buildings not already so constructed" (JBD, at tab 224).

[150] After communicating several times with the QSC, including some letters that remained unanswered, in despair over the QSC's failure to honour its obligations, on May 9, 1924, Father Guinard wrote to Premier Taschereau of Quebec to complain. He recalled that in July 1920, the QSC had undertaken to rebuild the lodgings of the Atikamekw, on certain conditions, which was to be done the following spring, but which had not been done. Moreover, the construction of the chapel was still unfinished. He wrote:

> [TRANSLATION]
>
> When, in 1922, I urged the Commission to rebuild the chapel, it was not a mere caprice; I had grave reasons to do so. We had housed the mission in the former chapel that, because of the flooding, was in a totally insalubrious location: we all became ill, and four people died during that mission. Last year, fearing a new epidemic, I advised the Indians to remain in the new village and to travel to the former village for religious exercises only.
>
> And now for the past two years there has been no mission in winter, <u>because the Indian houses are uninhabitable during that season</u>.
>
> . . .
>
> <u>Wells were supposed to have been dug, and these have not yet been commenced, or at least not as of mid-September</u>.
>
> Some of the Indians, between Obedjiwan and the La Loutre dam, have suffered <u>losses</u> that for them were <u>considerable</u>, and they have not been compensated.
>
> . . .
>
> . . . the Quebec Streams Commission has been making me suffer long enough, and continues to allow the suffering of the impoverished Indians of Obedjiwan. [Emphasis added; JBD, at tab 232]

[151] Further exchanges followed between the representatives of the Province of Quebec, the QSC and Father Guinard. In its accounts of the situation, the QSC maintains that it honoured its obligations, blaming delays on factors outside of its control, including difficulties with communications and the remoteness of the Opitciwan post.

[152] In 1924, in its twelfth annual report, the QSC stated that the reconstruction of the Indian village at Opitciwan, begun in 1922 and continued in 1923, was still not finished, and that several weeks' worth of work remained to be done (JBD, at tab 225).

[153] In 1925, in its thirteenth annual report, the QSC stated that the reconstruction work at the Opitciwan post, started in 1922, was completed in the summer of 1924. It explained that the work had been slowed down by the difficulty in finding workers who would agree to travel to that location. According to the QSC, the cost of rebuilding the post as of the fall of 1924 was $22,323.50. Finally, the report mentioned that the financial compensation owed to each owner of a reconstructed house, as determined by the Agreement of July 1920, had yet to be paid out (JBD, at tab 240).

[154] On January 5, 1925, the HBC wrote on behalf of Chief Awashish to the QSC. He wrote that the QSC had promised Chief Awashish that it would pay to replace his flooded camp on the territory near the reserve if he built a new one. Instead of rebuilding his camp, he erected a warehouse for himself and his son on the reserve. Chief Awashish asked whether the QSC would agree to pay him $120, which he would consider compensation for his camp (JBD, at tab 241).

[155] On January 9, 1925, the QSC informed the HBC officer that it considered the amount of $120 too high, but that it agreed to pay Chief Awashish $60 (JBD, at tab 242).

[156] On February 18, 1925, the QSC wrote to Father Guinard that it had to pay $120 to the Atikamekw and wanted to know whether it should write a cheque to each of them (JBD, at tab 243).

[157] On August 7, 1925, Secretary MacKenzie of the DIA wrote to Chief Engineer Lefebvre of the QSC about the two wells promised by the QSC in its letter of April 29, 1922. He noted that Chief Awashish of Opitciwan had told the DIA that there was still no water supply.

Mr. MacKenzie added that this was the cause of much inconvenience to the Indians and that he wished to be informed of the steps taken by the QSC to rectify the situation (JBD, at tab 258).

[158] In September 1925, the new village was inaugurated.

5. Payment from the QSC to the Atikamekw

[159] In the same month, 20 heads of family received a payment of $120, from which an amount representing the cost of purchased paint had been deducted. The payment was delivered to the Atikamekw of Opitciwan by Father Guinard on behalf of the QSC. The lists specifying the amount paid to each also contained claims for materials that had been purchased or paid for but not received, for the loss of camps, furniture or equipment on the territory and for materials that had not been provided (JBD, at tab 262).

G. Renewed interest from the DIA in 1927 and the Province of Quebec in 1930

[160] On November 5, 1927, Inspector Parker of the DIA informed Superintendent Scott of the DIA that the DIA's failure to monitor the Opitciwan Reserve had recently become embarrassing because of the new traders setting up there (JBD, at tab 272). On November 11, 1927, Mr. McLean of the DIA told Deputy Minister Lemieux of the DLF that "[t]his Department is most anxious to" obtain a reserve of about 2,290 acres for the Atikamekw of Opitciwan. Mr. McLean reminded him that on May 12, 1920, the QSC had told the DIA that it would recommend that the Government of Quebec replace the flooded area of the reserve with an area of equal size. He concluded by stating that "[i]t is now desired to have this area surveyed and confirmed a [*sic*] an Indian Reserve" (JBD, at tab 273).

[161] This was followed by a request from Deputy Minister Lemieux of the DLF to the QSC to obtain any available information about the Opitciwan Indian Reserve (JBD, at tab 274). On November 21, 1927, Mr. Lefebvre of the QSC confirmed to Deputy Minister Lemieux that the information provided by the Assistant Superintendent of the DIA was accurate. He specified that in 1920, the QSC had made a commitment to the DIA that it would recommend to the DLF that the flooded area at the front of the planned reserve be replaced by an equivalent area at the back

of the reserve, but that the QSC had not heard anything about the boundaries of the reserve since that letter (JBD, at tab 275).

[162] This revival of interest did not result in any immediate action.

[163] Almost two years later, on August 14, 1929, Mr. Lefebvre of the QSC informed Deputy Minister Lemieux of the DLF that during a recent visit to Opitciwan, Chief Awashish had questioned him about the boundaries of the reserve. Mr. Lefebvre wished to know whether a decision had been reached or an agreement struck between the DLF and the DIA on this point (JBD, at tab 282).

[164] On January 31, 1930, in response to a letter dated January 25, 1930, from the Deputy Minister of the DLF, the Acting Assistant Deputy Minister of the DIA, Mr. MacKenzie, wrote to the DLF:

> It is desirable to consult the Indians before definitely selecting the lands <u>to be added</u> to the reserve. [Emphasis added; JBD, at tab 284]

[165] Mr. MacKenzie added that if the DLF agreed, the DIA would send one of its surveyors to meet with the Atikamekw of Opitciwan and select a reserve with an area of 2,270 acres that included their residences. He noted that the area of the former reserve that was still above the water level of 1,325 feet was 1,728 acres, to which 542 acres would need to be added to reach the original area of 2,270 acres (it was actually 2,290 acres).

[166] In the meantime, on February 7, 1930, Mr. Lefebvre of the QSC informed Deputy Minister Lemieux of the DLF of the fact that the HBC had established its post at Opitciwan in the Indian village and that during his visit to Opitciwan in August 1929, Chief Awashish asked him what rights the HBC had on the land it was occupying. In Mr. Lefebvre's view, there was no doubt that the Atikamekw did not look favourably upon the establishment of the HBC near their village, but he concluded that it was the only convenient and nearby location (JBD, at tab 285).

[167] On February 10, 1930, Deputy Minister Lemieux of the DLF replied to the letter of January 31 from Acting Assistant Deputy Minister MacKenzie of the DIA and informed him that

he was suspending the file while the DIA consulted the Atikamekw of Opitciwan (JBD, at tab 303).

[168] A few days later, on February 12, 1930, Mr. Lemieux forwarded to Deputy Minister MacKenzie of the DIA the letter dated February 7, 1930, from Mr. Lefebvre of the QSC and noted that, according to the DLF's land registry information, no title had been granted to the HBC for the lands mentioned in Mr. Lefebvre's letter (JBD, at tab 286).

[169] On May 19, 1930, Surveyor General Robertson of the DIA asked Mr. White to conduct the survey of the Opitciwan Reserve taking into account the location of the new village. He recommended that the latter be accompanied by a surveyor licensed by Quebec so that the boundaries of the selected lands could be established to the provincial government's satisfaction (JBD, at tab 288).

[170] On September 8, 1930, Surveyor General Robertson of the DIA noted in an internal memorandum that it would be preferable to put off until the beginning of the following season the surveying work that needed to be conducted in Opitciwan. He stated that Inspector Parker should, when visiting the reserve the following winter, set a specific date with the Atikamekw so that they could meet with the DIA surveyor the following year (JBD, at tab 289).

[171] That survey was never conducted. No document has been found indicating the reasons for this.

H. Inquiries from the Atikamekw, discussions about the selection of reserve lands and putting the file on hold pending consultation with the Indians

[172] On March 31, 1934, in its annual report, the DIA published its census results showing a population of 226 individuals in Opitciwan, 167 individuals at Manawan and 145 individuals at Wemotaci (JBD, at tab 294).

[173] On May 15, 1937, Chief Paul Meguish of Opitciwan asked the DIA for a copy of the survey plans for the Opitciwan Reserve, since none had been provided to them after the village was relocated (JBD, at tab 302).

[174] On June 3, 1937, in a memorandum addressed to Superintendent Parker of the DIA, Mr. Nash, a surveyor, on behalf of Surveyor General White, described the situation with respect to the Opitciwan Reserve. He recalled that in 1930, following a proposal from the federal government to select 542 additional acres, the Deputy Minister of the DLF informed the DIA that he would be putting the file on hold pending the DIA's consultation of the Atikamekw of Opitciwan. Noting that the consultation did not take place and that the file was still on hold, Mr. Nash informed Mr. Parker that the DIA could not provide the survey plans of the reserve to Chief Meguish. Mr. Nash recommended, however, that the provincial government be asked for a parcel of 2,270 acres to be selected and surveyed at the site chosen by the Atikamekw of Opitciwan as soon as funding became available (JBD, at tab 303).

I. The DIA's instructions to Surveyor Rinfret

[175] In 1939, the DIA census showed a population of 263 individuals in Opitciwan (JBD, at tab 305).

[176] On July 6, 1939, Surveyor General Peters of the DIA sent his instructions in writing to Mr. Rinfret, a surveyor from the Department of Mines and Resources Canada for the survey of the Opitciwan Reserve. He noted that, in 1914, Mr. White had delimited an area of 2,290 acres at Opitciwan for the Atikamekw. In 1917, he added, the water levels had been raised and 542 acres of the land delimited by Mr. White had been flooded. Mr. Peters pointed out that the QSC had undertaken in 1920 to recommend to the Government of Quebec that the reserve be enlarged by an area equal to the flooded area. He therefore asked Mr. Rinfret to travel to Opitciwan to survey a reserve of 2,290 acres that included the village of the Atikamekw. He recommended that Mr. Rinfret attempt to find the boundaries traced by Mr. White and to join up his own survey to those. With respect to the HBC, Mr. Peters stated that on June 3, 1925, the HBC district manager had submitted to the DIA an application to lease five or six acres. Accordingly, said Mr. Peters, Mr. Rinfret should trace a parcel of that size where the HBC had set up its post so that a lease could be prepared (JBD, at tab 307).

[177] Surveyor General Peters then sent Deputy Minister Bédard of the DLF a copy of his instructions to Mr. Rinfret and asked him to approve them, as Mr. Rinfret needed to conduct the

survey in August of that same year. As for the area of the reserve, Mr. Peters pointed out that aerial photographs taken in 1932 indicated that the flooded section of the reserve was considerably larger than 542 acres. Under the agreement reached with the QSC in 1920, he added, the reserve had to contain the same number of acres as that surveyed by Mr. White in 1914 (JBD, at tab 307).

J. The raising of the crest of the spillway in 1942 and its impact

[178] In 1941, in its thirtieth annual report, the QSC presented its plan to increase the water storage capacity of the Gouin reservoir from 1,325 feet to 1,328 feet, which it intended to do in April 1942 (JBD, at tab 309).

[179] On July 2, 1941, in a report to the Secretary of the DIA, Agent Larivière of the DIA noted that the census for Opitciwan listed about 300 inhabitants, including families from Opemiska who, instead of returning to Waswanipi, recently integrated with the Opitciwan Band with the approval of Chief Meguish (JBD, at tab 311).

[180] A few weeks later, in a report to the Secretary of the DIA, Agent Larivière stated that when he had travelled to Opitciwan in late August 1940, the Atikamekw were boiling their water. It had been recommended to them that they boil their water for thirty minutes, but they were only boiling it for twenty minutes. According to Agent Larivière, nobody had fallen ill up to that point. He warned the DIA that the wells could not be dug until the following spring. He added that when the level of the lake had been raised several years earlier, the trees had been left, and they were still standing in the water or floating at the surface. Moreover, the level of the lake was constantly rising and falling according to the needs of the QSC. Finally, he indicated that the lake water seemed to percolate through the soil with the surface water, which might explain why the well water was not considered safe (JBD, at tab 312).

[181] On September 3, 1941, in a letter to the HBC district manager, Agent Larivière confirmed that the water from the HBC wells in Opitciwan was unsafe and requested that he ask the manager of the Opitciwan post to disinfect the wells (JBD, at tab 313).

[182] On February 18, 1942, the Government of Quebec adopted Order in Council No. 390, authorizing the QSC to raise the crest of the spillway of the Gouin dam by raising the water impounded in the reservoir from 1,325 feet to 1,328 feet (JBD, at tab 315).

[183] On July 3, 1942, Agent Larivière informed the Secretary of the DIA that Chief Meguish of Opitciwan and his band council had recently made him aware that the level of the Gouin reservoir had been raised six additional feet compared to the previous season. This level affected the hunting grounds of the Atikamekw and the fur-bearing animals and increased the hazards of travel. Furthermore, the flooding covered lands that had been cleared the previous year for planting. Finally, the water level of that year had rendered the water completely unfit for domestic use. Agent Larivière therefore recommended that the DIA refer the matter to Quebec to find out the anticipated high water level and, if appropriate, make a claim for the damage caused to the Atikamekw, offering to collaborate in the event that an evaluation proved necessary (JBD, at tab 318).

[184] Two months later, Vice-Chair Lefebvre of the QSC informed Deputy Minister Bédard of the DLF that the Rev. Fr. Meilleur had recently told him that the provincial authorities had neglected to deal with the DIA's repeated requests to determine the new boundaries of the reserve. Mr. Lefebvre added that he believed that the issue had been raised in 1918–19 and that he had understood at the time that the Atikamekw would receive compensation for the flooded lands and the shrinking of their reserve as the boundaries receded inland (JBD, at tab 319).

[185] On November 6, 1942, in a memorandum submitted to Deputy Minister Bédard, Mr. Boisvert, the head of the DLF's Lands Service, summarized the steps taken up to that point to create the Opitciwan reserve. He noted that the DIA had instructed Mr. Rinfret to survey the reserve and replace the flooded area, but that the survey plans and description had never been delivered to the DLF, and he did not know whether the work had been done. Mr. Boisvert added that during a discussion he had had with Duncan Scott, Deputy Superintendent of the DIA, about the settlement of certain issues regarding the abandoned Indian reserves, Mr. Scott had declared that [TRANSLATION] "his department would not consider any specific issues, including that of Obidjuan, until the federal and Quebec governments had reached an agreement about the

abandoned Indian reserves, the ownership of which had been given by the Privy Council to the provinces, a decision that the federal government was not willing to accept" (JBD, at tab 321).

K. Renewed action by Quebec (1943)

[186] In 1943, in its thirty-second annual report, the QSC stated that on April 17, 1942, the Gouin reservoir was at a level of 1,322.6 feet, and that on April 24, 1943, it was at a level of 1,315.9 feet, a drop of 6.7 feet. Table II (readings from the hydrometric gauge upstream from the dam), attached to the report, indicates that the reservoir is full at the level of 1,328 feet, and that the level of the dam was between 1,323.65 and 1,323.95 feet between August 21 and September 7, 1943 (JBD, at tab 325).

[187] On February 9, 1943, Deputy Minister Bédard of the DLF informed the DIA that the DLF was prepared to recommend to the Executive Council the recognition of the Opitciwan Reserve that Mr. White had surveyed in 1914. However, he wrote, of the 2,290 acres surveyed by Mr. White, 542 had allegedly been flooded by the Gouin dam. Mr. Bédard noted that in 1939, the DIA had asked Mr. Rinfret to locate 542 acres to be added to the reserve. However, Mr. Bédard did not consider it necessary to make such a large tract of land available to the Atikamekw in that district (JBD, at tab 326).

[188] On February 26, 1943, Superintendent Allan of the DIA asked Messrs. Peters and White of the DIA to prepare a draft response to the letter of February 9, 1943, from Deputy Minister Bédard of the DLF. He also wished to be informed as to whether the proposed location was suitable to the band, whether it was likely to be flooded and whether more water would be stored in the Gouin reservoir (JBD, at tab 330).

[189] On March 31, 1943, a draft letter to Deputy Minister Bédard of the DLF indicated that when the 2,290 acres of lands had been selected in 1914, Opitciwan had a total population of 163 inhabitants, and it was estimated that each of the 35 families should receive at least 60 acres of arable land. The DIA now intended to purchase the lands once the parties had agreed on the price (in the margin, the following handwritten note appears: "Maybe not. Try for a grant"). The DIA was of the view that 60 acres per family was not excessive (in the margin, handwritten notes

read “263 persons 1939 – July 7/41: 300 persons incl. Opemiska group now at Obedjiwan – 75 families – 75 x 60 = 4,500 acres”). Because the survey ordered in 1939 was not conducted, the DIA stated that it was prepared to proceed in accordance with the instructions that had been given to Mr. Rinfret, on the condition that the QSC had no intention to raise the level beyond the levels that had recently been maintained (JBD, at tabs 333 and 334).

[190] On June 22, 1943, Deputy Minister Campbell of the DIA sent a letter to Deputy Minister Bédard of the DLF to remind him that the case of the Opitciwan Reserve had been suspended for about 30 years, but that in the meantime, the Atikamekw population had grown considerably and the nature of the lands originally selected had been significantly altered by the floods caused by the Gouin dam. According to Mr. Campbell, the Opitciwan Band by then included about 75 families, for a total of almost 300 people. He added that their land requirements were in fact quite modest. Although the DIA wished to maintain the average of 60 acres per family, he continued, he was hesitant to ask the DLF to increase the area provisionally agreed upon for the band in prior negotiations (JBD, at tab 335).

[191] Accordingly, said Mr. Campbell, the DIA would be satisfied if it could obtain from the DLF the equivalent of the 2,290 original acres, on the condition that they be situated above the high water line ultimately planned as the future flood line. Mr. Campbell concluded that his letter should therefore be considered an application from the DIA to the DLF for that area of land for the Opitciwan Band. The DIA suggested that the area to be surveyed include the village of Opitciwan, excluding the parcel then occupied by the HBC, which the DIA wanted neither to disturb, nor to include in the reserve.

[192] On August 14, 1943, Mr. Rinfret received from Mr. Peters, the Surveyor General of the DIA, his instructions for setting the boundaries of a reserve of 2,290 acres at Opitciwan. Before proceeding, Mr. Rinfret first had to have his instructions approved by the DLF. He also had to check with Quebec whether the water level of the reservoir would be raised in the following years, in which case it was recommended that he include within the reserve boundaries an additional area equivalent to the area that would be flooded. Finally, if an issue of paramount importance were to be raised during his meeting with the provincial authorities, Mr. Rinfret was to inform the DIA immediately and await its response before proceeding (JBD, at tab 337).

[193] On August 19, 1943, Deputy Minister Bédard of the DLF authorized Mr. Rinfret to establish the boundaries of the Opitciwan Reserve with an area of 2,290 acres. The survey had to be conducted in accordance with the general instructions of the DLF and those issued by the DIA (JBD, at tab 338).

[194] From August 21 to September 7, 1943, Mr. Rinfret conducted the survey of the Opitciwan Reserve (JBD, at tab 340).

[195] On August 29, 1943, Mr. Rinfret informed his superiors that on August 17, he had met with Mr. Boisvert of the DLF in the absence of Deputy Minister Bédard. Mr. Boisvert told him that the area planned for Opitciwan was only 2,000 acres, and Mr. Rinfret disagreed. The next day, he met with Mr. Bédard "who willingly agreed on the 2 290 acres area for the reserve after I explained that we were striving to give 60 acres per family residing at the reserve. . . . As to the question of a further area to be flooded by the raising of water in the Gouin Reservoir, Mr. Boisvert called the Streams Commission and was informed that it was contemplated to raise the water 3 inches only above the highest point at which the water stood in 1942. The area involved was considered negligible and they refused to discuss the matter any further" (emphasis added; JBD, at tab 339).

[196] On September 20, 1943, Surveyor General Peters told Superintendent Allan of the DIA that Mr. Rinfret had completed the survey of the Opitciwan Reserve and that he had incidentally surveyed a parcel of 2.6 acres for the HBC. Mr. Peters added that "Mr. Rinfret . . . would like to know if this 2.6 acres parcel of land should be left off the Reserve. . . . Father Meilleur, . . . thinks it inadvisable to leave off the jurisdiction of the [DIA] lands in the center of the village. . . . Should the Company obtain these lands from this Department, the welfare of the Indians can be safeguarded by means of suitable clauses inserted in the leasehold. Please let me have your views . . ." (Exhibit P-14).

[197] Mr. Rinfret submitted his survey plan on November 11, 1943.

L. The official transfer of lands to the Opitciwan Reserve

[198] On January 14, 1944, in Order in Council 160, the Executive Council of the Government of Quebec placed into trust a tract of land of an area of 2,290 acres at the DIA's disposal for the use of the Opitciwan Band and transferred its administration and control to the federal government (JBD, at tab 343).

[199] On March 31, 1944, the HBC district manager told the manager of that company's fur trade division that the premises of the HBC post, in which they had no title, were included in the lands transferred by the Province for the benefit of the Atikamekw of Opitciwan. He concluded that "[i]t will now be necessary to approach the Department . . . in order to come to an understanding regarding our occupation of the site" (JBD, at tab 346).

[200] On March 21, 1950, in Order in Council P.C. 1458, the Governor in Council set apart lands with an area of approximately 2,290 acres for the use and benefit of the Opitciwan Band (JBD, at tab 363).

M. The unsafe water and the construction of the wells

[201] By 1944, the issue of the unsafe drinking water had yet to be settled.

[202] On March 12, 1944, the Director of the Department of Mines and Resources' Surveys and Engineering Branch wrote in a memorandum that three wells had been dug on the Opitciwan Reserve, but that an inspection was required to confirm that the quality and quantity of water were satisfactory (JBD, at tab 345).

[203] On November 30, 1944, in a letter from the DIA, Agent Larivière stated that in light of the number of individuals falling ill each summer, the difficulty in obtaining safe water, the level of the Gouin reservoir having a significant effect, he considered it very important to provide the reserve with a good well, the following summer if possible. Mr. Larivière included the most recent analysis report, noting that the test was done when the level of the reservoir was the lowest it had been in years, and that the water should be drinkable. At the bottom of the page, a typewritten note read, "according to the analysis, this water is unsafe" (JBD, at tab 347).

[204] On December 11, 1944, the Acting Director of the DIA replied to Agent Larivière that there was an urgent need to provide the Atikamekw with a well so that they would have good drinking water, thereby reducing medical expenses. According to the water analysis accompanying Agent Larivière's letter, the water was unfit to drink. He therefore asked him to advise the Atikamekw to boil their water (JBD, at tab 348).

[205] On May 1, 1945, Agent Larivière wrote in an information note that about 300 inhabitants lived in Opitciwan from May to November and that between 25 and 30 remained there over the winter. He explained that the water level of the Gouin reservoir had been raised by 40 feet to 50 feet and generally varied from 5 feet to 8 feet. The previous year, the reservoir had dropped 13 feet. When the reservoir was finished, the trees were flooded and the water became unfit for domestic use. The two HBC wells would fill up with bad water when the level was high (JBD, at tab 350).

[206] On January 19, 1946, drilling contractor Gérard Déry submitted his report confirming the construction of three wells on the Opitciwan Reserve (JBD, at tab 353).

[207] On March 12, 1946, the DIA's Chief Engineer informed the Director of its Surveys and Engineering Branch that three wells had been dug in Opitciwan but that they had yet to be inspected for water quantity and quality (JBD, at tab 354).

[208] On January 20, 1947, Agent Larivière sent the Chief Engineer of the DIA the plans for the three wells dug on the Opitciwan Reserve, the report from the contractor Mr. Déry and the invoice for the work. Agent Larivière was of the view that only one of the wells should be paid for because only one of the three was operational (JBD, at tab 357).

[209] On June 1, 1953, Agent Larivière informed the QSC that the water level of the Gouin reservoir was so high that the sawmill on the reserve was practically inoperable. He requested an inspection (JBD, at tab 365).

[210] On June 3, 1953, Chief Engineer Chagnon of the QSC told Agent Larivière that the Gouin reservoir had reached a level of 1,327.5 feet, while the maximum authorized storage was 1,328 feet (JBD, at tab 366).

[211] The next day, Agent Larivière requested of Chief Engineer Chagnon that a QSC officer come on site to take note of the rise in the Gouin reservoir's water levels, which had reached an unprecedented height, and the effect of the winds on them (JBD, at tab 367).

[212] On June 27, 1953, Chief Engineer Chagnon informed Agent Larivière that in June and July 1942, the Gouin reservoir was maintained at a level of 1,327.8 feet, and that in June, July and August 1947, it was maintained between the levels of 1,327.5 feet and 1,328 feet. He also informed him that Inspector D'Auray of the QSC would be travelling to Opitciwan the following week to identify certain contour points at the level of 1,329 feet. Any constructions in Opitciwan, according to Mr. Chagnon, should be situated two or three feet above the level of 1,329 feet to which the QSC was preparing to raise the crest of the dam (JBD, at tab 368).

N. The raising of the crest of the dam in 1955

[213] After more than 20 years of operation, the Gouin dam was raised twice. In 1942, the Government of Quebec authorized the QSC to raise the crest of the dam to reach a level of 1,328 feet. This three-foot increase went into effect in 1946.

[214] In 1955 and 1956, through the adoption of three orders in council, the Province of Quebec authorized repairs and modifications to the Gouin dam likely to increase the storage capacity of the reservoir. In 1955, work to increase the maximum level of operation to 1,329 feet was once again authorized. This second increase, by one foot, went into effect in 1956 (JBD, at tabs 374, 375 and 378).

[215] On March 26, 1956, Chief Engineer Chagnon of the QSC informed Deputy Minister Dussault of Quebec's Department of Hydraulic Resources that the act of raising the maximum storage level of the Gouin dam from 1,325 feet to 1,329 feet had the effect of increasing the possible flooding upstream from the dam by an area of 51,200 acres. Furthermore, he added, the vegetation would be affected by the infiltration of two or three feet above the full reservoir level (JBD, at tab 376).

[216] The consequences of the flooding resulting from the increases of 1942 and 1955 are discussed in decision 2016 SCTC 9 in File No. SCT-2007-11.

O. Oral history

[217] In *Mitchell v MNR*, 2001 SCC 33 at para 37, [2001] 1 SCR 911 [*Mitchell*], the Supreme Court of Canada focused on the importance of oral history evidence and the weight to be given to the Aboriginal perspective.

[218] Paragraph 13(1)(b) of the SCTA states that oral history evidence is admissible in cases before the Tribunal.

[219] The Claimant called Paul-Yves Weizineau, whose work with the Opitciwan health service brings him into frequent contact with the elders, including four elders named Antoine and Joséphine Awashish and Jérémie and David Chachai. The elders testified that they had been informed by one or another of the following elders, now deceased: Basile Awashish, son of Chief Gabriel Awashish, Mathias Weizineau, Louisa Awashish, grandmother of Joséphine and wife of Chief Gabriel Awashish, David Niquay and Basile Denis-Damée.

[220] The testimony of the elders was frank and sincere, and, despite a few discrepancies between them on certain details and dates, it generally corroborated the voluminous documentary evidence on the issues of which they had knowledge.

[221] Moreover, this case deals with events that are almost contemporary for the elders who testified, as they were born in the 1930s. They were therefore able to testify about subjects such as the lack of insulation in the QSC houses, the wells and the independent traders. Though they were young at the time, these are facts of which they have a direct experience. The risk of distortion is therefore lower than in cases where several generations separate those who lived through the events from those who recount them.

[222] The Tribunal found that the testimony of the elders was credible.

[223] Antoine and Joséphine Awashish and Jérémie and David Chachai recounted the oral histories transmitted to them by their elders and the events that they had seen for themselves.

[224] All of them focused on how the Atikamekw suffered after the flooding and on the difficulties they faced in surviving and feeding their families.

[225] Despite the clarifications made by each witness, their testimony as a whole can generally be summarized as follows:

(a) Not having been informed of the date set for the rise in water levels, and never knowing how high the water would rise, the Atikamekw could not prepare in advance to recover their property. They did not realize that they would be flooded until they noticed that the water was rising very rapidly. During the decades that followed, the water level of the reservoir was never stable and changed each year.

(b) There had been between 18 and 20 plank houses and about 10 *misatokokiam* (log houses) on the site of the former village. The Atikamekw lost everything to the flood. Their houses collapsed and floated away, and the furniture they had built themselves (tables, chairs, beds, etc.) ended up underwater. They were only able to save their blankets and clothing. They also lost the sheds (*cicipitakan*) in which they stored their food and all their equipment (shovels, tools, dog team harnesses, sleds, snowshoes, several traps, etc.).

(c) After the village had been flooded, the Atikamekw cleared the location of the new village with their few remaining tools but had to wait four or five years to receive the planks of wood they had been promised in compensation for the flooded houses. Not only were there not enough planks for the number of inhabitants, but they were thin and broke easily, unlike the thick, solid and durable planks that they made themselves and with which they had built their houses before the flood. The houses that they had to rebuild themselves with few materials were not insulated and were very cold in the winter.

(d) After the flooding, they quickly realized that the water they were accustomed to drinking was no longer safe and that the fish they had been eating was no longer edible. In the opinion of the elders, the water pollution was attributable to the fact that the trees had not been cut before the water levels rose and the fact that many drowned animals were floating at the surface. Several people, including many young children, fell ill and complained of stomach pain. Several others were sent to the hospital, and

some died. Pregnant women also died or lost their fetuses after drinking the reservoir water.

(e) The Atikamekw had a very difficult time finding drinking water, as several lakes had been flooded. After locating streams or small lakes where the water was clear and potable, they cleared paths to be able to reach them.

(f) To acquire drinking water more easily, the Atikamekw dug four surface wells themselves in the 1950s. However, these were completely submerged by the rise in water levels that occurred the second time the crest of the dam was raised, once again forcing them to locate new sources of drinking water. They recalled that it was not until about 1944 that the [TRANSLATION] "Whites" built a well with a water pump (JBD, at tab 353; the drilling contractor submitted his report on January 19, 1946, confirming that three wells had been built).

(g) While it had been easy for the Atikamekw to feed themselves before the flooding, the rise in water levels caused the death of several animals that they were accustomed to eating. The beavers, muskrats, moose and all other small game were drowned.

(h) The Atikamekw lost everything on their hunting grounds, including several *misatokokiam* and tents in which they lived while in the forest. Not having had time to recover anything before the water levels rose, they also lost all of the equipment they needed to survive in the forest (tools, traps, nets, shovels, harnesses, bark canoes, and the snow shoes and sleds they had made to move around during the winter). [TRANSLATION] "It was a total loss". They were never compensated for these losses. The rise in water levels that followed the second rising of the crest of the dam was even more destructive, and even more *misatokokiam* were submerged.

(i) The Atikamekw also lost several prepared campsites where they were accustomed to stopping and setting up for the night when travelling in the territory.

(j) With the rise in water levels, it became very difficult for the Atikamekw to find their lakes and reach their territory because the forest had been flooded and the entire

landscape had changed. Pieces of earth were floating, along with many trees that had not been cut down, which continued to float all over the reservoir. Other trees that had remained standing were submerged and invisible and often caused accidents by perforating the bark canoes of the Atikamekw. Danger was omnipresent. Several people drowned.

P. Expert evidence

[226] The Claimant called two experts, Jacques Frenette and Claude Marche. Five experts were called by the Respondent: Jean-Pierre Garneau, Stéphanie Béreau, Éric Groulx, Christian Gagnon and Michel Leclerc.

1. For the Claimant

(a) Jacques Frenette

[227] Jacques Frenette was called as an expert by the Claimant. A significant portion of his report and testimony was objected to by the Respondent. The Tribunal allowed him to file his report and testimony, subject to the Respondent's objection, and qualified Mr. Frenette as an expert in anthropology and Aboriginal ethnohistory.

[228] His report has been submitted in connection with four claims: SCT-2004-11, SCT-2005-11, SCT-2006-11 and SCT-2007-11.

[229] Expert witness Jacques Frenette holds a Bachelor's degree (1977), a Master's degree (1981) and a Ph.D. (1993) in anthropology from Laval University. In his Master's and Ph.D. theses, he specialized in Native ethnohistory. He has worked as a consultant in the field of Native studies for more than 30 years. He has done archival, field and library research to document the history and the way of life of the Abenakis, Algonquins/Anishinabeg, Atikamekw, Crees/Eeyous, Innus/Montagnais, Malicites and Métis.

[230] Mr. Frenette filed a report entitled *Les Atikamekw d'Opitciwan (1880-1950), Bilan de la littérature scientifique* (Exhibit P-3). His mandate was to document the Claimant's internal organization and its relations with the outside world for the period from 1880 to 1950. More

specifically, it was to describe the Opitciwan First Nation and to situate it within the Atikamekw Nation, and describe its territory and way of life and its links with the HBC, independent traders, missionaries, the DIA, loggers, the QSC, etc. (Exhibit P-3, at p 1).

[231] The academic literature, namely the works, articles and research reports written by specialists such as anthropologists, archeologists, geographers and historians, was the primary source of information on which Mr. Frenette based his observations (Exhibit P-3, at p 1). Not included are published primary sources (e.g. missionaries' accounts), unpublished primary sources (e.g. ecclesiastical archives), and oral sources (e.g. interviews with members of the First Nation). Mr. Frenette wrote the following on this point in his report:

> [TRANSLATION]
>
> If there is any caveat regarding the scope of our work, it is that consulting the academic literature has not necessarily produced all of the answers to all of the questions, or all of the nuances for all of the subjects. No attempt to do so is possible without consulting the archives and the Atikamekw themselves. [Exhibit P-3, at p 2]

[232] Mr. Frenette explained that he had chosen this approach for methodological, practical and financial reasons.

[233] His report is divided into five chapters, which he summarizes as follows:

- Chapter 1: presentation of the Haute-Mauricie territory, the state of animal resources during the period relevant to this dispute and the content of two reports by a surveyor who visited the Opitciwan region in the early 20th century.

- Chapter 2: the presence of various Euro-Canadians in Haute-Mauricie and the Opitciwan region, particularly the HBC, independent fur traders, professional trappers, members of rod and gun clubs, missionaries and loggers.

- Chapter 3: the social context of the Atikamekw of Opitciwan—from the general to the specific.

- Chapter 4: how the Atikamekw of Opitciwan occupy and use their territory, and their annual cycle of activities.

- Chapter 5: the sources of income or earnings of the Atikamekw of Opitciwan.

[234] In his report, Mr. Frenette summarized the main observations drawn from the academic literature about the Atikamekw of Opitciwan for the period from 1890 to 1950. In addition, on the issue of social organization, he wrote the following:

(a) The Obedjiwan trading post was run by a chief designated by his peers to act as a spokesperson with the HBC and the missionary. In 1886, the band elected its first chief, Thomas Awashish.

(b) The Obedjiwan Band included approximately 80 people until 1870. Its population then grew to 122 individuals in 1888. It was the most populous of the bands in the Haute-Mauricie in the early 20th century, with 151 members in 1909, falling to 146 in 1924. It experienced continual growth until 1949.

(c) To the north, its territory extended into the highlands in various locations, where the Crees also lived. To the south, the territory extended as far as the Wabano River, forming a shared border with the Atikamekw of Wemotaci, generally following the railway line. To the west, the territory included the sources of the Megiscane, Gatineau and Lièvre Rivers, near Algonquin territory. To the east, it extended into the Ashuapmushuan Basin, home of the Montagnais.

(d) The Obedjiwan Band belonged to the Atikamekw Nation, with the same way of life, the same language and the same culture, oral tradition and custom of endogamy as the Wemotaci and Manawan Bands. The Obedjiwan chief and other Atikamekw chiefs could take joint actions when the need arose even in the absence of a formal centralized political body.

(e) The Atikamekw Nation had a population of about 200 in 1870, 256 in 1880 and 621 in 1939.

(f) Among the Euro-Canadians with whom the Atikamekw of Obedjiwan were in regular contact, there were officers of the Hudson's Bay Company and independent traders. The former lived in the territory. Although the latter began visiting Obedjiwan in the 1920s, they never settled there permanently. The fur trade was based on barter, credit, gifts and cash.

(g) The Atikamekw of Obedjiwan were in contact with the missionaries who began visiting the Haute-Mauricie in 1837, building a chapel at Kikendatch in 1898 and another at Obedjiwan in 1916. The Atikamekw would receive the missionary in the summer when gathering at the trading post. Because of the railway, these visits occurred more frequently around holy days such as Christmas and Easter. The Obedjiwan chief always dealt with the missionary, who often acted as their spokesperson while at the same time promoting his own interests. As there was no Indian Agent among the Atikamekw, the DIA regularly dealt with the missionary to ensure the application of its decisions and the provisions of the *Indian Act*.

(h) On the territory, as of 1870, the Atikamekw began enduring competition from Euro-Canadian trappers, whose numbers exploded in 1930. Serious logging activities did not begin until the 1940s.

(i) The construction of the Gouin dam, from 1915 to 1917, and the impoundment of the reservoir, starting in 1918, which was meant to regulate the flow of the Saint-Maurice River to facilitate the floating of logs downstream, ended up flooding 16 of the hunting territories of the Atikamekw of Obedjiwan as well as their village. The HBC was able to reach an immediate agreement with the QSC, which granted it $1,400 for the damage caused to its trading post in Obedjiwan. The settlement with respect to the Atikamekw homes and hunting grounds, the chapel and the cemetery took longer, with negotiations dragging on from 1918 to 1925. Even then, the situation of several victims was not considered.

(j) The populations of key mammal species such as caribou, moose, beavers and martens dropped sharply in the 1850s, slowly re-establishing themselves by the end of the

century, but never reaching their former numbers. It was estimated that the Gouin reservoir had submerged 30,000 cords of commercially valuable wood. Although it was foreseeable, the issue of damage to fauna was never raised.

(k) When the large game practically disappeared from the Haute-Mauricie in the 1850s, the Atikamekw were left with no choice but to intensify their trapping efforts. Their economy remained focused on the fur trade until the 1940s.

(l) Each family had rights to a territory whose boundaries were known and respected. A family had exclusive rights to the fur-bearing animals on its territory.

(b) Claude Marche

[235] The Respondent is challenging the admissibility of Dr. Marche's report and testimony and is seeking to have them rejected. According to the Respondent, a finding that Dr. Marche's report and testimony are inadmissible would have a significant impact on File No. SCT-2007-11 and by extension on this file.

[236] The objection, which was taken under advisement, is based on Dr. Marche's lack of qualifications in the fields of surveying and geochemistry (water quality). The Respondent also submits that his expertise is entirely unreliable. Subject to the objection, the Tribunal allowed Dr. Marche's testimony and qualified him as an expert in dam hydraulics.

[237] In early 2013, Dr. Marche was given the following mandate:

(1) assess the impact of the creation and management of the Gouin reservoir on the area of the lands set apart for the Atikamekw of Opitciwan Band; and

(2) establish whether there was a link between the operation of the reservoir and the notable decrease in the quality of the water from the reservoir and the shore wells consumed by the band for several years.

[238] More specifically, he describes the nature of his mandate as follows:

[TRANSLATION]

The mandate I was given had five objectives in the context of File Nos. SCT-2004-11 and SCT-2007-11:

(a) File No. SCT-2004-11:

(i) Establish whether there had been permanent drowning of a certain area of the reserve surveyed at Opitciwan in August 1914 following the impoundment of the Gouin reservoir. If so, identify the submerged area.

(ii) Establish whether there could have been repeated drownings of certain areas of the reserve between the impoundment of the reservoir and the final survey of 1943. Specify the cause or causes of these drownings and identify the submerged areas.

(b) File No. SCT-2007-11:

(i) Establish whether there was a permanent drowning of a certain area of the reserve of 2,290 acres surveyed at Opitciwan in August-September 1943. If so, specify when it occurred and its causes. Identify the submerged area.

(ii) Establish whether repeated drownings of additional areas of the reserve surveyed in 1943 could have taken place between then and now. Identify the submerged areas.

(c) File Nos. SCT-2004-11 and SCT-2007-11:

Establish whether the quality of the water used or consumed on the reserve could have been affected by hydrological causes and/or causes relating to the operations of the Gouin reservoir. [Dr. Claude Marche, *Sur la réduction de la superficie des terres réservées aux Atikamekw du réservoir Gouin, et la contamination de leur eau de consommation,* April 2013, Exhibit P-10, at p 74]

[239] The qualifications of Dr. Marche were summarized and analyzed in decision 2016 SCTC 9 in File No. SCT-2007-11. That summary and analysis apply *mutatis mutandis* to this decision.

2. For the Respondent

(a) Jean-Pierre Garneau

[240] Jean-Pierre Garneau was called as an expert by the Respondent. He was qualified by the Tribunal as an expert anthropologist specializing in the culture and history of the Aboriginal populations in Quebec north of the St. Lawrence River with experience in assessing the economic and sociological impacts of industrial projects on Aboriginal communities.

[241] Mr. Garneau holds a Bachelor's degree (1979) and a Master's degree (1985) in anthropology from Laval University. He has spent the past 24 years working as a consultant in the field of Native studies. During his career, he has assessed the environmental impacts of hydroelectric, logging and mining projects affecting various Aboriginal communities and performed socio-economic studies. He has also conducted archival, field and library research to document the history and way of life of the Huron-Wendat, Algonquins/Anishinabeg, Atikamekw, Crees/Eeyous, Innu/Montagnais, Naskapi and Inuit.

[242] He filed an opposing expert report entitled *Contre-expertise du Rapport de M. Jacques Frenette intitulé "Les Atikamekw d'Opitciwan (1880-1950) : bilan de la littérature scientifique"* (Exhibit D-4). His mandate was to gather the facts necessary for an opinion opposing Mr. Frenette's expert report. He deals with the history of the Atikamekw Nation since the mid-19th century, with a particular focus on the history of the Opitciwan First Nation since the early 20th century until about 1950. Among other things, he documented the events leading up to the creation of the Opitciwan Reserve and the impact suffered by the community in the wake of the construction of the dam and the impoundment of the Gouin reservoir. His opposing opinion is intended to place the facts in their proper chronological order and document the complexity of the interactions between the individuals involved, in a certain number of areas relevant to the facts set out in the Declarations of Claim, namely,

> 1. the time it took to create the reserve;
>
> 2. the distribution of territory (the areas considered and ultimately granted);
>
> 3. the settlement for the damage resulting from the filling of the reservoir; and
>
> 4. the effects of the delays in creating the reserve on the presence of smaller traders and the sale of alcohol. [Exhibit D-4, at p 7]

[243] His principal conclusions can be summarized as follows:

(a) As of 1912, the federal Crown was prepared to begin the process of creating a reserve for the Atikamekw of Opitciwan. The federal Crown could not create the reserve unilaterally, and, at the time, the Province of Quebec preferred to wait until the flooding had taken place and its consequences were known before moving forward (Exhibit D-4, at p 28).

(b) After the flooding and after the Atikamekw had settled in the new site, the federal Crown reopened the file twice, in 1927 and 1930, but for reasons impossible to discern with any certainty, their initiatives did not produce any results (Exhibit D-4, at p 28).

(c) In 1942, Father Meilleur brought up the issue again, appealing directly to Quebec, which he accused of dragging its heels in this case. This effort had a positive effect, the Province agreed to proceed, a new application from the Crown was approved, a survey was conducted and the land was transferred (Exhibit D-4, at p 28).

(d) In 1919, the Atikamekw made an inventory of their flooded houses and assessed the value of what they believed they had lost. The QSC conducted similar observations, which were communicated to the DIA during the meeting with Mr. McLean of the DIA and Officer Lefebvre of the QSC in May 1920. The DIA was of the view that the agreement was not unreasonable, but hesitated to confirm it, since it was possible that the Atikamekw would wish to move farther away, in which case the DIA would have preferred a cash settlement. The DIA therefore left the decision in the hands of the Atikamekw. The 1920 Agreement between the QSC and the Atikamekw, reached in the presence of Father Guinard, raised these doubts, since the Atikamekw confirmed their intention to resettle nearby. No document in which the DIA officially confirms the agreement has been found, but the QSC believed that it was the case (Exhibit D-4, at pp 67–68).

(e) In 1921 and 1922, the situation soured in that relations between Father Guinard and the QSC became rancorous in the summers of those years. The appeal from Mr. Lefebvre of the QSC to the DIA in November 1922 provoked an intervention by the DIA, and the intervention of the Premier of Quebec brought political pressure to bear on the QSC, but the determining factor was the visit by Inspector Parker of the DIA to Opitciwan (Exhibit D-4, at p 68).

[244] The final section of Mr. Garneau's opposing opinion deals with the presence of traders and the sale of alcohol on the Opitciwan Reserve and relates to File No. SCT-2005-11. It will be addressed in the context of that file.

(b) Stéphanie Béreau

[245] Stéphanie Béreau was called as an expert witness by the Respondent. The Tribunal qualified her as a historian with expertise in the history of Aboriginal peoples in Quebec and their relations with the State.

[246] Ms. Béreau studied history at Sorbonne University (Paris IV). She obtained a Master's degree there in 1997 and a Diplôme d'Études Approfondies [a post-graduate diploma] in 1998. She then pursued doctoral studies at the European University Institute in Florence. Her thesis, on modern history, was defended there in November 2006.

[247] Since 2005, she has been working full-time as a history consultant. She has delivered several research reports on the Aboriginal peoples in Quebec to provincial and federal departments as well as private organizations such as museums and publishing houses. She has authored several articles, a book and some conference proceedings.

[248] Ms. Béreau filed two reports.

[249] The first is entitled *La question de la superficie dans la création des réserves au Québec (milieu du XIX^{e} – milieu du XX^{e} siècle)*, October 2013 (Exhibit D-5). This report was submitted for File No. SCT-2006-11 in particular and has the following objective:

> (1) to determine from a historical point of view whether certain statutes contained provisions dealing with the methods for calculating the areas of reserves created after 1851; and
>
> (2) to determine whether a method of calculation could have been applied by the colonial administrators to establish the size of the reserves.

[250] Her expertise in this regard will be addressed in File No. SCT-2006-11.

[251] Ms. Béreau's second expert report is entitled *La question des délais dans la création des réserves au Québec (milieu du XIX^e^ siècle – milieu du XX^e^ siècle)*, October 2013 (Exhibit D-9). This report was submitted for File No. SCT-2005-11 in particular and will be dealt with in that file.

(c) Éric Groulx

[252] Éric Groulx was qualified by the Tribunal as a surveyor and a Canada lands surveyor. He is a member of the Ordre des Arpenteurs-Géomètres du Québec and of the Association of Canada Lands Surveyors.

[253] In November 2013, he filed an opposing expert opinion in response to Dr. Marche's expert report entitled *Contre-expertise en arpentage et en géomatique* (Exhibit D-18).

[254] Although it applies to certain aspects of this file, his opposing expert opinion is dealt with in decision 2016 SCTC 9 in File No. SCT-2007-11.

(d) Michel Leclerc

[255] Michel Leclerc was qualified by the Tribunal as an engineer with expertise in hydrology and hydraulics.

[256] His expert report was filed for the purposes of File No. SCT-2007-11 and will be addressed in that file.

(e) Christian Gagnon

[257] Dr. Christian Gagnon was qualified by the Tribunal as an expert in geochemistry.

[258] In November 2013, in response to Dr. Marche's expert report on water quality, he filed an opposing expert report entitled *Contre-expertise en géochimie* (Exhibit D-41).

[259] His opposing expert opinion relates to this file and File No. SCT-2007-11. However, it is addressed in File No. SCT-2007-11.

IV. OBJECTIONS REGARDING THE ADMISSIBILITY OF EXPERT REPORTS AND TESTIMONY

A. Report and testimony of Jacques Frenette

[260] The Respondent objects to the admissibility of several parts of Jacques Frenette's report and related portions of his testimony on the ground that they are not relevant since the purpose of this evidence is essentially to establish the Claimant's Aboriginal rights even though this issue is explicitly excluded from the Tribunal's jurisdiction under paragraph 15(1)(f) of the SCTA.

[261] More specifically, the Respondent submits that the following items and the related portions of testimony should be struck:

- chapter 2, item 2.5.4, pages 40 et seq., entitled *Les impacts sur les territoires de chasse d'Obedjiwan*;
- chapter 3, item 3.1, at pages 52 to 54, entitled *La nation atikamekw*; item 3.2, at pages 57 to 59, entitled *La bande de poste de traite d'Obedjiwan*; and item 3.3, entitled *Le groupe de chasse*;
- chapter 4 in its entirety, entitled *L'occupation et l'utilisation du territoire*; and
- chapter 5 in its entirety, entitled *De la traite des fourrures au travail rémunéré*.

[262] Regarding the other chapters and items of the report, the Respondent argues that they are not relevant evidence. They merely paint a general picture of the situation that has no bearing on the specific issue involved in this claim.

[263] The Respondent refers to *R v Mohan*, [1994] 2 SCR 9 at para 18, 114 DLR (4th) 419, in which the Supreme Court of Canada notes that "[r]elevance is a threshold requirement for the admission of expert evidence as with all other evidence".

[264] The objection is rejected.

[265] The Tribunal finds that the challenged parts of Jacques Frenette's expert report and testimony are relevant in that the description of the historical occupation and use of the traditional territory provides context for the circumstances of the present dispute.

[266] Moreover, some of the subjects discussed by Mr. Frenette, such as the traders on the territory, and which the respondent wishes to strike, are also dealt with by the Respondent's expert witness, Jean-Pierre Garneau.

[267] In short, a reading of all of the portions challenged in the objection suggests that they are relevant to the subject-matter of the claim.

[268] Lastly, it is important to note that, under paragraph 13(1)(b) of the SCTA, the Tribunal may receive and accept any evidence that it sees fit, "whether or not that evidence . . . is or would be admissible in a court of law".

[269] Regarding the issue that Mr. Frenette's expert report relies on secondary sources rather than primary ones, this concerns the evidentiary weight of the report rather than its admissibility.

B. Report and testimony of Claude Marche

[270] For the reasons set out in decision 2016 SCTC 9 in File No. SCT-2007-11, which apply *mutatis mutandis* to this decision, the Tribunal rejects the Respondent's objection regarding the admissibility of Dr. Marche's report and testimony.

V. EVIDENTIARY WEIGHT OF EXPERT REPORTS AND TESTIMONY

[271] I previously concluded that Mr. Frenette's report and testimony are useful and relevant.

[272] According to the Respondent, little weight should be given to the report of this expert witness since Mr. Frenette used only secondary sources.

[273] In *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 [*Beardy's*], Justice Slade deals with the issue of primary and secondary sources in an expert report, concluding as follows:

> [42] It is difficult to assess the weight to accord to opinions from secondary sources relied on by an expert witness to ground his own opinion. The court relies on the secondary source being authoritative if it adheres to the standards of the discipline of the author. Ultimately the weight of each piece of evidence is open to scrutiny by the court.
>
> [43] Where, as here, there are conflicting opinions in the academic literature which may apply in respect of secondary sources, the assessment of the weight accorded to an expert opinion is made with greater confidence when the opinion is supported by primary sources.

[274] In the matter before us, Mr. Garneau does not disagree with the contents of Mr. Frenette's report, writing:

> [TRANSLATION]
>
> Overall, and aside from the specific criticisms we make at the beginning of each chapter of this opposing expert report, Jacques Frenette's review contains few elements with which we actually disagree. In fact, many of the statements made by Mr. Frenette are so general that they would be hard to falsify. In other cases, Mr. Frenette provides such a brief summary of the facts involved in an issue that the complexity of the events and interactions is lost. Mr. Frenette's lack of specificity, and the fact that his work essentially relies on secondary sources, has led us to attempt to be more precise and to rely essentially on primary sources. [Exhibit D-4, at p 6]

[275] Even though Mr. Frenette's expert report carries less weight because of its reliance on secondary sources, there is no reason not to give it any weight. Instead, it must be considered within its limitations and in combination with Mr. Garneau's expert report. If the positions of the two experts lead to discrepancies, the Tribunal will analyze the respective reports in light of the documentary evidence on file.

[276] Mr. Garneau's report is useful and relevant in that it allows us to understand the facts in a more specific context. However, the role of the historian is to establish a timeline and plausible links by providing the necessary nuances. In some respects, these nuances are lacking from Mr. Garneau's report. Mr. Garneau also reveals a tendency in his report of wanting to corroborate the Respondent's position, which becomes very clear when, after setting out and analyzing the historical events, he provides his own interpretation and concludes from the facts that the federal Crown was neither negligent nor casual. See, for example, pages 16, 19, 25 and 29 of Mr. Garneau's report.

[277] It is not the role of experts to express an opinion on or to characterize a party's actions and its liability in light of the applicable rules of law. Whether a party's actions constitute negligence and thus attract liability is for a court or tribunal to determine, regardless of the mode of trial.

[278] Consequently, the usefulness of Mr. Garneau's expert report must be considered in the light of this caution. The interpretations and conclusions in Mr. Garneau's opinion and report must be viewed with care.

[279] The weight of the expert opinions of the other expert witnesses is discussed in the other files and applies *mutatis mutandis* in this file in as much as these expert opinions apply here.

VI. APPLICABLE PRINCIPLES OF LAW

A. The honour of the Crown

[280] The doctrine of Aboriginal rights arose from the assertion of Crown sovereignty over the Aboriginal peoples (*Canada v Kitselas First Nation*, 2014 FCA 150 at para 39, [2014] 4 CNLR 6 [*Kitselas* FCA]). This assertion and the Crown's control of land and resources that were formerly in the control of Aboriginal peoples gave rise to the honour of the Crown (*Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 66, [2013] 1 SCR 623, [*Manitoba Metis Federation*]).

[281] The honour of the Crown, a principle that is entrenched in section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, is always at stake in the Crown's dealing with Aboriginal people (*R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324). The ultimate purpose of this principle is the "reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty" (*Manitoba Metis Federation*, at para 66).

[282] The honour of the Crown "speaks to *how* obligations that attract it must be fulfilled" (emphasis in original; *Manitoba Metis Federation*, at para 73). It "gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest" (*Manitoba*

Metis Federation, at para 73; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18, [2004] 3 SCR 511 [*Haida Nation*]; *Wewaykum*, at paras 79, 81).

[283] The honour of the Crown is pledged to the fulfilment of its obligations, which requires the Crown to act diligently and to endeavour to ensure its obligations are fulfilled (*Manitoba Metis Federation*, at para 79). A "persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise". However, "the honour of the Crown [does not] constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts" (*Manitoba Metis Federation*, at para 82).

[284] Lastly, as noted by the Supreme Court of Canada in *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at para 87, 71 DLR (4th) 193 [*Peguis*]:

> [At least since the signing of the Royal Proclamation of 1763], the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.

B. General fiduciary principles

[285] With the assertion of Crown sovereignty over land occupied by Aboriginal peoples and the resulting honour of the Crown arose an obligation to treat Aboriginal peoples fairly and to protect them from exploitation (*Mitchell*, at para 9).

[286] The limits imposed on the original sovereignty of Aboriginal peoples and the resulting discretion afforded to the Crown in managing its relationship with Aboriginal peoples have resulted in characterizing the relationship as fiduciary in nature (*Kitselas* FCA, at para 39).

[287] The fiduciary duty "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" (*Wewaykum*, at para 79).

[288] The Supreme Court of Canada has recognized that, in addition to implying political duties for Canada when dealing with Aboriginal peoples, the fiduciary relationship is *sui generis* and thus colours government actions with respect to Aboriginal matters. It can also lead to judicially enforceable fiduciary duties on the Crown (*Kitselas* FCA, at para 40).

[289] The judicially enforceable fiduciary duty is not limited to transactions involving reserve land. It can be found to exist "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power" (*Kitselas* FCA, at para 42, citing *Guerin v R*, [1984] 2 SCR 335 at p 384, 13 DLR (4th) 321) [*Guerin*]).

[290] A fiduciary duty requires the fiduciary "to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person" (*Manitoba Metis Federation*, at para 47, referring to *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at pp 646–47, 61 DLR (4th) 14).

[291] In *Manitoba Metis Federation*, at para 49 (referring to *Haida Nation*, at para 18, and *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36, [2011] 2 SCR 261 [*Elder Advocate*s]), the Supreme Court of Canada identified two ways in which a fiduciary duty may arise.

[292] First, in the Aboriginal context, a fiduciary duty may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests. Consequently, if there is a specific or cognizable Aboriginal interest, and a Crown undertaking of discretionary control over that interest, a fiduciary duty may arise.

[293] Second, an *ad hoc* fiduciary duty may arise if the following conditions are met:

(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary;

(2) a defined person or class of persons vulnerable to a fiduciary's control;

(3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[294] In *Elder Advocate*s, at issue was when governments, as opposed to individuals, may be bound by a fiduciary duty. The Supreme Court of Canada, per Chief Justice McLachlin, wrote as follows:

> Fiduciary duty originated as a private law doctrine. In the past, state actors have been held to be under a fiduciary duty in limited circumstances, namely, in discharging the Crown's special responsibilities towards Aboriginal peoples and where the Crown is acting in a private capacity, as in its role as the public guardian and trustee. [at para 25]

[295] Chief Justice McLachlin continues by noting that the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances. She then quotes from *Guerin*, where Justice Dickson (as he then was) held that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship (*Elder Advocates*, at para 37).

[296] Chief Justice McLachlin subsequently refers to *Wewaykum*, where, again, the decision in *Guerin* is cited to make the point that the Crown can be no ordinary fiduciary since it wears many hats and represents many, often conflicting, interests. She adds, however, that *Guerin* exceptionally recognized that the Crown was under a fiduciary duty in the management of Aboriginal lands for their benefit. In that instance, the Crown's obligation to Aboriginal peoples with respect to their land is neither a public law duty nor a private law duty in the strict sense. It is nonetheless in the nature of a private law duty. The Crown is therefore considered to be a fiduciary in this *sui generis* relationship (*Elder Advocates*, at para 38).

C. Fiduciary duty in the reserve creation process

[297] In *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 [*Ross River*], the Supreme Court of Canada recognized that potential relief by way of fiduciary remedies is not limited to existing Indian reserves or the rights guaranteed by section 35 of the

Constitution Act, 1982. The Supreme Court of Canada, per Justice LeBel, held that the process of reserve creation is presumed to give rise to the Crown's fiduciary duty:

> It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights . . . [*Ross River*, at para 68]

[298] These principles were reiterated by the Supreme Court of Canada in *Wewaykum*, at paras 13 and 79, referred to extensively by the parties, and which discusses the scope of the Crown's fiduciary duty in the process of reserve creation.

[299] In *Wewaykum*, the Supreme Court of Canada dealt with a government program to create reserves in what was not part of the "traditional tribal lands". (*Wewaykum*, at para 77). These reserves had not yet been officially recognized as reserve lands under the *Indian Act*. They had merely been "provisionally approved" as part of the process implemented in British Columbia under section 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10.

[300] In *Wewaykum*, the Supreme Court of Canada noted that the content of the Crown's duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity (*Wewaykum*, at para 86).

[301] Then, referring to *Ross River*, the Supreme Court of Canada, per Justice Binnie, reiterated that the exercise of the particular power of reserve creation remains subject to the fiduciary's obligations. Justice Binnie, citing Justice LeBel, wrote as follows: "it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band" (*Wewaykum*, at para 88).

[302] Subsequently, with respect to the particular facts of *Wewaykum*, Justice Binnie wrote as follows:

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

> provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion. [Emphasis added; at para 89]

[303] Inquiring into the content of the fiduciary duty "with respect to the lands occupied by the Band" at the time of creating the reserve, Justice Binnie had the following to say:

> The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the *disposition* of an existing Indian interest in the subject lands, but the *creation* of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right. [*Wewaykum*, at para 91]

[304] Justice Binnie then provided the analytical framework to be applied to the issue before him in order to define the scope of the fiduciary duty:

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

[305] Regarding the content of the Crown's fiduciary duty, Justice Binnie held as follows:

> 2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* — which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
>
> 3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation. [Emphasis added; *Wewaykum*, at para 86]

[306] In *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 [*Kitselas*], a decision by the Tribunal affirmed by the Federal Court of Appeal, the Kitselas argued that Canada had breached its fiduciary duty by excluding from their reserve a 10.5-acre tract of land. Recognizing that the tract of land was not held in trust or part of a "provisional reserve", Justice Slade found that the evidence established the use and occupation of the site by the Kitselas and that this, in the context of Article 13 of the *British Columbia Terms of Union*, was a cognizable Indian interest (*Kitselas*, at para 197).

[307] Justice Slade also determined that federal jurisdiction, amplified by Article 13 of the *British Columbia Terms of Union*, established discretionary authority in decisions over the definition and allotment of reserves by the Commissioners (*Kitselas*, at para 198).

[308] Justice Slade then concluded that the elements of the test for the creation of a Crown fiduciary duty had been established (*Kitselas*, at para 199).

[309] The Federal Court of Appeal, dealing with an application for judicial review of Justice Slade's decision, concluded as follows:

> I discern no fundamental legal error in [the] findings of the Judge.
>
> . . .
>
> In the light of those findings of fact, I can find no error of law in the conclusion of the Judge that the Kitselas had a cognizable interest in the excluded land that gave rise to a fiduciary duty of loyalty, good faith, and full disclosure and of acting reasonably and with diligence in the best interest of the Kitselas in determining whether to include or to exclude that land from Kitselas I.R. No. 1. The land at issue was clearly delineated and identifiable, and the cognizable interest in that land was its historic and contemporary use and occupation as a settlement [emphasis in original] by the Kitselas themselves, a land interest specifically contemplated by Article 13 of the *British Columbia Terms of Union* and by the Crown instructions issued to implement that Article. [Emphasis added; *Kitselas* FCA, at paras 50, 54]

[310] Lastly, in *Ross River*, at para 67, Justice LeBel summarized the principles governing the creation of reserves:

> Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. [Citation omitted] Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record. [Emphasis added]

VII. ISSUES

[311] The issues can be summarized as follows:

(a) Have the particular facts of this case given rise to a legal or fiduciary duty on the part of the Respondent?

(b) If so, did the Respondent breach its legal or fiduciary duties towards the Atikamekw of Opitciwan?

(c) If so, what losses can be compensated at the second stage?

VIII. DISCUSSION AND ANALYSIS

A. Have the particular facts of this case given rise to a legal or fiduciary duty on the part of the Respondent?

1. The SCTA and the Tribunal's jurisdiction

[312] Paragraphs 14(1)(b) and (c), and paragraph 15(1)(f) of the SCTA provide as follows:

> **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; . . .
>
> **15 (1)** A First Nation may not file with the Tribunal a claim that
>
> . . .
>
> **(f)** is based on, or alleges, aboriginal rights or title; . . . .

2. Positions of the parties

(a) Position of the Claimant

[313] The Claimant argues that the 1850 and 1851 Acts and the 1853 Order in Council form a legislative package with respect to Indians and lands reserved for Indians.

[314] This package constitutes the statutory framework for the Crown's fiduciary duty to the Atikamekw of Opitciwan born through its immediate source, the launching of the process for creating the Opitciwan Reserve in 1908. This legislative package is part of the sovereignty-protection pact between the Crown and First Nations, from which the Crown's fiduciary duty with respect to Aboriginal peoples arose.

[315] In other words, according to the Claimant, the particular facts of the process of creating the Opitciwan Reserve are the immediate source of the fiduciary duty the Crown owes to the Atikamekw of Opitciwan. However, when a set of facts gives rise to a fiduciary duty, the statutory provisions regarding the fiduciary must be interpreted in light of this duty.

[316] Consequently, according to the Claimant, as soon as the 1853 Order in Council was made, it became mandatory for the Crown to complete the reserve creation process since the areas listed in the Schedule approved by the Order in Council had been "appropriated" to and for the use of the tribes identified therein.

[317] In its Reply to the Respondent's Memorandum of Fact and Law, the Claimant writes:

> [TRANSLATION]
>
> 83. Completion of this process involved selecting and surveying the lands.
>
> 84. By operation of the 1851 Act, the administration, control and management of reserves whose creation was finalized before Confederation was automatically transferred to the Commissioner of Indian Lands [citations omitted].
>
> 85. In contrast, the process for reserves whose creation had not been completed by had to be pursued according to the division of powers under the *Constitution Act, 1867*, which required the cooperation of both levels of government.

[318] The Claimant adds:

> [TRANSLATION]
>
> 86. As soon as the reserve creation process was launched, the federal Crown had a fiduciary duty of making reasonable efforts to secure the contemplated lands for the affected Indians as quickly as possible. [Reply to the Respondent's Memorandum of Fact and Law]

[319] In the case of Opitciwan, this duty or commitment was called into existence in 1908 because of the power the DIA would exercise in the reserve creation process over a specific or cognizable "Aboriginal" interest of the Atikamekw of Opitciwan.

[320] The Claimant has the following to say about this at paragraph 222 of its Memorandum of Fact and Law:

> [TRANSLATION]
>
> The Crown's fiduciary duty was born not only out of the fact that it would exercise control over a specific or cognizable "Aboriginal" interest of the Atikamekw of Kikendatch/Opitciwan, but also out of the fact that in exercising this control, it had sufficient discretion to adversely affect the interest of the Atikamekw. This is a corollary of the principle of the honour of the Crown [citations omitted].

[321] The Claimant also submits that Opitciwan was a "provisional reserve" within the meaning of *Wewaykum*, more specifically as of the survey of the village in 1914. The Claimant adds that, in *Kitselas*, the Tribunal recognized that the federal Crown has a fiduciary duty towards First Nations even when lands have not been provisionally reserved. The federal Crown therefore clearly owed a fiduciary duty to the Atikamekw of Opitciwan as soon as Opitciwan was deemed a provisional reserve.

[322] The Claimant argues that, in light of subsection 91(24) of the *Constitution Act, 1867*, the legislative package consisting of the 1850 and 1851 Acts and the 1853 Order in Council is similar to Article 13 of the *British Columbia Terms of Union*, in that both confer responsibility for Indians and lands reserved for Indians on the federal government, and the joint responsibility for creating Indian reserves on both levels of government, with the federal government initiating the process and the provincial government appropriating the required lands and transferring them to the federal government to be administered in trust for Indians (Claimant's Memorandum of Fact and Law, at para 216).

[323] The Claimant adds that, like Article 13 of the *British Columbia Terms of Union*, the legislative package in this case makes up the immediate framework for the federal Crown's fiduciary duty that was part of the post-Confederation Indian reserve creation process and that was called into existence for each beneficiary band upon the selection and setting apart of reserve lands.

[324] The Claimant draws similarities between the 1850 and 1851 Acts and the 1853 Order in Council, and Article 13 of the *British Columbia Terms of Union* and concludes that, since the Atikamekw were occupying the area at issue, a "provisional reserve" existed from the initiation of the reserve creation process until its completion upon transfer of the lands from the province to the DIA in 1944.

[325] The Claimant further submits that, in fulfilling its fiduciary duty, the Respondent also had to consider the 1914 Order in Council made under the *Navigable Waters Protection Act*, by which the federal government authorized the building of the dam, and the practice it followed in the event of flooding of the Indian reserves.

(b) Position of the Respondent

[326] The Respondent argues that the Crown did not owe the Atikamekw a fiduciary duty within the broader context of the 1918 Flood.

[327] According to the Respondent, there is no need to determine how to interpret the 1850 and 1851 Acts and the 1853 Order in Council to resolve the present dispute, nor to decide whether there are similarities between this legislative package and Article 13 of the *British Columbia Terms of Union*, since it admits that a reserve creation process may call into existence a fiduciary duty. Moreover, the reserve for the Atikamekw of Opitciwan was created from the 100,000 acres released under the *Act respecting lands set apart for Indians*, SQ 1922, c 37 (the "1922 Act"), and not from the 230,000 acres provided under the 1851 Act.

[328] According to the Respondent, to determine whether there is a fiduciary duty, one must look at the facts as of 1908. What is important is whether there was an intention to create a reserve. In the province of Quebec, this intention is required from both levels of government. Yet

before 1944, the year in which the province transferred the reserve lands to the federal government, an intention to create a reserve cannot be claimed to have existed. In the absence of a common intention by both governments to create a reserve, one cannot speak of a "provisional reserve". What is more, this concept does not even exist in Quebec.

[329] The Respondent further adds that, before the meeting of minds between the two levels of government, the Crown never undertook to create a reserve for the Atikamekw of Opitciwan or to allocate a particular area. It simply promised to make an effort to do so.

[330] In the event that the Tribunal does adjudicate on the 1850 and 1851 Acts and the 1853 Order in Council, the Respondent submits various arguments to establish that this legislative package did not create a positive duty to create reserves. Subsequent steps, such as selecting the specific site and surveying it, were required.

[331] According to the Respondent, therefore, the use of the term "may" in the 1851 Act confers on the Crown the ability to establish reserves but does not create a duty to do so. Use of this verb points to the discretionary and optional nature of this power, and the existence of an implied duty to act is an exception that has to be proven by the pleading party.

[332] The legislative package in question is also not a promise to Aboriginal peoples, nor does it give rise to any fiduciary duty on the part of the federal Crown to create a reserve specifically for the Atikamekw of Kikendatch (Opitciwan) in Opitciwan. The 1853 Order in Council is merely a statement of intent by the government to distribute lands to certain groups of Indians. The Crown's decision to determine how to allocate the land resources established by the 1851 Act and the Order in Council falls within the royal prerogative. The 1853 Order in Council provides certain guidelines for the powers set out in the 1851 Act.

[333] According to the Respondent, the Order in Council grants lands to the Atikamekw in general. The Order in Council provided for the allocation of 45,750 acres in Maniwaki and 16,000 acres in La Tuque for their benefit and that of other tribes, which was done. Lands were therefore allocated to the Atikamekw in the form of a reserve, but the Atikamekw refused to settle there. Despite this, the government listened to their demands and created two further

reserves, Wemotaci and Coucoucache. A few years later, the Manawan Reserve was created and, subsequently, the Opitciwan Reserve. Each new reserve was an exercise of the royal prerogative, and in exercising this prerogative, the government acted in good faith.

[334] Should the Tribunal deem it appropriate to dispose of this issue, the Respondent submits that the concept of a "provisional reserve" is one that belongs to the reserve creation process in British Columbia and has no basis in Quebec.

[335] In its Memorandum of Fact and Law, the Respondent writes that what distinguishes Quebec from British Columbia is that in the latter province, the process is a joint one, which is not the case in Quebec. The Respondent writes as follows:

> [TRANSLATION]
>
> 162. Contrary to what the Claimant alleges, the land sought by the Claimant never had the status of provisional reserve within the meaning of *Wewaykum*.
>
> 163. Provisional reserves are specific to British Columbia and arise from the *British Columbia Terms of Union* (Art. 13), which do not apply in the Province of Quebec.
>
> > The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
> >
> > To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies. (R.S.C. 1985, App. II, No 10)
>
> 164. The concept of provisional reserve within the meaning of *Wewaykum* was developed by the Supreme Court of Canada in order to describe the particular case of British Columbia, which, under a joint process, provides for the allocation and surveying of the lands of the potential Indian reserves approved or designated by the province, but the management of which has not yet been transferred to the federal Crown [citations omitted].
>
> 165. Contrary to the regime under the *British Columbia Terms of Union*, which explicitly provides for the development of a joint reserve creation process,

> the regime applicable under the *Constitution Act, 1867*, does not provide for such a process.
>
> 166. In Quebec, in accordance with the *Constitution Act, 1867*, the province owns public lands (section 109, *Constitution Act, 1867*) and exercises executive and legislative powers to manage and administer them (subsections 92(5) and 92(13), *Constitution Act, 1867*), and the reserve creation process follows the model explained above.
>
> 167. The situation at issue clearly differs from the situation in British Columbia under the *British Columbia Terms of Union*.
>
> 168. In fact, while the situation is the same in Quebec and British Columbia when it comes to the distribution of natural resources and public lands (section 109, *Constitution Act, 1867*, and Article 13 of the *British Columbia Terms of Union*), these provisions do not have the same impact on the reserve creation process in these two provinces.

[336] The Respondent adds, moreover, that the analogy the Claimant is trying to draw with Article 13 of the *British Columbia Terms of Union* is wrong since, in the matter at bar, the request was made by the Claimant, the Province of Quebec never agreed to the location and area of the reserve to be created before 1943, and the provincial Crown did not transfer the usufruct of the lands (transfer of the management and administration) to the Government of Canada until January 14, 1944.

[337] Moreover, regarding the first condition for establishing a fiduciary duty, namely, a cognizable Indian interest, the Respondent submits that use of a territory is not sufficient for this use to qualify as a cognizable Indian interest. The Claimant has to demonstrate that it has a communal, pre-existing specific and cognizable interest in the lands. This interest is similar to a "quasi-proprietary" interest. In this case, the interest claimed by the Atikamekw does not meet these requirements.

[338] Furthermore, the Atikamekw moved to the village of Opitciwan in 1912. They had not occupied this territory for centuries, like in *Kitselas*. The place they moved to was surveyed in 1914 for the purpose of negotiating the reserve lands with the province, which refused to agree to grant them because of the dam it was planning to build.

[339] The Respondent adds that, contrary to the facts in *Kitselas*, the lands in this matter had been set aside for a public purpose. It concludes that, in 1914, the Atikamekw did not have a

specific and cognizable interest in the lands that form the reserve today or in the lands surrounding the reserve. In any event, according to the Respondent, the dispute concerns damages to property belonging to individuals. Property belonging to individuals does not make for a "quasi-proprietary" interest in the lands.

[340] Regarding the second condition for calling into being a fiduciary duty, the exercise of discretion, the Respondent argues that the desired lands belonged to the province and that the federal government could not exercise discretion over lands that did not belong to it. The only thing it could do was to attempt to work jointly with Quebec. That is what it did, and successfully so. In any event, for the Respondent, there is no discretion in this case, and if there was, it would be that of the province. Consequently, if there is liability, which it denies, it would fall exclusively on the shoulders of the provincial Crown.

[341] The Respondent adds that the federal government's sole involvement in the dam was its adoption of the Order in Council flowing from section 7 of the *Navigable Waters Protection Act*. When it issued this Order in Council, the federal Crown was acting in the public interest. This does not result in a commitment by the Crown to protect the assets of the Atikamekw, nor does it make the Crown responsible for enforcing the Agreement of July 2, 1920, to compensate the Atikamekw for the harm suffered.

[342] In short, according to the Respondent, none of the 1850 and 1851 Acts, the 1853 Order in Council, the survey of the area in 1914 by Mr. White or the approval of the QSC's plans by the federal government under the *Navigable Waters Protection Act* created a fiduciary duty.

3. The statutory context of reserve creation

(a) Before Confederation

[343] Without going into the specific details of reserve creation in Quebec, the reserve creation process in Quebec is as distinct as in British Columbia, in that, in Quebec, reserves were not created under treaties, unlike in Ontario and most of the Western provinces.

[344] Consequently, before Confederation, the reserve creation process was governed entirely by the colonial government, whose policy it was to defend the rights and privileges of Aboriginal bands by preventing encroachments upon the lands that had been appropriated to and for them.

[345] On August 10, 1850, the Parliament of United Canada therefore enacted the 1850 Act. The purpose of this Act, as indicated in section 1, was to

> . . . make better provision for preventing encroachments upon and injury to the lands appropriated to the use of the several Tribes and Bodies of Indians in Lower Canada, and for the defence of their rights and privileges: . . . [Emphasis added]

[346] The 1850 Act created the position of "Commissioner of Indian Lands", who had broad powers to manage the lands that would be and were set apart or appropriated to or for Aboriginal tribes:

> . . . it is hereby enacted by the authority of the same, That it shall be lawful for the Governor to appoint . . . a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any Tribe or Body of Indians, shall be and are hereby vested, in trust for such Tribe or Body, and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such Tribe or Body in common, or by any Chief or Member thereof or other party for the use or benefit of such Tribe or Body, and shall be entitled to receive and recover the rents, issues and profits of such lands and property, and shall and may, in and by the name aforesaid, be subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property: Provided always, that this section shall extend to any lands in Lower Canada now held by the Crown in trust for or for the benefit of any such Tribe or Body of Indians, but shall not extend to any lands now vested in any Corporation or Community legally established and capable in law of suing and being sued, or in any person or persons of European descent, although held in trust for or for the benefit of any such Tribe or Body. [Emphasis added]

[347] The 1850 Act also provided for the Commissioner of Indian Lands for Lower Canada to have full power to concede, lease or charge such lands, and to receive or recover the rents, issues and profits thereof. The 1850 Act further conferred on the Commissioner the power to exercise and defend "all or any" of the rights lawfully appertaining to the proprietor, possessor or occupants of the lands vested in the Commissioner, and the power to bring and conduct actions necessary for this purpose.

[348] On August 30, 1851, the Parliament of United Canada enacted the 1851 Act, under which the Commissioner of Crown Lands could, under the authority of one or more orders in council, describe, survey and set apart the lands reserved for Indians, which would then be vested in the Commissioner of Indian Lands for Lower Canada at no charge and be managed by him, under the 1850 Act:

> WHEREAS it is expedient to set apart certain Lands for the use of certain Indian Tribes resident in Lower Canada . . . it is hereby enacted by the authority of the same, That tracts of Land in Lower Canada, not exceeding in the whole two hundred and thirty thousand Acres, may, under orders in Council to be made in thatbehalf [*sic*], be described, surveyed and set out by the Commissioner of Crown Lands, and such tracts of Land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian Tribes in Lower Canada, for which they shall be respectively directed to be set apart in any order in Council, to be made as aforesaid, and the said tracts of Land shall accordingly, by virtue of this Act, and without any price or payment being required therefor, be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under the Act passed in the Session held in the thirteenth and fourteenth years of Her Majesty's Reign, and intituled, *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*. [Emphasis added]

[349] The 1851 Act also provided for the yearly payment out of the Consolidated Revenue Fund of a sum to be distributed among certain Indian tribes in Lower Canada by the Superintendent General of Indian Affairs in such proportions and in such manner as the Governor-General in Council might from time to time direct.

[350] In short, the goal of the 1850 and 1851 Acts was to prevent encroachments upon and injury to the lands already appropriated to and for the use of Indians, and the Acts created a framework for the creation of new Indian reserves in Lower Canada. Additional areas of land not exceeding 230,000 acres could be described, surveyed and set apart under orders in council and appropriated to and for Indians. Lands that had already been appropriated or that would be so were placed under the control of a "Commissioner of Indian Lands", who, like the Commissioner of Crown Lands, reported solely to the colonial government.

[351] The Crown retained the discretion to choose to whom to distribute the 230,000 acres and how to do so.

[352] On August 9, 1853, Order in Council 482 (the "1853 Order in Council") was made under the 1851 Act, approving the Schedule that divided the 230,000 acres into 11 reserves. The Schedule indicated the location and size of the planned reserves as well as their beneficiaries. The Schedule also stipulated that the Têtes-de-boule would share 45,750 acres in Maniwaki with the Algonquins and the Nipissingues, and 16,000 acres in La Tuque with the Algonquins and the Abenakis of Bécancour.

[353] Even though the 1851 Act provided for the possibility of making several orders in council to distribute the 230,000 acres between the Indian tribes, in actual fact, there was only one.

(b) After Confederation

[354] Before Confederation, United Canada owned public lands and had the executive and legislative powers to set apart reserve lands for the use of Aboriginal peoples. The Commissioner of Crown Lands and the Commissioner of Indian Lands for Lower Canada reported to only one government.

[355] Before Confederation, therefore, reserves were created through a unified process under one government under the 1851 Act. This was the case, for example, of the Maniwaki Reserve, which the Atikamekw had to share with the Algonquins and the Nipissingues, and which, in fact, was described, surveyed and occupied when the 1853 Order in Council was made.

[356] With Confederation, the *Constitution Act, 1867*, changed the reserve creation process that had been in place under the colonial government.

[357] In fact, Canada's Parliament was delegated legislative authority over Indians and lands reserved for Indians under subsection 91(24) of the *Constitution Act, 1867*. Furthermore, under section 109 of this Act, the provinces were given ownership of all lands, mines, minerals and royalties subject to any trusts existing in respect thereof, while subsections 92(5) and 92(13) granted the provinces legislative authority in relation to provincial ownership and the power to manage and sell the public lands belonging to them and the timber and wood thereon.

[358] In this spirit, in 1868, Parliament enacted *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868, c 42, which, among other things, provided for the continued application of the 1850 and 1851 Acts and the replacement of the Commissioner of Indian Lands for Lower Canada by the Superintendent General of Indian Affairs (sections 5 and 26).

[359] In Quebec, the position of Commissioner of Crown Lands was from then on assumed by the province's Minister of Lands and Forests. (The *Act respecting the sale and management of the Public Lands* (32 Vict Cap 11), assented to on April 5, 1869, created the "department of crown lands", presided over by the "'commissioner of crown lands' for the time being". In 1897, the Department of Crown Lands became the "Department of Lands, Forests and Fisheries" ["Département des terres, forêts et pêcheries"]. It was replaced by the "Department of Lands, Mines and Fisheries" ["Département des terres, des mines et des pêcheries"] in 1901, and in 1905 by the "Department of Lands and Forests" ["Département des terres et forêts"], which, in French, became the "Ministère des Terres et Forêts" in 1941, remaining the "Department of Lands and Forests" in English.)

[360] Consequently, the reserves created under the 1851 Act after Confederation were done so through a bilateral process under the joint authority of the federal government and the government of the province of Quebec. I will come back to this later on.

[361] The *Constitution Act, 1867*, does not explicitly provide for an Indian reserve creation process, nor does it set out the roles and responsibilities of each level of government in such a process. The provincial governments (Quebec, Ontario, Nova Scotia and New Brunswick) and the federal government have therefore turned to the courts on several occasions to clarify their respective rights (Memorandum of Fact and Law of the Respondent, at para 145; *St. Catherine's Milling and Lumber Company* (1888), 14 App Cas 46, 10 CRAC 13 [*St. Catherine's Milling*]; *Canada (AG) v Ontario (AG)*, [1897] AC 199, 11 CRAC 308 (*Indian Annuities*); *Ontario Mining Co v Seybold*, [1903] AC 73, 13 CRAC 75 [*Seybold*]; *Quebec (AG) v Canada (AG)*, 56 DLR 373, [1921] 1 AC 401 [*Star Chrome*]).

[362] In 1888 a dispute broke out over the ownership of lands transferred in the province of Ontario, giving rise to the famous *St. Catherine's Milling* judgment. In that case, the Salteaux tribe of Ojibbeway Indians owned the lands located in Indian country, as established under the *Royal Proclamation of 1763*. In 1873, the tribe signed a treaty with the federal Crown, in which it transferred its Aboriginal land title in exchange for various commitments from the Crown.

[363] In 1883, the company St. Catherine's Milling and Lumber was issued a permit by Canada to carry out forestry operations on these lands. The Province of Ontario sued the company, alleging that, under section 109 of the *Constitution Act, 1867*, it was the owner of the lands and only it could allow their exploitation.

[364] The Privy Council concluded that subsection 91(24) of the *Constitution Act, 1867*, had the effect of conferring on Canada the right to extinguish the Aboriginal land title through treaties, even though the lands in question belonged to Ontario.

[365] In another decision, *Seybold*, while analyzing the provisions of the *Constitution Act, 1867*, the Privy Council wrote the following about the choice of Indian lands to be appropriated to create reserves:

> The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two Governments. [at para 12]

[366] A further dispute, this time in Quebec, gave rise to the Privy Council's decision in *Star Chrome*. In *Star Chrome*, the Abenakis of Bécancour, in 1882, surrendered to the Crown part of the reserve granted to them under the 1851 Act. The federal Crown granted these lands to a third party. In 1907, the Star Chrome Mining Company acquired the property, but subsequently instituted proceedings against the seller, Rosalie Thompson, alleging that the disputed lands were public lands that belonged to the Province of Quebec and that neither the federal government nor Rosalie Thompson's predecessors had any title to the lands. The Privy Council had to determine whether the title to the lands in the Province of Quebec appropriated through the 1853 Order in Council to and for the use of the Abenakis under the 1851 Act and surrendered to the federal Crown by Quebec in 1882 belonged to the federal Crown or the province.

[367] Justice Duff, writing for the Privy Council, noted that the purpose of the 1850 Act was to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, while that of the 1851 Act was to set new lands apart for the use of Indian tribes.

[368] Referring to *St. Catherine's Milling*, Justice Duff concluded that after Confederation, the 1853 Order in Council merely surrendered the usufructuary rights in the lands for the use of Indians to the Crown, but that the bare ownership of these lands remained the province's, and that in the event of the Indians surrendering the lands, the province remained the owner of them.

[369] After analyzing the 1850 and 1851 Acts, Justice Duff made the following observations:

> It results from these considerations, in their Lordships' opinion, that the effect of the Act of 1850 is not to create an equitable estate in lands set apart for an Indian tribe of which the Commissioner is made the recipient for the benefit of the Indians, but that the title remains in the Crown and that the Commissioner is given such an interest as will enable him to exercise the powers of management and administration committed to him by the statute.
>
> The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the Indians, but, to quote once more the judgment of the Board in the *St. Catherine's Milling Co.'s Case*, 14 App. Cas. 54, it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial statute of 1867". [*Star Chrome*, at paras 17–18]

[370] Following the decision in *Star Chrome*, the Government of Quebec, with almost no more lands available under the 1851 Act (230,000 acres), enacted the 1922 Act, increasing to a maximum of 330,000 acres the size of provincial public lands that could be transferred to the federal government in order to create Indian reserves in the province. In other words, the 1922 Act released an additional 100,000 acres, on top of the 230,000 acres provided for under the 1851 Act. The 1922 Act also described the nature of the rights that could be transferred to Canada and various steps the province had to take to do this:

> **1.** The Lieutenant-Governor in Council may reserve and set apart, for the benefit of the various Indian tribes of this Province, the usufruct of public lands described, surveyed and classified for such purpose by the Minister of Lands and Forests.
>
> The extent of such public lands shall not exceed, in all, three hundred and thirty thousand acres in superficies.

> The usufruct of the lands described, surveyed and classified by the Minister of Lands and Forests shall be transferred, gratuitously and on the conditions be [*sic*] may determine, by the Lieutenant-Governor in Council to the Government of Canada to be administered by it in trust for the said Indian tribes.
>
> Such usufruct shall be inalienable, in whole or in part, and the lands subjected thereto shall return to the Government of this Province, without any formality whatsoever, from and after the day when the Indians to whom they have been assigned in usufruct by the Government of Canada cease to occupy them as usufructuaries.
>
> Mining rights shall not be included in such concession, notwithstanding the absence of any mention to this effect.
>
> Nor shall any such reserve be granted or taken out of any territory under license to cut timber, unless the consent of the license-holder shall be first obtained.

[371] The 1922 Act therefore transposes into legislative terms the Privy Council's ruling in *Star Chrome*, thus forming an extension to the 1850 and 1851 Acts and the 1853 Order in Council.

[372] In short, the process of creating reserves for the Atikamekw as a whole was launched through the combined operation of the 1850 and 1851 Acts and the 1853 Order in Council, but was not completed until much later, with the formal creation of the Opitciwan Reserve for the Atikamekw of Opitciwan on January 14, 1944 (see decision 2016 SCT 7 in File No. SCT-2005-11 for the reserve's date of creation).

[373] With the making of the 1853 Order in Council, the federal Crown was obliged to complete the reserve creation process as the areas set out in the Schedule had been "set apart and appropriated to and for the use of the several Indian Tribes" listed in the Schedule, including the Atikamekw.

[374] According to the 1853 Schedule, the Atikamekw were initially to move to the Maniwaki Reserve and the planned La Tuque Reserve.

[375] Realizing that the locations chosen in the 1853 Schedule did not suit the Atikamekw, the Crown created the Wemotaci and the Coucoucache Reserves after Confederation, and, a few years later, that of Manawan. The acres granted for the Wemotaci, Manawan and Coucoucache Reserves came from the reserved 230,000 acres.

[376] The Atikamekw of Kikendatch (Opitciwan) were expected to move to Wemotaci, but this location did not suit them either as it was too far away from their hunting grounds.

[377] In 1908, Chief Awashish asked the DIA to create a reserve for the Atikamekw of Kikendatch/Opitciwan at Kikendatch or not more than 40 miles to the north of Kikendatch. The DIA promised to make an effort to do so and took the appropriate steps.

[378] Even though there was not enough land for the Opitciwan Reserve in the reserved 230,000 acres in 1908, the federal and provincial governments discussed other options for completing the missing acreage, including the federal government purchasing lands from the province or transferring acres from Wemotaci to Opitciwan.

[379] In the end, the Opitciwan Reserve was created from the 100,000 acres added to the 230,000 acres. The fact that the Opitciwan reserve lands come from the 100,000 acres added under the 1922 Act does not change the nature of the commitment made initially by the colonial government to the Atikamekw, and reiterated by the federal Crown. The enactment of the 1922 Act does not change the purpose of the 1850 and 1851 Acts.

4. The "provisional reserve"

[380] To begin with, it must be noted that the Respondent's arguments regarding the absence of a [TRANSLATION] "*de facto* reserve" have no merit. The Claimant does not allege that there was a [TRANSLATION] "*de facto* reserve". As the Claimant argued, it is not seeking to establish that the Opitciwan Reserve was completed before 1944, but rather that the Respondent had a fiduciary duty before this date as a result of the reserve creation process.

[381] Regarding the characterization "provisional reserve", I find that there is sufficient factual evidence to suggest that there was a "provisional reserve" in the matter before us.

[382] First, the concept of "provisional reserve" originally appeared in the case law of the Supreme Court of Canada in *Wewaykum*. Even though the Supreme Court was dealing with the reserve creation process in British Columbia and referring to Article 13 of the *British Columbia Terms of Union*, this provision does not mention the word or concept of "provisional reserve".

This term was used to indicate that, even though federal-provincial cooperation was required in the reserve creation process at issue in *Wewaykum*, only the federal government had recognized the allocation of the reserve:

> The approval was in any event provisional, as the Indian Superintendent must be taken to have been aware that British Columbia had still not agreed on what provincial Crown lands would be made available for that purpose. [*Wewaykum* at para 32]

[383] Moreover, in *Wewaykum*, at para 15, Justice Binnie held that federal-provincial cooperation is required in the reserve creation process "because, while the federal government had jurisdiction over 'Indians, and Lands reserved for the Indians' under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property". For the Supreme Court of Canada, it is the wording of subsection 91(24) of the *Constitution Act, 1867*, that requires a joint process and not Article 13 of the *British Columbia Terms of Union*. Cooperation between the two levels of government was therefore required because of the division of powers between the federal and provincial governments, a fact that applies equally to British Columbia and Quebec.

[384] Second, also in *Wewaykum*, Justice Binnie held that the allocation of reserves was not a provincial responsibility. He added that the permissible constitutional scope of the provincial "intent" in relation to "lands reserved for Indians" was limited to the size, number and location of reserves to be transferred by it to the administration and control of the Crown in right of Canada (*Wewaykum*, at para 70). Therefore, like in British Columbia, nothing in the provisions of the *Constitution Act, 1867*, confers on the Province of Quebec the allocation of reserves, which was the responsibility of the federal government under subsection 91(24) of the *Constitution Act, 1867*.

[385] It is clear that, in post-Confederation Quebec, the two levels of government had to work together in the reserve creation process, with the federal government having jurisdiction over Indians and the lands reserved for Indians under subsection 91(24) of the *Constitution Act, 1867*, and the province being the owner of public lands under section 109 of this Act.

[386] The administration, control and management of reserves whose creation was finalized before 1867 was transferred to the Commissioner of Indian Lands. The process for reserves whose creation had not been completed by the time of Confederation had to continue within the division of powers under the *Constitution Act, 1867*, which required the cooperation of both levels of government (*Wewaykum*, at para 15; *Seybold*).

[387] The process of selecting lands for new reserves under the 1851 Act and the 1853 Order in Council therefore continued, becoming, however, a joint one between the Government of Canada and the Province of Quebec (*Seybold*).

[388] In post-Confederation Quebec, therefore, the reserve creation process required the cooperation of both levels of government, with the federal government being responsible for launching the process and the provincial one having to respond to the federal government's initiatives (see also the transcript of the hearing, January 17, 2014, at pp 14–15). However, under the *Constitution Act, 1867*, the federal government became the only level of government competent to create reserves. The federal Crown therefore undertook to become the exclusive intermediary between Aboriginal people and the province.

[389] Indeed, even if in Quebec surveyors could be instructed by the provincial government, they were also instructed by the federal government, as was the case with the Opitciwan Reserve. The evidence further reveals that, for the Wemotaci and Coucoucache Reserves, the DIA paid the costs of the survey, and it was at the DIA's request that the DLF instructed the surveyor Mr. Duberger (JBD, at tab 170).

[390] It is therefore wrong to say that, in Quebec, solely the province determined the location of Indian reserves. Surveyors could therefore be instructed by both levels of government.

[391] In short, in Quebec as in British Columbia, although the terms were different, the reserve creation process was a joint one.

[392] Third, even though the reserve creation process differed from one province to the next (*Ross River*, at para 67), the legal requirements for the creation of a reserve within the meaning

of the *Indian Act* and the Crown's obligation to take into consideration the *sui generis* nature of Aboriginal land rights were the same throughout Canada. In *Wewaykum*, Justice Binnie held:

> The legal requirements for the creation of a reserve within the meaning of the *Indian Act* were considered by this Court in *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816, 2002 SCC 54, released June 20, 2002. They include an act by the Crown to set apart Crown land for use of an Indian band combined with an intention to create a reserve on the part of persons having authority to bind the Crown and practical steps by the Crown and the Indian band to realize that intent (para. 67). In that case it was found that the Crown never intended to establish a reserve within the meaning of the Act. At para. 68, LeBel J. noted "that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights". [*Wewaykum*, at para 13, decision regarding lands in British Columbia; see also *Canada v Anishnabe of Wauzhushk Onigum Band*, [2003] 1 CNLR 6, a decision from Ontario; *R v Mason*, 2008 NSPC 3, and *Montana Band v Canada*, 2006 FC 261, [2006] 3 CNLR 70, decisions from Alberta; *White Bear First Nations v Canada (Minister of Indian Affairs and Northern Development*, 2012 FCA 224, [2012] 4 CNLR 332, a decision from Saskatchewan; *Musqueam Indian Band v British Columbia (Assessor of Area No. 9 – Vancouver Sea to Sky Region*), 2012 BCCA 178, 30 BCLR (5th) 211, a decision from British Columbia.]

[393] Moreover, just like in British Columbia, the parameters of the reserve allocation policy in Quebec and the actual allocation of lands for the creation of reserves were not the result of negotiations between Aboriginal peoples and the Crown. These were left to the Crown's discretion.

[394] Fourth, the Respondent does not explain how subsections 92(5) and 92(13) and section 109 of the *Constitution Act, 1867*, would have a different effect on the reserve creation process in Quebec than it would in British Columbia.

[395] Fifth, we must look at the evidence as a whole and not draw conclusions from a single element. Consequently, while it is true that, in 1908, Chief Awashish wrote to apply for the creation of a reserve at Kikendatch or not more than 40 miles to the north of Kikendatch, this does not support the conclusion that the process was initiated at the Chief's request. If one looks at the evidence as a whole, one notes that, even though the reserve was created at Opitciwan at the request of the Atikamekw of Kikendatch (Opitciwan), the creation process was initiated by the federal Crown in extension of the reserve creation process for all Atikamekw. This process is

the result of the enactment and implementation of the 1850 and 1851 Acts and the 1853 Order in Council.

[396] In 1908, Chief Awashish applied for the creation of a reserve at Kikendatch or not more than 40 miles to the north of there because the federal Crown had created reserves for each of the Saint-Maurice River Indian bands close to their hunting grounds, except for the Kikendatch (Opitciwan) band, even though it had the most members.

[397] Moreover, in this matter, like in *Wewaykum*, the desired lands were located within the province and on public lands. Indeed, one can compare the 1944 transfer of the Government of Quebec's usufruct to the federal government with Order in Council 1036 of 1938, by which the management of public lands in British Columbia was transferred to the federal government, the final step in the reserve creation process in *Wewaykum*.

[398] To sum up, the making of the 1853 Order in Council launched the process for creating reserves for the Atikamekw in general.

[399] Around 1890, the DIA had reliable census data for the four Atikamekw bands to allow it to determine what proportion each would receive of the 61,750 acres they had to share with other tribes in Maniwaki and La Tuque and to determine the demographic weight of these bands. Realizing that the location envisaged in the Order in Council did not suit the Atikamekw, the DIA had to choose locations closer to the Atikamekw hunting grounds.

[400] The federal Crown subsequently created the Wemotaci, Coucoucache and Manawan Reserves for the benefit of three Atikamekw bands. The process of creating the Opitciwan Reserve began in 1853 with the identification of the Atikamekw as beneficiaries of certain acres of land for the purpose of creating a reserve; moved forward in 1908 with the application of Chief Awashish for a reserve at Kikendatch, and in 1912, for a reserve at Opitciwan; crystallized in 1914, following the federal authorities' favourable response to this application, with the survey by Mr. White; and ended with the creation of the reserve in January 1944.

[401] In light of the teachings of the Supreme Court of Canada, particularly in *Wewaykum*, the reserve creation process in Quebec, albeit not identical, is sufficiently similar to the one in

British Columbia that Opitciwan can be characterized as a "provisional reserve" as of the 1914 survey.

[402] Arguing, as the Respondent does, that the reserve creation process in Quebec began only with the making of the provincial order in council transferring the lands to the federal government amounts to denying the very existence of such a process in Quebec.

5. Existence of an enforceable fiduciary duty

(a) In the reserve creation process

[403] I conclude from the evidence on the record that a process of creating reserves for all Atikamekw was launched by the federal Crown following the making of the 1853 Order in Council. In 1908, the federal Crown initiated the process of creating a reserve for the Kikendatch/Opitciwan band specifically.

[404] The process of creating a reserve in Opitciwan crystallized with the survey by Mr. White in 1914.

[405] By no later than 1914, therefore, the Atikamekw had a cognizable and acknowledged Aboriginal interest in the lands of Opitciwan, which they used as their village. By no later than this date, the federal Crown had also demonstrated a plain and clear commitment to creating a reserve in Opitciwan for the Atikamekw of Opitciwan and had recognized the interests of the Atikamekw of Opitciwan in the lands identified for this purpose. Both this commitment and this recognition obliged the federal Crown to complete the reserve creation process with the Government of Quebec.

[406] In accordance with the Supreme Court of Canada's teachings in *Wewaykum*, this process limited the federal Crown's responsibility to fulfilling the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the Aboriginal beneficiaries (*Wewaykum*, at para 86).

[407] My reasons to support these conclusions are set out below.

(i) A cognizable Aboriginal interest

[408] The evidence reveals an acknowledged, cognizable Aboriginal interest in the Opitciwan Reserve by no later than the 1914 survey.

[409] First, the Atikamekw had been occupying and using the Opitciwan site since well before 1914. A reading of the *Notice sur les missions du Diocèse de Québec* dated 1837 reveals that the mission contained two posts, one of which was in Opitciwan, and that the Indians known as the Têtes-de-boule (Atikamekw) gathered there every year (JBD, at tab 405). Furthermore, the former HBC post in Opitciwan appears on maps dated from 1827 to 1840 (JBD, at tabs 394, 395 and 413). In addition, in a report dated September 1908, an HBC representative stated that the HBC already had a post in Opitciwan, that this location was in the heart of the Indian hunting grounds and that the Indians wanted the HBC to move its post there (JBD, at tab 99; see also Exhibit P-3, at p 19).

[410] Second, on two occasions, in 1908 and in 1912, Chief Awashish shared with the DIA his community's desire to move there in order to create a reserve, in a letter written by himself in 1908 and in a letter written by an HBC representative in 1912 (letter sent by Mr. Wilson of the HBC and reported on by Forest Inspector Chitty of the DIA in a memorandum dated October 5, 1912). In 1912, the Atikamekw started moving to Opitciwan and occupying it more intensively as a village. The HBC moved there too, closer to the hunting grounds (JBD, at tab 110). Indeed, in September 1912, the HBC representative sent the DIA a list of about 25 names of the heads of families who had moved to and were occupying Opitciwan (JBD, at tab 111). In addition, in October 1912, Forest Inspector Chitty reported that at least 40 families were preparing to leave Kikendatch and to move to Opitciwan.

[411] In short, it appears from the evidence that, in 1912, the location of the future reserve had been delimited and identified, namely at Lake Opitciwan, on the north shore of the strait and opposite the HBC post. Furthermore, in April 1913, the HBC representative informed the DIA of the intention of the Atikamekw in Opitciwan to start building and sowing crops that summer (JBD, at tab 127).

[412] Third, in 1914, the location had been clearly identified and recognized by the federal Crown. In fact, the federal Crown had sent Surveyor White to delimit the area of the planned reserve. The Respondent argues that, contrary to the situation in *Kitselas*, the site sought by the Atikamekw had been set aside for a public purpose. In fact, only part of the site, the portion below the maximum operating level of the Gouin reservoir, was affected by the flood.

[413] In short, the evidence establishes that by no later than 1914, the Atikamekw of Opitciwan had an acknowledged, communal and cognizable Aboriginal interest in the lands of Opitciwan and that these lands were being used, among other things, as an Indian village. Following the survey performed by the DIA in 1914, the lands in question were specific and clearly identifiable. The fact that the surveyor Mr. Rinfret performed a new survey in 1943 does not affect the nature of the previously acknowledged cognizable Aboriginal interest of the Atikamekw in these lands.

(ii) Exercise of authority with respect to a cognizable Aboriginal interest and the Crown's intention to create a reserve in Opitciwan

[414] The courts have recognized that, in some circumstances, an authority conferred on a fiduciary by statute may entail a duty, particularly when it comes to protecting the rights and interests of Aboriginal people. In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, the Supreme Court of Canada, per Justice McLachlin (as she then was), wrote as follows:

> Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other . . . [at para 115; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3, at para 328; *Peguis*]

[415] There is no doubt that the Atikamekw of Opitciwan were vulnerable. They were illiterate, most spoke only Atikamekw, and, in times of scarcity, they received direct assistance through the allocations paid under section 2 of the 1851 Act and healthcare from the federal government (transcript of the hearing, January 13, 2014, at pp 96–99, 105; JBD, at tab 347). They were completely dependent on the governments for the creation of their reserve.

[416] During colonial times, through the 1850 and 1851 Acts and the 1853 Order in Council, the Crown unilaterally undertook to create reserves for the Indian tribes listed in the areas indicated.

[417] Since the size of the areas was mentioned in the Schedule, the Aboriginal tribes identified were entitled to receive the amounts of lands set aside as these had been "appropriated" to and for them. The Crown therefore had a duty to finalize the creation of the reserves mentioned in these statutes, which required the eventual selection and surveying of the lands.

[418] Following the making of the 1853 Order in Council, the 230,000 acres set aside were distributed, within a certain timeframe, between the Indian tribes identified therein, which included the Têtes-de-boule, and therefore the Atikamekw of Kikendatch (Opitciwan).

[419] The evidence shows that, generally speaking, the Crown created the reserves so as to include, where possible, the tribes' hunting grounds.

[420] Moreover, it appears from the evidence that some of the First Nation groups and potential reserve locations under the 1853 Schedule were not realistic, as also concluded by expert witness Mr. Garneau (Exhibit D-4, at p 9; transcript of the hearing, January 16, 2014, at p 38).

[421] In the case of the Atikamekw, the evidence reveals that the Maniwaki Reserve was too far away from their hunting grounds and that the other groups whom this reserve benefitted, such as the Algonquins, did not want the Atikamekw to be part of the reserve.

[422] For the La Tuque Reserve, the lands were never selected or surveyed since the Abenakis and the Atikamekw had decided not to move there, the location being too far away from their hunting grounds. Moreover, in 1882, the Rev. Fr. Guéguen informed federal authorities that the two groups living together would create great "disturbance".

[423] The Respondent is correct to argue that under the 1850 and 1851 Acts and the 1853 Order in Council, the choice of location for, the size of and the beneficiary of a reserve was within the Crown's discretion and that the 1853 Order in Council did not specifically provide for a reserve for the Atikamekw of Kikendatch (Opitciwan).

[424] However, observing that the Atikamekw were not settling in the reserves that had been set aside for them, despite the efforts that had been made since 1878 for them to do so, yet being required to allocate them reserves, the DIA wrote in an internal memorandum dated 1888 that it had to take the initiative to find reserves for them elsewhere as quickly as possible given the rapid growth of colonization (JBD, at tab 55). Exercising its discretion, the DIA therefore chose to change the location and the size of the reserves initially set aside for the Atikamekw by allocating them new areas, thus creating, first, the Wemotaci and the Coucoucache Reserves, and a few years later the Manawan Reserve.

[425] For all three of these reserves, the federal Crown worked hard at finding reserve lands in areas that were satisfactory to the affected Atikamekw, that is, close to their hunting grounds (see, for example, JBD, at tabs 37, 39, 41, 55, 76 and 78; see also the transcript of the hearing, January 14, 2014, at pp 196 et seq.).

[426] The Respondent argues that the Atikamekw of Kikendatch/Opitciwan agreed to a reserve being created for them at Wemotaci. It refers, among other things, to the census carried out in 1888 for the purpose of creating a reserve there and which shows that the Atikamekw of four bands were in Wemotaci at the time. The census also reveals the presence of Chief Louis Nawashish and future Chief Gabriel Awashish, who, in his capacity as chief, applied for a reserve at Kikendatch in 1908. Lastly, it adds that, in 1908, Chief Awashish apologized for not taking steps earlier.

[427] The evidence establishes that, at the time of the Wemotaci Reserve census, the federal Crown knew that the Atikamekw formed four distinct groups, the Wemotaci, the Coucoucache, the Manawan and the Kikendatch (Opitciwan) (JBD, at tab 54). The evidence also reveals that, at the time of the 1888 census, all the Indians from the various Saint-Maurice posts were gathered at Wemotaci for a few weeks for the Rev. Fr. Guéguen’s mission (JBD, at tabs 52 and 53).

[428] It is likely that the Atikamekw of Kikendatch (Opitciwan) were aware of the DIA’s intention to create a reserve at Wemotaci; however, the evidence does not show that they or the Atikamekw of Manawan were consulted or that it was explained to them what the creation of a reserve in Wemotaci would mean for them, namely, that they would have to leave their summer

grounds even though at the time, in 1888 and 1890, there were HBC posts in both Kikendatch and Manawan.

[429] What is more, in 1893, two years before the Wemotaci Reserve was created, the Atikamekw of Manawan told the DIA that they did not want to go to Wemotaci because it was too far away from their hunting grounds. Despite this, the DIA counted the number of Atikamekw of Manawan when it surveyed the Manawan Reserve, ignoring their request.

[430] Also, in 1898, Inspector MacRae of the DIA noted that the Wemotaci Reserve was used by neither the Atikamekw of Manawan nor the Atikamekw of Kikendatch (Opitciwan) (JBD, at tab 82). The fact that he wrote this in an internal document does not change the observation in evidence. Lastly, the DIA created the Manawan Reserve in 1906, which explains Chief Awashish's application in 1908 for a reserve for the Atikamekw of Kikendatch (Opitciwan), the most populous group of Atikamekw.

[431] In response to Chief Awashish's 1908 application, the DIA continued the process that had been initiated and exercised its discretion by taking steps to create a reserve in Opitciwan. On August 22, 1908, the DIA asked Chief Awashish to provide it with the number of band members and the names of the heads of each family as soon as possible, adding that "[o]n the receipt of this information an effort will be made to have a reserve laid out for you" (JBD, at tab 98).

[432] The Respondent disputes that the federal Crown made a commitment to create a reserve at Kikendatch and later at Opitciwan. It argues that the Crown did not undertake to make an effort to create this reserve and that it did not have the authority to undertake to create a reserve without the province's agreement to provide the desired lands, which was not forthcoming until 1944.

[433] However, the evidence establishes that, in response to Chief Awashish's application in 1908, the DIA took steps to ensure that the Opitciwan lands would be set aside and acted with the intention of creating a reserve on the lands of the provincial Crown in this area.

[434] Moreover, the federal Crown clearly constituted itself as the exclusive intermediary between the Atikamekw of Opitciwan and the provincial Crown with respect to the creation of the Opitciwan Reserve. The fact that, on occasion, the HBC and certain missionaries transmitted information between the Atikamekw and the DIA does not change this. The purpose of these exchanges was simply to facilitate communication.

[435] In fact, the HBC representative in Opitciwan often acted as a messenger for the various stakeholders, including between the DIA and the Atikamekw. Indeed, the Respondent's expert witness, Jean-Pierre Garneau, acknowledged this in his report, indicating moreover that the Atikamekw spoke neither French nor English (Exhibit D-4, at pp 8–9, 13–14, 50). It is also clear that the missionaries considered the DIA to be responsible for the Indians.

[436] Between 1908 and 1925, the federal Crown's interventions took the following form:

(a) As we have seen, on August 22, 1908, the DIA asked Chief Awashish to provide it with information on the number of individuals making up the band and the names of the heads of each family (JBD, at tab 98).

(b) On September 10, 1909, having obtained the information on the number of people wishing to settle in Kikendatch or not more than 40 miles to the north of there, the DIA asked Deputy Minister Taché of the DLF to create an Indian reserve of about 5,120 acres (JBD, at tab 104).

(c) On December 8, 1909, the DIA proposed to Deputy Minister Taché the purchase of a 3,000-acre tract of land a short distance north of Kikendatch (JBD, at tab 107).

(d) In 1909, after being informed by Deputy Minister Taché that only 581 acres remained in the land bank, the DIA initiated discussions with Quebec representatives on what options there were to make up the difference between the 3,000 acres that were required and the 581 acres that remained. Various solutions were contemplated, including the purchase of lands by the federal government and the transfer of part or all of the Wemotaci or Coucoucache Reserves.

(e) In 1912, the DIA was informed of the HBC's move to Opitciwan and confirmed that most of the Kikendatch Indians were in favour of this move. The Kikendatch Indians started gathering and moved to Opitciwan with the DIA's knowledge, with the DIA receiving a list of the 26 families residing in Opitciwan.

(f) In an internal memorandum dated October 5, 1912, Forest Inspector Chitty of the DIA reported on an exchange between the Department and the HBC's district manager. He indicated that Mr. Wilson of the HBC had informed the DIA in August 1912 that Chief Awashish wished to know what steps the DIA had taken to acquire lands. The DIA asked Mr. Wilson to provide it with information on the number and names of the Atikamekw who wished to settle there. Further letters were exchanged on this subject in 1912.

(g) On October 15, 1912, the DIA informed Deputy Minister Taché that the Indians wished to move to Opitciwan and reiterated its request for the creation of a reserve of about 3,000 acres at this location.

(h) On October 22, 1912, the DIA wrote to the HBC's district manager to inform it that an effort would be made to obtain a 3,000-acre reserve in Opitciwan for the Indians.

(i) On November 23, 1912, after being informed by Deputy Minister Dechêne that, for the moment, the Province of Quebec could not consider the DIA's application to create a reserve in Opitciwan, Mr. McLean asked the Deputy Minister to hold onto the application for consideration at a future date (JBD, at tab 122).

(j) On April 17, 1913, the HBC again informed the DIA that the Atikamekw of Opitciwan wished to be granted lands in Opitciwan and had inquired about the situation before they began building and sowing (JBD, at tab 127).

(k) In the summer of 1914, a delegation of Atikamekw travelled to Ottawa to reiterate the band's request for a reserve. In response, in late August, the DIA sent a surveyor, Mr. White, to Opitciwan "for the purpose of surveying the reserve" (JBD, at tab 251) and subsequently sent Mr. White's plan to the DLF.

(l) On December 10, 1914, the DIA wrote to Deputy Minister Dechêne of the DLF. Referring to the Indians "settled at Obiduan Lake", the DIA informed the Deputy Minister that "a surveyor was sent from this Department to select and survey a suitable reserve for that band". It then described the area that had been surveyed (JBD, at tab 147).

(m) On January 13, 1915, the DIA wrote to Deputy Minister Dechêne and asked him to note that "the tract of land at Obiduan, of which a plan has been sent you, is desired by this Department, in order that no other disposition be made of it" (emphasis added; JBD, at tab 150). Regarding this letter, surveyor Éric Groulx, an expert witness called by the Respondent, stated that, even today, this type of entreaty signals the sender's desire or wish for an area and is a request that the owner of the land in question does not dispose of it (transcript of the hearing, January 23, 2014, at pp 208–09).

(n) In July 1917, after the HBC informed him of Chief Awashish's concerns about flooding, the HBC representative suggested that it would be necessary to choose another site. The DIA replied that it preferred not considering this option unless the Atikamekw of Opitciwan discovered that their hunting and fishing activities would be affected.

(o) In 1920, after the flood, the QSC proposed to the DIA that the Opitciwan Reserve be enlarged by an area equivalent in size to the lands that had been flooded The DIA found this arrangement to be satisfactory (JBD, at tab 190), but no concrete action was taken at the time.

(p) In April 1923, the DIA informed Father Guinard that it agreed to support supervised schools in Opitciwan and sent him instructions in 1924 (JBD, at tabs 221 and 228). An initial request had been made by an Indian Affairs employee in 1918 (JBD, at tab 181). The school opened in the summer of 1924.

(q) In July 1923, a DIA official inspected the houses of the Indians located in Opitciwan and concluded that they were unfit for habitation; he demanded that the QSC promise to take immediate action (JBD, at tab 222).

(r) In May 1925, in response to a request from the HBC to move to the north shore close to the Indian village, the DIA informed the HBC that it did not object as long as the Indians agreed (JBD, at tab 251). In another letter, the DIA informed the HBC manager that "[t]here would appear to be no reason why we should not be willing to accord the Hudson's Bay Company license of occupation to a reasonable site on the land selected for an Indian Reserve" (JBD, at tab 252). The HBC thanked the DIA for allowing it to move its post to the Indian Reserve (JBD, at tab 254). The Respondent argued that it was not giving its permission, but making an observation. A reading of the letters dated May 29, 1925 (JBD, at tab 252), June 8, 1925 (Exhibit D-13), and July 6, 1939 (JBD, at tab 307), suggests that it was giving its permission rather than making an observation. Moreover, the fact that, in 1925, the HBC sought the DIA's permission for moving its trading post to the reserve is another indicator to suggest that third parties considered Opitciwan to be a reserve.

(s) In addition, DIA officials visited Opitciwan from 1918 onwards.

(t) Subsequently, the DIA realized its intention through its actions until the reserve creation was completed.

[437] In short, the federal Crown had the discretion to supervise the creation of reserves, and the evidence reveals that it had the manifest and clear intention to create a reserve at Opitciwan. In 1912, the Crown started exercising this discretion by taking steps in this direction, giving effect to it through the 1914 survey. Moreover, the attitude and the letters of the DLF and the QSC establish that Quebec also considered Opitciwan to be a reserve, not one that had been formally created, but one that had been sufficiently identified, was occupied by Indians and was being used as a reserve. The same applies to third parties, such as the HBC and the missionaries living on the reserve.

[438] It should be noted that, in its correspondence, the DIA often used the word “reserve” for Opitciwan. The same was true of other stakeholders. Even though the use of this word does not mean that a reserve had been officially created, it is definitely an additional indicator of the DIA’s intentions regarding this territory and of the understanding other stakeholders had of the status of the site.

[439] The Respondent argues that it did not control or own the lands and that this was at the province’s discretion. Yet the cognizable Aboriginal interest is in the lands occupied by the Atikamekw of Opitciwan as the site of an Indian village and acknowledged for this purpose by the federal Crown by no later than the 1914 survey. The discretionary power in question meant ensuring that the reserve creation process was implemented. This discretion belonged to the federal Crown.

[440] As noted by Justice Binnie in *Wewaykum*, at para 88, the exercise of the particular power of reserve creation remains subject to certain obligations of the Crown. This is a corollary of the principle of the honour of the Crown.

[441] The Crown’s fiduciary duty arose not only from the fact that it was going to exercise a discretionary power over an acknowledged, cognizable Aboriginal interest of the Atikamekw of Opitciwan, but also from the fact that in exercising this power, it had sufficient discretion to adversely affect the interest of the Atikamekw.

[442] I therefore conclude that there was an enforceable fiduciary duty in the process for creating the Opitciwan Reserve that attracted the federal Crown responsibility for fulfilling the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the Aboriginal beneficiaries (*Wewaykum*, at para 86).

[443] The federal Crown was bound by this duty to the Atikamekw of Opitciwan as soon as Opitciwan constituted a provisional reserve, as of 1914.

[444] These obligations required the federal Crown to take the necessary and appropriate measures to obtain from the Province of Quebec a sufficient allocation of lands to replace the lands of the provisional reserve flooded during the 1918 Flood. I will come back to this.

(b) Regarding Condition No. 7 of the order in council authorizing the dam and the federal government's undertaking

[445] I find that the evidence establishes that the Crown deliberately undertook to act in the best substantial, practical interests of the Atikamekw, namely to protect their assets located on the territory affected by the dam, including certain assets located on the territory surrounding Opitciwan.

[446] I also find that this deliberate undertaking gave rise to an enforceable fiduciary duty on the part of the federal Crown, which required it to fulfill the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

[447] These obligations were not respected by the federal Crown.

[448] My reasons to support these findings are set out below.

[449] In November 1914, the Governor in Council adopted an order in council to authorize the plans for and construction of the La Loutre dam, subject to Condition No. 7, which stipulated that the QSC assume responsibility for any damage caused by its works or actions in connection with this dam.

[450] In 1919, rising water levels started affecting the provisional reserve at Opitciwan and the surrounding area.

[451] We have seen that, in 1919, a QSC employee wrote a report on the losses claimed by the Atikamekw of Opitciwan affected by the rising waters. On May 1, 1920, at a meeting at the DIA office, Mr. Lefebvre of the QSC submitted a compensation proposal to Mr. McLean and asked whether the DIA was satisfied with the proposed conditions. The DIA informed the QSC that it wished to consult the Atikamekw of Opitciwan before approving the proposal. On July 2, 1920,

13 heads of Atikamekw families signed a compensation agreement with the QSC. On August 4, 1921, about 30 heads of family, including Chief Awashish, asked the DIA to rescind the July 2 Agreement. Instead of acquiescing to the petition, on August 16, 1922, the DIA ordered the QSC to honour the agreement without further delay.

[452] It is clear from the evidence that, at the meeting of May 1, 1920, the QSC asked Mr. McLean of the DIA to approve the compensation plan it intended to submit to the Atikamekw, a request that was reiterated in a letter dated May 7, 1920, and that the DIA undertook to consult the Atikamekw before doing so. Expert witness Mr. Garneau confirms this (Exhibit D-4, at p 54).

[453] The Respondent submits that the DIA advised the QSC that it would consult the Atikamekw on the proposed settlement submitted by the QSC, but it did not promise them that it would do so. Moreover, in the Respondent's opinion, nothing in the evidence suggests that the consultation did not take place given the factual vacuum in the documentation in this regard. It adds that in his opposing expert opinion, Mr. Garneau wrote that [TRANSLATION] "[w]e do not know whether, or how, the DIA contacted the Atikamekw of Opitciwan after this letter, or if it contacted them at all" (Exhibit D-4, at p 55). According to the Respondent, if, as the Claimant alleges, a consultation never took place, the only conclusion is that nothing could have been done.

[454] The Respondent adds that the DIA never approved the 1920 Agreement, did not participate in its negotiation and was not a party to it. According to the Respondent, no obligation arises from the agreement since the federal Crown did not exercise any discretion in its regard. It submits that, consequently, the federal Crown did not make any undertakings to the Atikamekw that could have called a fiduciary duty into existence.

[455] What is the truth of the matter here?

[456] The fact that the QSC sought to obtain the DIA's approval and the DIA's response indicate :

- that the two governments felt that the DIA's approval was necessary because of the federal responsibility for the lands and property of Indians (section 4 of the *Indian Act*, RSC 1906, c 81 (1906 *Indian Act*); subsection 91(24) and section 109 of the *Constitution Act, 1867*); or

- that they wanted to ensure that the condition for full compensation, Condition No. 7, which the federal government had imposed on the QSC when it authorized the dam, would be fulfilled to its satisfaction; or

- both.

[457] Whatever the case may be, the DIA's confirmation to the QSC that it would consult the Atikamekw of Opitciwan before approving the agreement constitutes an undertaking on the part of the DIA. By approving the project subject to the condition imposed on the QSC to provide compensation for any damages arising from it and by obliging itself to consult the Atikamekw before giving its approval to the compensation proposal dated May 1, 1920, and drafted and submitted by the QSC, the federal Crown deliberately undertook to act in the best substantial, practical interests of the Atikamekw. It therefore undertook to protect their assets located in the area affected by the dam, including those located in the area surrounding Opitciwan. I will deal with the question of the Tribunal's jurisdiction in this regard in greater detail a little later on.

[458] The evidence overwhelmingly demonstrates that the DIA did not consult the Atikamekw on the QSC's compensation proposal, as it had undertaken to do, specifically because the time between the dates of the arrival of the Atikamekw in Opitciwan in the early summer of 1920 and the signature of the agreement on July 2, 1920, is too short and because no document confirming a consultation could be found.

[459] On this topic, under cross-examination, Mr. Garneau acknowledged that it could have taken a few weeks in June for many of the Atikamekw to have arrived at the Opitciwan Reserve from their hunting grounds and that all the Atikamekw were in Opitciwan from late June until about early September (transcript of the hearing, January 16, 2014, at pp 225–26). The elders Antoine Awashish and Jérémie and David Chachai also testified along those lines.

[460] The Respondent refers to the expert report of Jacques Frenette, according to which the Atikamekw tended to arrive in Opitciwan in late May and early June (Exhibit P-3, at p 96). The Tribunal accepts the testimony of Mr. Garneau, who used primary sources, while Mr. Frenette's report is based on secondary sources.

[461] Also, in the HBC Journal for June 1924, the June 5 entry reads that none of the Indians had arrived yet. The June 7 entry indicates that the Indians had slowly started to arrive (Exhibit P-9).

[462] This is not a situation where nothing could have been done. Nothing stopped the DIA from taking steps to organize a consultation.

[463] By ordering the QSC to honour the Agreement of July 2, 1920, the DIA ratified it, thus recognizing its duty to act. This decision is the DIA's *de facto*, if not *de jure*, approval of the 1920 Agreement. As noted above, in its ninth annual report, the QSC confirmed that the 1920 Agreement was the result of negotiations with the DIA (JBD, at tab 195).

[464] This undertaking created an *ad hoc* fiduciary duty for the DIA to act in the best interests of the Atikamekw of Opitciwan in the context of the fiduciary relationship resulting from "[t]he unique and historic nature of Crown-Aboriginal relations" (*Elder Advocate*s, at paras 40, 48).

[465] It arose from the particular nature of the relationship between the Atikamekw of Opitciwan and the Crown, which, in addition, was dealing with vulnerable people and exercising a discretion or control that could adversely affect the interests of these people.

[466] The DIA exercised the following discretionary powers:

(a) In 1921, the DIA intervened with the QSC, ordering it to honour the 1920 Agreement (JBD, at tab 198).

(b) In 1922, the DIA asked the QSC for a report, after it had received a long list of grievances from the Atikamekw (JBD, at tab 216).

(c) In 1923, the DIA sent a representative to Opitciwan to assess the situation with regard to the building of the houses (JBD, at tab 222).

(d) In 1925, the DIA asked the QSC to inform it of what steps had been taken to comply with its 1922 undertaking to dig two wells, which had still not been fulfilled (JBD, at tab 258).

[467] Lastly, the Respondent's argument that the DIA's undertaking to consult had been expressed to the QSC but without the knowledge of the Atikamekw has no merit. As noted by Chief Justice McLachlin in *Elder Advocate*s, at para 30, a fiduciary's undertaking can be express or implied.

[468] The Respondent submits that the adoption of Condition No. 7 resulting from the authorization of the dam falls under public law, because it concerns not only the Atikamekw but also the damages that can be suffered by anyone.

[469] However, other than the HBC post that had been established at Opitciwan to trade with the Atikamekw and some property belonging to the missionaries, including the church built at Opitciwan to convert the Atikamekw of Opitciwan, there were no non-Aboriginal interests in the area. The lands were not yet being exploited by the forestry or mining industries. In light of the facts, including the very specific historical context of the time and the remoteness of this location, which was occupied and used essentially, if not exclusively, by the Atikamekw of Opitciwan, who had their hunting grounds there, the specific purpose of Condition No. 7 was to protect the Atikamekw of Opitciwan and their assets.

[470] Moreover, as the Supreme Court of Canada has often noted, the fiduciary duty owed to the Aboriginal peoples in Canada is unique and grounded in analogy to private law:

> . . . the fiduciary duty owed by the Crown to Aboriginal peoples is not restricted to instances where the facts raise "considerations 'in the nature of a private law duty'". [*Elder Advocate*s, at para 39]

[471] I conclude that the DIA's actions with regard to the compensation proposal submitted by the QSC following the adoption of Condition No. 7 created an *ad hoc* fiduciary duty for the DIA to act in the best substantial, practical interests of the Atikamekw of Opitciwan.

[472] By undertaking to consult the Atikamekw of Opitciwan before approving the agreement and by subsequently *de facto* approving this agreement and demanding that the QSC honour its obligations under the agreement, the DIA took responsibility for the rights and obligations of the Atikamekw of Opitciwan with regard to the enforcement of the QSC's debt towards them. In doing so, the Crown was administering the community's assets, including the compensation received by the Atikamekw of Opitciwan (I will return to the issue of assets and whether they should be characterized as collective or individual).

[473] This unilateral undertaking created an enforceable fiduciary duty for the DIA.

B. Did the Respondent breach its legal and fiduciary obligations to the Atikamekw of Opitciwan?

1. With respect to the reserve creation process

[474] The federal Crown's breaches with respect to the reserve creation process are the subject of File Nos. SCT-2005-11, SCT-2006-11 and SCT-2007-11, and will be dealt with there.

2. With respect to the compensation agreement

(a) Before the 1918 Flood

[475] As we have seen, on November 4, 1912, the DLF informed the DIA of the possibility of a dam being built at the outlet of Lake Opitciwan (JBD, at tab 119).

[476] On November 14, 1912, in its first annual report, the QSC expressed its intention of building a dam at the La Loutre (Gouin) rapids, estimating the elevation of the high water level of the dam at full capacity to be 1,324 feet (JBD, at tab 120). It confirmed construction of the dam in its second report of 1913, produced a map of the areas that would be flooded and

stipulated this time that, at full capacity, the elevation of the water level of the dam would reach 1,325 feet (Exhibit P-10, at p 8).

[477] The Crown was aware (or could have known, since the QSC's report was public) that, since late 1912, the site of the village of Opitciwan was likely to be flooded. In 1913, it could have had access to a map showing the flooded areas.

[478] Subsequently, on April 17, 1913, the HBC manager, Mr. Wilson, wrote to Mr. McLean of the DIA that the Atikamekw wanted a reserve since they intended to start building houses in the summer of 1914 (JBD, at tab 127). The DIA replied that the Government of Quebec could not immediately consider a reserve because it was planning to build a dam at the outlet of Lake Opitciwan (JBD, at tab 128). However, despite the DIA knowing that the lands where the Atikamekw wished to build their houses were likely to be flooded, the evidence shows that it did not advise them on how to protect what they would build.

[479] On the contrary, a year later, in response to the Atikamekw envoys who had travelled to Ottawa to inquire about the status of their reserve, the DIA sent a surveyor, Mr. White, to Opitciwan in late August 1914 to perform a survey of the Indian reserve.

[480] Shortly afterwards, on November 4, 1914, the federal Crown adopted its order in council authorizing the planned dam and Condition No. 7, which held the QSC responsible for any resulting damages.

[481] On December 28, 1914, in reply to a letter from the DIA, the DLF informed the DIA that it could not approve the application for a reserve on account of the high probability of "all this territory around Lake Obiduan becoming flooded . . ." (JBD, at tab 149).

[482] Knowing that the Atikamekw would be affected by the rising waters, the federal Crown acted with prudence in imposing Condition No. 7 on the QSC.

[483] However, acting with basic prudence in the interest of the Atikamekw also dictated that the federal Crown inquire about the maximum operating level of the dam before the survey by Mr. White. As well, the duty of prudence and loyalty required the federal Crown to inform the

Atikamekw of the practical effect the maximum water elevation could have for Opitciwan and to recommend that they build their houses above this level.

[484] It appears from the evidence that the federal Crown could have had a sense of the anticipated maximum operating limit as of 1912–1913, since it was indicated in the QSC's public report and on a map that could be consulted. It is therefore wrong to say that no one knew how high the water would rise in 1912 and 1914.

[485] The DIA could therefore have known that the Atikamekw of Opitciwan would have been safe above the 1,325-feet operating level. Prudence dictated that at the very least, the DIA could have informed the Atikamekw of this.

[486] The only information the Atikamekw did receive from the DIA regarding the impact of the dam came from the surveyor, Mr. White; however, this information turned out to be wrong.

[487] In his report dated December 5, 1914, submitted to Assistant Superintendent McLean of the DIA, Mr. White wrote by hand: "The Indians were advised at the time of the survey that they should build their houses on high land as I had heard that the water might be raised as much as twelve feet" (emphasis added; JBD, at tab 146).

[488] According to expert witness Mr. Garneau, this sentence leaves little room for doubt. Mr. White informed the Atikamekw that the lands where they were settled were intended to be flooded and encouraged them to build their houses on high land (Exhibit D-4, at pp 17–18).

[489] However, one can also conclude from this recommendation that Mr. White was informing the Atikamekw that the water could rise by a maximum of 12 feet, which was wrong, since, at one point, the water rose as much as 28 feet.

[490] Mr. White surveyed the reserve two years after the release of the QSC's first report. It is hard to accept that he did not know or could not have known that the water could rise by more than 12 feet given the information contained in the QSC's 1912 annual report. The only conclusion that can be drawn is that Mr. White provided the Atikamekw with wrong information.

[491] Moreover, the evidence does not suggest that the Atikamekw refused to follow Mr. White's recommendation. In fact, the Atikamekw built their houses at the same elevation as the buildings of the HBC and the Oblates.

[492] Even though the water did not rise by up to 28 feet until 1919–1920, the fact remains that the maximum authorized limit was known as of 1912. If there was any uncertainty about the waters rising, as the Respondent alleges, prudence did not dictate leaving the Atikamekw at the mercy of this uncertainty, as the DIA opted to do in 1917 after the HBC representative informed it of the concerns of the Atikamekw of Opitciwan (JBD, at tab 171).

[493] In fact, in July 1917, Commissioner Bacon of the HBC told the DIA of the concern expressed by Chief Awashish, who feared that there would be flooding when the gates of the La Loutre dam (Gouin dam) were closed. Mr. Bacon added: "I presume it will be necessary to choose another location for the Indian Reserve, and I shall be glad to learn in due course whether this is being done, as the Company will be unable to select a location for their Post until it is known where the Indian Reserve will be situated" (JBD, at tab 169).

[494] Yet, rather than responding to this concern, the DIA replied on July 28, 1917, that it did not know to what extent the flooding of the lands would affect the Indians and that since nothing had been done to acquire other lands, the DIA had decided to wait: "It is not likely that a move will be made in that direction unless the Indians find that their hunting and fishing have been adversely affected by the raising of the waters" (JBD, at tab 171).

[495] Once again, despite the uncertainty, the Respondent chose to do nothing rather than take measures to prevent the damage, warn the Atikamekw accordingly or select another site. This careless attitude is in contrast to that of the HBC, which communicated with the QSC and moved its post after receiving compensation from the QSC (JBD, at tabs 170, 173, 174 and 175).

[496] Moreover, despite knowing that the reserve that Mr. White had just surveyed and the surrounding area would be flooded, the Respondent did nothing to protect the assets of the Atikamekw. It did not make an inventory of the assets owned by the Atikamekw, such as their houses, camps and chattels, or tell them to do so.

[497] While it cannot be argued that the DIA had a policy, the evidence shows that, in some cases, the DIA took the initiative to investigate the damages suffered by Indians so that they could be compensated after the flooding of a reserve. This was the case, for example, in Pointe-Bleue in the 1920s (JBD, at tabs 278, 279 and 293) and at the Gibson Indian Reserve in the early 1930s (JBD, at tab 288).

[498] In the matter before us, the Crown demonstrated a reckless, careless attitude towards the Atikamekw before the flood, which was contrary to the obligations of prudence, loyalty and full disclosure required of it in its capacity as fiduciary.

(b) After the 1918 Flood

[499] We saw that following the 1919 report by the QSC envoy, a meeting took place on May 1, 1920, between DIA and QSC representatives to discuss a compensation plan. The meeting was followed by a letter from Mr. Lefebvre of the QSC dated May 7, 1920, setting out the submitted proposal. Appended to the letter was Plan B-847, containing an inventory of the losses of the Atikamekw, accounted for after the waters had started to rise but before they reached their full capacity. The Parties were unable to find the plan. Given the timespan between the submission of the report of the QSC's envoy on July 15, 1919, and the meeting of May 1, 1920, it is likely that the inventory attached to Plan B-847 is the list of claims compiled in 1919.

[500] The evidence reveals that the 1920 Agreement differs from the compensation proposal submitted by the QSC to the DIA on May 1, 1920, which partially differs from the claims identified by the QSC envoy in 1919:

(a) In the compensation proposal dated May 1, 1920, the QSC did not feel that it should have to transfer the remains from the old to the new cemetery because the old cemetery would not be flooded, which turned out to be wrong. Yet in 1919, the QSC envoy had found this to be an issue of great importance to the Atikamekw.

(b) According to the 1919 report, the Atikamekw had agreed to have their houses replaced, on condition that the new houses be weatherproof. In the May 1920 proposal, the QSC undertook to provide each Atikamekw family with a house as solid

and as comfortable as the one it had before the flood. Under the Agreement of July 2, 1920, the Atikamekw were to build their houses themselves and the QSC was to provide dry wood, nails and paper in the summer of 1921 to enable the Atikamekw to have houses of the same size as their former houses; pay them each $120 to build, clear and move; and send three carpenters with tools. The quality of the houses was no longer an issue.

(c) The Agreement of July 2, 1920, was signed by only 13 heads of family despite the 1919 report indicating that there were 20.

(d) The 1919 report refers to six hunting camps claimed by three families in the surrounding area and some movable assets. Neither the proposal of May 1, 1920, nor the Agreement of July 2, 1920, refer to these items.

(e) The 1920 proposal mentions the possibility of building wells. The Agreement of July 2, 1920, does not.

[501] Also, on May 12, 1920, Mr. Lefebvre of the QSC informed the DIA that the Chair of the QSC had authorized him to say that the QSC would recommend to the Government of Quebec that the flooded lands on the Opitciwan Reserve be replaced by enlarging the reserve by an area of equal size (JBD, at tab 189). The DIA found this arrangement to be satisfactory, but took no immediate action (JBD, at tab 190).

[502] Yet the obligations of prudence and loyalty to the Crown dictated that it send a representative to Opitciwan to assess the extent of the damage instead of leaving it to the QSC to do so.

[503] Failing that, these obligations required it not only to inform the Atikamekw of the QSC's compensation proposal but also to ensure that the proposal covered all the damage and inconvenience suffered.

[504] In the circumstances of this case, the federal Crown should have consulted the Atikamekw of Opitciwan directly about the compensation to which they were entitled. The

federal Crown should have refused to approve the 1920 Agreement or attempted to improve it, especially after it realized that the QSC had, without its knowledge, negotiated with the Atikamekw an agreement that benefitted them less than what had been provided in the 1919 report or the 1920 proposal. But the DIA preferred to do nothing. Instead it approved the agreement by ordering the QSC to respect it.

[505] Moreover, the 1920 Agreement was not respected in that, for example, the wood provided to build the houses should have been dry and sent in the summer of 1921, which it was not; five years went by before the Atikamekw finally had their houses. The QSC should have paid each Atikamekw $120, a sum they were only paid in 1925, upon deduction of the cost of the paint. The carpenters were late to arrive in Opitciwan. And so forth.

[506] In contrast, Father Guinard obtained more benefits than the Atikamekw for building his chapel. The chapel was painted and varnished inside and out at the QSC's expense, without his compensation being reduced. Ultimately, Father Guinard received adequate compensation, while the HBC obtained more than it had asked for from the QSC and quickly so.

[507] The DIA should have provided proactive, close supervision of the compensation paid to the Atikamekw of Opitciwan, the delays in implementing the QSC's compensation plan, the manner in which the QSC fulfilled its undertakings and its complete fulfillment of these undertakings. The federal Crown clearly breached the obligations it was required to fulfill in its capacity as fiduciary.

[508] Relying on the expert witness Mr. Garneau, the Respondent argues that the DIA's sending of Inspector Parker to Opitciwan in 1923 was instrumental in ensuring the completion of the building of the houses of the Atikamekw rather than the letter from Father Guinard to Premier Taschereau in May 1924, which had an impact on church property (JBD, at tab 232; Exhibit D-4, at pp 64–65).

[509] Yet the documentary evidence shows that on July 31, 1923, the Atikamekw again turned to the DIA to complain that they still had not received anything from the QSC (JBD, at tab 223). Furthermore, in his letter to Premier Taschereau dated May 9, 1924, Father Guinard complained

not only about how slowly work on the chapel was progressing but also about the fact that the houses of the Atikamekw were uninhabitable and that nothing had been done about the wells.

[510] So, even though the DIA's intervention may have helped in getting things moving, it was Premier Taschereau's intervention in response to Father Guinard's letter that activated the QSC.

[511] Lastly, the DIA found that the property losses should be compensated. In fact, it asked the QSC to report on each of the claims of the Atikamekw, which also included losses of equipment on and outside the reserve (JBD, at tabs 214 and 216). Also, the fact that the QSC agreed to pay compensation for a camp outside the territory demonstrates that it did not interpret Condition No. 7 as limiting its responsibility to property on the reserve (JBD, at tab 242).

(c) Contamination of water and wells

[512] The Claimant argues that the DIA did not act prudently or diligently by intervening late and half-heartedly, and by not monitoring the situation of the wells and, incidentally, the drinking water, despite its responsibility and its powers with respect to health and safety in reserves and Indian communities.

[513] The Respondent submits that

(a) drinking water is not an asset under paragraph 14(1)(c) of the SCTA; that the navigable and floatable watercourses of the province of Quebec are dependencies of Quebec's provincial public domain and that the water of the lake can therefore not be considered to be the property of the Atikamekw;

(b) paragraph 92(e) of the 1906 *Indian Act* is of assistance as it confers on the Crown the discretion to make regulations with respect to health and safety but does not give rise to a duty to act;

(c) the compensation agreement between the Atikamekw and the QSC, to which the federal Crown is not party, does not include any terms regarding wells and drinking water, and that the federal government took charge in 1942 and that between this date

and 1950, significant efforts were made by the federal Crown to resolve the problem of the drinking water supply; and that

(d) it was established in the opposing expert opinion of Dr. Christian Gagnon that an increase in the concentration of the products of decomposing organic matter, mainly humic substances, could not, on its face, have turned the lake water unfit for consumption.

[514] The Respondent's argument concerning the fact that drinking water is not an asset within the meaning of the SCTA has no merit since the Claimant is not making any claims for drinking water. In fact, it is claiming damages resulting from the consumption and use of contaminated and unsafe water, which were caused by the DIA's breaches of its fiduciary duties in administering the QSC's compensation program, including the supply of wells the QSC had promised.

[515] As indicated at the beginning of this decision, the expert report of Dr. Marche on this issue and the opposing expert opinion of Dr. Gagnon were analyzed in File No. SCT-2007-11, and this analysis applies *mutatis mutandis* to this decision.

[516] I determined that the expert evidence analyzed in decision 2016 SCTC 9 in File No. SCT-2007-11 established that it was more likely than not that the decomposing fish eggs, other animals, animal carcasses and bird and animal feces carried in the water as a result of the reservoir's fluctuating water levels and turnover caused a bacterial contamination of some parts of the reservoir water and that it was clear that water containing humic substances led to major harm given that this water was the main source of supply of the Atikamekw.

[517] Having said that, since the claim under review concerns the consequences of the 1918 Flood, I will focus on the factual considerations of this case.

[518] The elders testified that, before the first flood, the Atikamekw were drinking water from the lake at the edge of the village. After the flood, the water became unfit for consumption. At the beginning, several people, including children and pregnant women, drank the water and complained of stomach pain. Some individuals were sent to the hospital, and some died there,

including children. Pregnant women lost their fetuses. Joséphine Dubé Awashish stated that she did not know why the people fell ill, that it was probably because of the water, but that it had also been cold. Antoine Awashish testified that he did not know whether the people fell ill because of the water. Jérémie and David Chachai both blamed the illnesses suffered by the Atikamekw and the deaths on the water they drank from the reservoir.

[519] After the flooding, the Atikamekw, including the women and the children, had to fetch water from a small lake and a stream, which required them to clear some parts of the area to create a path to get there. They had to walk for about an hour to get to the small lake and another hour to get back, and an hour to and from the stream. The Atikamekw, including the women, walked there with pails. The Atikamekw dug some water points, some of which were later flooded. Jérémie Chachai testified that once the QSC's plank houses had been built, the Atikamekw dug four wells or water points in the village that were about twenty feet deep. This solved the problem, as they no longer had to walk for miles to fetch water, until the following flood.

[520] Jérémie and David Chachai testified that after the waters rose on the territory, not only had the wood not been harvested beforehand, there were also many drowned animals floating in the water. Among other things, they mentioned the carcasses of moose that had drowned because they had become disoriented and that were now floating in the reservoir, drowned beavers trapped in cages, birds and birds' nests that had been submerged by the waters. The elders did not say that all the Atikamekw of Opitciwan fell ill, but that many of them experienced discomfort, including stomach pain, after drinking the water and that some were sent to the hospital and had died there.

[521] The elders' testimony is corroborated by the documentary evidence, which clearly establishes that, after the flood, the water was no longer safe to drink, in addition to having created an unhealthy environment:

(a) On March 12, 1920, a letter from Father Guinard to the Provincial Reverend Father of the Oblates mentioned the need [TRANSLATION] ". . . to dig wells for the Indians

because the water has become foul because of the raising of the La Loutre" (JBD, at tab 184).

(b) On May 7, 1920, Mr. Lefebvre told Mr. McLean of the DIA that the QSC would build wells for the community if the claims of the Atikamekw were proven to be correct (JBD, at tab 186).

(c) On April 10, 1922, Father Guinard reminded Mr. McLean of the DIA that the 1920 Agreement had not been respected and noted that the Atikamekw "are forced to quit a place were [*sic*] there was [*sic*] no flies . . . they have no water that they can drink . . . [t]hey have to cut down the wood to prepare a site for their new village, to dig wells . . ." (JBD, at tab 202).

(d) On July 11, 1922, Father Guinard wrote to the Chair of the QSC to explain the problems he had observed, including the fact that [TRANSLATION] "we are still drinking foul water" (JBD, at tab 206).

(e) On July 14, 1922, in an internal memorandum, Chief Engineer Lefebvre of the QSC wrote that the QSC had told the Atikamekw that it would dig two wells in the new village (JBD, at tab 207). This indicates that the QSC had concluded that the complaints expressed by the Atikamekw in 1920 about the quality of the water had been proven to be correct.

(f) On May 9, 1924, Father Guinard wrote to Premier Taschereau of Quebec. He reported that the QSC had failed in its duties to the Atikamekw and that the QSC had been supposed to dig wells, but that this work had not yet begun. He added:

> [TRANSLATION]
>
> . . . We had housed the mission in the former chapel that, because of the flooding, was in a totally insalubrious location: <u>we all became ill, and four people died during that mission</u>. Last year, fearing a new epidemic, I advised the Indians to remain in the new village and to travel to the former village for religious exercises only. [Emphasis added]

In conclusion, he wrote that, for long enough, [TRANSLATION]: "... the Quebec Streams Commission ... [has continued] to allow the suffering of the impoverished Indians of Obedjiwan" (JBD, at tab 232).

(g) On August 7, 1925, Mr. Lefebvre of the QSC was informed by Acting Assistant Superintendent Mackenzie of the DIA that the two wells promised by the QSC in its letter of April 29, 1922, had still not been dug. Mr. Mackenzie wrote that he wished to be informed of the steps taken by the QSC to rectify the situation since "Chief Gabriel Awashish recently called at this Department and states that up to the present time no water supply has been provided". He added that this was causing a great deal of inconvenience (JBD, at tab 258).

[522] The documentary evidence does not include a reply to the DIA's letter or reveal any concrete steps taken by the DIA in this regard. It seems therefore, as noted by expert witness Mr. Garneau, that one of the QSC's obligations, that of digging wells for drinking water, was ignored (Exhibit D-4, at p 65).

[523] In short, the documentary evidence and the elders' testimony clearly reveal that, after the 1918 Flood, the water became unfit for consumption.

[524] Even though the stomach pain from which some Atikamekw suffered was not necessarily or solely caused by their drinking the water from the reservoir, it is more than likely that, in some areas, this water was contaminated by bacteria produced from decomposing animals and caused the health problems the elders described.

[525] Moreover, the evidence is clear that the Atikamekw suffered a great deal of inconvenience as a result of the poor water quality. This included having to boil the water from the reservoir for several years, making many trips through the forest to find other drinking water sources, clearing paths for this purpose, digging water points and having to use foul-smelling, coloured water.

[526] The federal Crown's duty as regards the inconvenience suffered by the Atikamekw in terms of the village's drinking water and the building of the wells, which were not dug before the

1940s and 50s, falls under the implementation of the QSC's compensation program by which it was bound. If the Crown had honoured its obligations and consulted the Atikamekw on the compensation proposal, the wells would have been provided for in the 1920 Agreement since they had already been included in the proposal submitted to the DIA in 1920 (JBD, at tab 186). Similarly, if the Crown had taken steps in the interest of the Atikamekw by refusing to approve the Agreement when the latter asked it to rescind the agreement, the issue of the wells could again have been discussed.

[527] The Crown therefore breached its obligations by not ensuring that the Atikamekw were adequately compensated for the damage caused to them by the construction of the dam and by failing to provide a tough response to this issue even though it had been informed of it.

[528] In short, I conclude that the federal Crown did not respect its enforceable legal and fiduciary obligations be it in the reserve creation process or as part of its unilateral undertaking to act in the best substantial, practical interests of the Atikamekw of Opitciwan.

C. What losses can be compensated at the second stage?

1. Does the Tribunal have jurisdiction over the losses alleged to have occurred on the territory surrounding the tract of land from which the Opitciwan Reserve was to be created?

(a) Position of the Respondent

[529] On June 12, 2013, the Respondent filed a motion to strike with respect to the present Statement of Claim under section 17 of the SCTA. It alleges the compensation sought by the Claimant for the damage and inconvenience suffered outside the reserve cannot be granted under sections 14 and 15 of the SCTA on the grounds that this is a claim for Aboriginal rights and that the Tribunal does not have jurisdiction over such claims.

[530] More specifically, the Respondent wishes to strike paragraphs 6; 121(d), (g) and (k); 125(e)(ii); and 126(h), (i) and (j) of the Further Amended Declaration of Claim of November 8, 2012, which read as follows:

[TRANSLATION]

6. This claim involves the flooding of the Opitciwan Reserve (previously known as "Obidjuan" or "Obedjiwan") and . . . the surrounding area from which the Atikamekw of Opitciwan (previously known as the Têtes-de-boule of Kikendatch) drew a substantial part of their livelihood following the impoundment of the Gouin reservoir in 1918 and the damage and inconvenience suffered by them as a result of that event. For greater certainty, this claim is not based on the Aboriginal rights or title of the Atikamekw of Opitciwan, nor does it refer to such rights or title.

121. The particular facts include:

d. the fact that the site of the planned reserve and the surrounding area . . . were occupied and used by the Atikamekw of Opitciwan;

g. the Government of Quebec's planned impoundment on the Saint-Maurice River, which was likely to affect the lands and chattels of the Atikamekw, and the Crown's power, under the *Navigable Waters Protection Act*, to authorize the site and the plans for this work and to make conditions;

k. the consultations between the Crown and the QSC regarding the relocation of the reserve and compensation of the Atikamekw both within and outside the reserve;

125. The Crown breached or failed to honour its legal, statutory and fiduciary obligations, as described below:

e. by knowing that the reserve it had just surveyed and the surrounding territory were going to be flooded, and

(ii) failing to, prior to the flood, make an inventory of the houses, camps and chattels possessed by the Atikamekw of Opitciwan on the reserve and the surrounding territory;

126. The damage and inconvenience suffered by the Atikamekw of Opitciwan as a result of the 1918–1922 flooding and for which they were not compensated are related to:

h. the loss of territory . . . surrounding the Opitciwan Reserve and to a drop in their productivity, and, consequently, to losses of food supply and income;

i. the difficulty of obtaining raw material to build canoes and make snowshoes, baskets and other tools and objects the Atikamekw needed in their everyday lives;

j. the inconvenience resulting from the difficulty of accessing, travelling on and living on the territory surrounding the Opitciwan Reserve caused by the rising waters and the entangled tree trunks and vegetation, and to the accidents caused by this situation. [Emphasis added]

[531] In its Memorandum regarding the motion to strike filed on December 23, 2014, the Respondent adds new elements not alleged in the motion. It submits, for example, that any part of the hunting grounds or surrounding area outside the reserve and the area forming the reserve but before its creation cannot, on its face, constitute an asset that can give rise to a claim against it under section 14 of the SCTA and within the meaning of the definition of "asset" in section 2 of the Act.

[532] It further argues that the Claimant's claims are not within the scope of the Tribunal's jurisdiction since they do not arise from the collective loss of a First Nation within the meaning of section 14 of the SCTA. It adds that, at the time of the events in question, the Atikamekw were not a First Nation within the meaning of the SCTA.

[533] It also makes the following submissions:

a. The *Specific Claims Policy* excludes any claims based on Aboriginal rights or title.

b. The area surrounding the reserve is part of Quebec's public domain.

c. The doctrine of "neighbourhood annoyances" does not apply here (article 976 of the *Civil Code of Québec*).

[534] According to the Respondent, the case law, such as *R v Baker*, 2008 ONCA 29 at para 9, [2008] OJ No 154 (CA); *Saskatchewan (Minister of Environment and Resource Management) v Landry*, 2001 SKQB 424 at paras 21–22, [2002] 1 CNLR 330; and *R v Paul*, 2011 NBPC 23 at para 16, recognizes that in the absence of evidence of a band's interest in the property, the property cannot be considered to be for communal use.

[535] The Respondent adds that the evidence reveals, further to the testimony of Jérémie and David Chachai, that the houses, camps and chattels that are the subject of the claim are individual assets in that

a. when compensation was granted, it was granted to individuals;

b. the individuals could dispose of these assets as they wished without consulting or informing the community;

c. they were free to use, repair, renovate and dispose of the assets in the manner that they saw fit without prior consent from the band; and

d. on the death of the owner, the assets were transferred to the estate.

[536] It adds that the documentary evidence shows that the claims for the lost houses in the village or the flooded hunting camps were separate and that the ownership of the houses and camps was associated with specific individuals (JBD, at tabs 183, 192, 193, 241 and 242).

[537] Lastly, the Respondent admits that while the Agreement of July 2, 1920, does, in some respects, concern certain collective items such as the choice of site, the bulk of the agreement concerns claims that are ultimately personal in nature and specific to individuals and not the band.

(b) Position of the Claimant

[538] The Claimant argues that this claim is not based on the Aboriginal rights or title of the Atikamekw of Opitciwan, nor does it refer to such rights or title.

[539] It submits the following:

(a) The true nature of the claim is a claim for lost assets and inconvenience and that a reference to relevant evidence of occupation in a claim under paragraph 14(1)(c) of the SCTA is not an allegation of Aboriginal rights.

(b) The compensation claimed for outside the reserve involves affected assets and the compensation to be paid for the loss of these assets, of which the DIA had assumed the administration through its unilateral undertaking during the negotiations with the QSC in 1920. This unilateral undertaking gave rise to a fiduciary duty on the part of the DIA, which was superimposed on its existing fiduciary duty in the reserve creation process specific to relations between the Crown and Aboriginal peoples.

(c) The losses or assets are collective ones, and the Kikendatch (Opitciwan) First Nation was a First Nation at the time of the events in question.

(d) Whether or not the provincial Crown was the owner of the area surrounding the reserve is irrelevant. What is important is that Quebec, through its agent, the QSC, recognized the Claimant's right to be compensated for the losses it had suffered in the surrounding area. In other words, the QSC recognized its responsibility even with respect to the assets located in the hunting grounds.

[540] First, the Claimant relies on evidence of occupation and use of the territory to establish the facts on which its claim for damages and inconvenience outside the reserve is based.

[541] Second, the Claimant argues that the location of the assets is irrelevant since, under the 1920 Agreement, the federal Crown had a fiduciary duty to both the Atikamekw and their assets.

[542] In its Memorandum of Fact and Law, the Claimant writes:

> [TRANSLATION]
>
> 253. This response from the DIA reflects an explicit unilateral undertaking on its part, and, what is more, an undertaking to act in the best substantial, practical interests of the Atikamekw:
>
> a. as a result of a fiduciary duty it was already exercising in the reserve creation process [citations omitted];
>
> b. because the usual process required the DIA to submit the claim of the Atikamekw to the QSC, and not the opposite [citations omitted];
>
> c. because the DIA did not have to consider both the interests of the Atikamekw and the interests of other Canadians, in other words, it did not have to deal with conflicting demands [citation omitted].
>
> . . .
>
> 255. The Atikamekw had substantial, practical interests not only in the provisional reserve, but also in their assets in this reserve and outside it [citations omitted].
>
> 256. In addition, the DIA's exercise of its discretionary power—in this case, reviewing the QSC's compensation program—stood to adversely affect the interests of the Atikamekw [citations omitted].

> 257. The DIA now had the duty to communicate with the Atikamekw, consult with them regarding their losses and the inconvenience suffered, make an inventory, and act prudently in their interest to ensure they would all be compensated as fully and as diligently as possible [citations omitted].

[543] According to the Claimant, the conditions giving rise to the *ad hoc* fiduciary duty are met in this case.

[544] Regarding the losses in the surrounding area, the Claimant notes that the DIA, under section 4 of the 1906 *Indian Act* was vested with the control and management of the lands and property of the Indians. It adds that in *Peguis*, at pp 127–31, the Supreme Court of Canada used the term "chattels", meaning movable property, to refer to the expression [TRANSLATION] "property of the Indians in Canada", which suggests that we are dealing here with personal property, at least in terms of how it is understood in common law (*Peguis*, at para 87: "From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base").

[545] The Claimant also refers to section 37A of the *Indian Act*, SC 1911, c 14, which, as it notes, authorized the Crown, on behalf of the Indians, to claim consecutive damages for any trespass of lands of which a band claimed possession without these lands having to constitute an Indian reserve.

[546] In its Reply to the Respondent's Memorandum of Fact and Law, the Claimant writes:

> [TRANSLATION]
>
> 153. . . . the DIA's fiduciary duties with regard to the compensation program proposed by the QSC do not arise from s. 4 of the 1906 *Indian Act*, but from
>
> a. the process for creating the Obedjiwan Reserve; and
>
> b. the DIA's undertaking to consult the Atikamekw about the compensation program.
>
> 154. However, s. 4 of the 1906 *Indian Act*, combined with the DIA's and the QSC's considerations for the movable property of the Indians <u>regardless of their situation</u>, and subject to the condition of full compensation in the authorization order, supports the argument that the Atikamekw should have been fully compensated <u>irrespective of the physical location of their losses and the inconvenience suffered</u>. [Emphasis added]

[547] It should be noted that despite the losses alleged in paragraph 126 of the Further Amended Declaration of Claim and suffered by the Atikamekw on the surrounding territory, the Claimant has the following to say in its Memorandum of Fact and Law:

> [TRANSLATION]
>
> 306. For the above reasons, the Claimant asks the Tribunal to
>
> a. allow its claim at the validity stage;
>
> b. find that the Respondent breached its obligations to the Claimant and, consequently, caused it losses that it should be compensated for under the *Specific Claims Tribunal Act*;
>
> c. find that these losses include
>
> . . .
>
> x. the loss of camps and equipment on the surrounding territory from which the Atikamekw made their living; . . .

[548] The Claimant therefore seems to be restricting the losses on the territory surrounding the reserve to camps and equipment, without, however, amending its Further Amended Declaration accordingly.

(c) Analysis

(i) Regarding the territory

[549] As we saw above, the Tribunal's jurisdiction is described in section 14 of the SCTA. Its jurisdiction is restricted by paragraph 15(1)(f) of the SCTA in particular, which provides:

> **15 (1)** A First Nation may not file with the Tribunal a claim that
>
> . . .
>
> **(f)** is based on, or alleges, aboriginal rights or title; . . .

[550] The Claimant submits that its claim, even though it is based on occupation and use of the territory, is not a claim of Aboriginal rights. The Respondent argues the opposite.

[551] The evidence of historical occupation and use of the territory surrounding the reserve as presented by the Claimant can be found in the documentary evidence, the elders' testimony and the expert report of Mr. Frenette.

[552] In *Kitselas*, Justice Slade held that a reference to relevant evidence of occupation does not, in the context of a claim advanced on the ground set out in s. 14(1)(c) of the *Act*, raise allegations of Aboriginal rights as a basis for the claim. In that matter, the territory dispute involved the exclusion of a 10.5-acre parcel of land that was landlocked on three sides by the Kitselas Reserve and on the fourth side by the river bank. The evidence of occupation and use concerned a very limited parcel of land within the reserve.

[553] In *Manitoba Metis Federation*, the dispute concerned 1.4 million acres of lands granted by Canada to Metis children whose existing landholdings had been recognized. These lands, moreover, were directly mentioned in section 31 of the *Manitoba Act*.

[554] Furthermore, in *Haida Nation*, at para 18, relief was sought based on a fiduciary duty. The Haida had claimed title to the Haida Gwaii islands and the waters surrounding them for more than 100 years, a title they were attempting to prove. The title had not yet been legally recognized. During this time, the Province of British Columbia had issued a licence to a forestry company permitting it to harvest trees on the claimed territory. This licence was replaced and subsequently transferred to another company. At issue was whether, in these circumstances, the government had a duty to the Haida Nation, including a fiduciary duty.

[555] Despite the extensive evidence of occupation and use of the territory at issue, the Supreme Court of Canada concluded that "[the] Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act . . . as a fiduciary" (*Haida Nation*, at para 18).

[556] In the matter before us, regarding the territory outside the Opitciwan Reserve, the Declaration of Claim as formulated concerns the occupation and use of a substantial, but vague portion of the territory alleged to be traditional. This is a vast area. With the exception of the camps and the equipment stored there, for the reasons explained above, I find that the claim sought is more in the nature of a claim for Aboriginal rights, a matter over which the Tribunal has no jurisdiction.

[557] This is not the case for the area that was surveyed in 1914, which, as we have seen, was sufficiently delimited to give rise to a fiduciary duty specific to the reserve creation process. In addition, I have recognized this territory as being a "provisional reserve".

[558] Having said that, the evidence reveals that there are particular circumstances in this case that attract the federal Crown's responsibility with respect to, for example, the assets located within the reserve, and also with respect to the camps and other houses and movable assets located outside the reserve. These circumstances are the following:

- In 1914, the federal Crown authorized the dam, in the knowledge that the Atikamekw were occupying and using lands that were likely to be flooded at Opitciwan and in the surrounding area.

- As a condition to its authorization, it required "[t]hat the Commission, or its successors or assigns, shall assume all responsibility for any damage whatsoever, which may be caused by the Commission's works or actions in connection with the construction of the said dam", regardless of the location of the assets (JBD, at tab 145).

- In 1919–1920, the Opitciwan Reserve and surrounding area were partially flooded.

- In July 1919, when the reservoir had not yet reached its full capacity, an envoy from the QSC compiled a list of the claims of the Atikamekw, which referred to assets located outside the reserve.

- In 1920, the DIA undertook to consult the Atikamekw on the compensation proposal submitted by the QSC before approving it. As indicated in the previous sections, this was clearly a unilateral undertaking from the federal Crown to act in the best interests of the Atikamekw of Opitciwan.

- On September 25, 1922, Mr. DeLair of the HBC, on behalf of Chief Awashish and the Atikamekw of Opitciwan, informed the Chair of the QSC of the claims of the Atikamekw, including claims for assets located on the territory surrounding the

reserve. This letter was forwarded to the DIA (JBD, at tab 214). On November 29, 1922, Mr. McLean of the DIA urged Mr. Lefebvre of the QSC to provide the DIA with detailed information on each complaint or claim of the Atikamekw of Opitciwan (JBD, at tab 216).

[559] Moreover, the fact that the QSC awarded Chief Awashish compensation for his camp located on the territory surrounding the reserve demonstrates that it also did not interpret the condition of authorization as a limitation of its responsibility to the reserve lands (JBD, at tab 242).

(ii) Regarding the collective or individual nature of the assets

[560] The Respondent submits that the camps and the equipment constitute individual property, claims over which the Tribunal has no jurisdiction.

[561] Paragraph 14(1)(c) of the SCTA provides that a First Nation may file with the Tribunal a claim based on the Crown's administration of the assets of the First Nation. This provision, however, must be read in light of the other provisions of the SCTA.

[562] The term "asset" is defined as "tangible property" in section 2 of the SCTA, without this property being qualified as being either collective or individual.

[563] In *Beardy's*, at para 295, Justice Slade examined the terms "asset" and "tangible property", writing:

> The term "tangible property" means: "Property that has physical form and characteristics." Things that can be seen or touched, or otherwise perceptible to the senses, are tangible personal property [*Black's Law Dictionary*, 10th ed, *sub verbo* "tangible property"].

[564] Section 15 of the SCTA provides as follows:

> **15 (1)** A First Nation may not file with the Tribunal a claim that
>
> . . .
>
> **(g)** is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights.

> **(2)** Nothing in paragraph (1)(g) prevents a claim that is based on a treaty right to lands or to assets to be used for activities, such as ammunition to be used for hunting or plows to be used for cultivation, from being filed. [Emphasis added]

[565] Section 20 of the SCTA sets out the basis and limitations for decisions on compensation made by the Tribunal. The second subsection establishes an exception to those limitations by stipulating as follows:

> **(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. [Emphasis added]

[566] In both cases (subsections 15(2) and 20(2) of the SCTA), both collective and individual losses are contemplated.

[567] It goes without saying that hunting, fishing and trapping are activities related to harvesting rights. It is also clear that the hunting camps and the equipment used for fishing, hunting and trapping are intrinsically linked to harvesting rights. They are accessories thereto. Harvesting rights are collective rights exercised by individuals. Furthermore, hunting, fishing and trapping are generally carried out in areas outside the reserve.

[568] Similarly, allowing claims for assets such as ammunition and plows necessarily implies that individual losses can be the subject of a claim.

[569] Furthermore, despite being collective in nature, rights may have both collective and individual aspects (*Moulton Contracting Ltd v British Columbia*, 2013 SCC 26, [2013] 2 SCR 227). Without going into great detail on the subject, the Supreme Court of Canada has recognized that certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them.

[570] In any event, what it important is that the claim is filed by the First Nation and that, ultimately, if compensation is granted, the Respondent be released from any obligation to the First Nation and any of its members, as provided by section 35 of the SCTA.

[571] Indeed, paragraph 35(a) of the SCTA stipulates:

> **35** If the Tribunal decides that a specific claim is invalid or awards compensation for a specific claim,
>
> > **(a)** each respondent is released from any cause of action, claim or liability to the claimant and any of its members of any kind, direct or indirect, arising out of the same or substantially the same facts on which the claim is based; . . . [Emphasis added]

[572] While some of the provisions of the SCTA may be ambiguous, given that this statute concerns Indians and aims to settle the First Nations' historical grievances against the Crown, the provisions must be given a large and liberal interpretation in light of the purpose of this Act.

[573] The evidence suggests that the 1920 Agreement with the QSC is a collective agreement and was treated as such by both the federal government and the QSC itself.

[574] First, it is correct to say that 13 Atikamekw signed the agreement for a total population of 168 members. However, the signatories signed in their capacity as heads of family, representing about a third of the population.

[575] Second, there was only one compensation agreement. In the event of individual agreements, one would have expected the QSC to have entered into distinct contracts with each individual.

[576] Third, nothing in the compensation agreement signed by the 13 heads of family suggests that the Atikamekw community waived all the claims they could bring. The list of claims compiled by the QSC's representative in 1919 listed 28 houses claimed by 20 families. The 1920 compensation agreement makes no mention of this. Similarly, the 1919 list refers to the transfer of the remains from the cemetery, a claim that was described as being of great importance to the Atikamekw (JBD, at tab 183). This was a collective request.

[577] Fourth, in 1921, the letter asking that the 1920 Agreement be rescinded was not signed by 13 people, but by about 30, including Chief Awashish.

[578] In addition, it is clear that the DIA considered this agreement to be a collective one. On May 10, 1920, in an internal memorandum, Surveyor General Robertson of the DIA recommended verifying whether the conditions of the agreement were acceptable to the

Atikamekw before the agreement was approved, writing: "if these conditions would be acceptable to the Indians" (emphasis added), adding "or if the Indians, as was stated last Fall, would prefer to change their location to some more distant point" (emphasis added; JBD, at tab 187). Indeed, the handwritten minutes of a meeting [TRANSLATION] "of the principal residents and stakeholders at the Indian post of Lake Obidjuan" dated July 2, 1920, report that the signatories would be satisfied if the QSC were to compensate them as follows: [TRANSLATION] "new site for the village three quarters of a mile from the present site, . . . chosen by the Indians". It is clear that this issue could not be decided by 13 individuals, but by the community (JBD, at tabs 192 and 194).

[579] In short, the Atikamekw of Opitciwan had a claim against the QSC. As seen in the previous section, through its actions, the DIA assumed responsibility for this claim. It administered the community's assets, including the claim for the camps and equipment situated within and outside the provisional reserve and the compensation received from the QSC.

[580] Consequently, the conditions for establishing a general or *ad hoc* fiduciary duty have been met as far as the protection of the camps and equipment on and outside the provisional reserve are concerned. Regarding the territory of the provisional reserve, there is also a fiduciary duty with respect to the other alleged losses and inconveniences.

(d) Conclusion on the motion to strike

[581] In conclusion, the Respondent's motion to strike will be allowed in part, since the Tribunal has no jurisdiction over the claim for the alleged losses related to

- the loss of territory surrounding the Opitciwan Reserve and to a drop in productivity of the Atikamekw, and, consequently, to losses of food supply and income (Further Amended Declaration of Claim, at para 126(h));

- the difficulty of obtaining raw material to build and make the objects the Atikamekw needed in their everyday lives (Further Amended Declaration of Claim, at para 126(i)); and

- the inconvenience resulting from the difficulty of accessing, travelling on and living on the territory surrounding the Opitciwan Reserve (Further Amended Declaration of Claim, at para 126(j)).

[582] Considering the particular circumstances at issue in this matter regarding the Agreement of July 2, 1920, the Tribunal has jurisdiction regarding the lost camps and other houses and the lost equipment related thereto and which was located on the territory surrounding the provisional reserve, as described in the following section.

[583] It should not be concluded, however, that the Tribunal is declining jurisdiction over any other alleged losses pertaining to the surrounding territory which the Atikamekw have not yet suffered.

2. Did the federal Crown's breaches result in the Claimant's losses?

[584] In its Further Amended Declaration of Claim, the Claimant alleges that the damage and inconvenience suffered by the Atikamekw after the 1918 Flood for which they were never compensated and which are being claimed under paragraph 14(1)(c) of the SCTA, are related to

> [TRANSLATION]
>
> a. the claims that were not or only partially considered, including the transfer of the remains from the cemetery, certain houses in Opitciwan for which they were not compensated and the movable assets from the houses in Opitciwan;
>
> b. the damage and inconvenience for which they were inadequately compensated, such as the clearing of the new site for the village and the rebuilding of the houses;
>
> c. the poor response from the QSC, with respect to the material supplied for the houses for example;
>
> d. the undue delay with which the QSC honoured its undertakings;
>
> e. the undertakings that were not honoured by the QSC, with respect to the digging of the wells and the sending of workers to build the houses for example;
>
> f. the inconvenience caused by the contamination of Lake Obedjiuan, including the obligation to establish water points far from the village, and to the illnesses caused by the drinking of contaminated water;
>
> g. the loss of enjoyment of the lands flooded in the village of Opitciwan and to the inconvenience related to moving to the new location of the village;

> h. the loss of territory . . . surrounding the Opitciwan Reserve and to a drop in their productivity, and, consequently, to losses of food supply and income;
>
> i. the difficulty of obtaining raw material to build canoes and make snowshoes, baskets and other tools and objects the Atikamekw needed in their everyday lives;
>
> j. the inconvenience resulting from the difficulty of accessing, travelling on and living on the territory surrounding the Opitciwan Reserve caused by the rising waters and the entangled tree trunks and vegetation, and to the accidents caused by this situation. [Emphasis in original; at para 126]

[585] According to the Claimant, the federal Crown is solely liable for the losses suffered, while the Respondent argues that the provincial Crown must be held entirely liable. The Respondent also submits that part of the liability can be allocated to the Atikamekw of Opitciwan, who, even though they were warned about the risks of flooding, opted to stay.

[586] I find that the losses suffered by the Atikamekw of Opitciwan result from the QSC's negligence in carrying out its duties towards the Atikamekw, but that these losses are also attributable to the federal Crown's breaches of its fiduciary duties. I am satisfied by the evidence that there is a direct link between the Claimant's grievances and the federal Crown's fiduciary relationship. The evidence does not establish that the Atikamekw should be held liable for these losses.

[587] Having said that, I do not find that there is sufficient evidence to allocate a specific percentage of liability to both the provincial and the federal Crown. This issue must be debated at the second stage.

(a) Houses on the provisional reserve

[588] The inventory made by the QSC in 1919 included 28 houses claimed by 20 families (JBD, at tab 183). Jérémie Chachai stated that there were between 18 and 20 plank houses and about 10 *misatokokiam* on the site of the former village that was flooded. He also stated that several families had lived under the same roof.

[589] According to the DIA's correspondence at the time of the survey by Mr. White, 163 people made up 35 families in 1914.

[590] In a document prepared by Father Guinard in 1925, and appended to the list of the 20 heads of family that were compensated, it is written that [TRANSLATION] "I paid all the Indians their 120.00, with the exception of Sabiel Kitcinew, leaving a balance of 81.90, which I have". Sabiel Kitcinew is included in the list of the 20 heads of family. However, the documentary evidence establishes that every one of the 20 heads of family received $120 minus the cost of the paint, but not that compensation was paid for 28 houses (JBD, at tab 262).

[591] Moreover, 1919 was not the end of the flooding. In a letter written in 1922, Mr. DeLair of the HBC informed the QSC of the claims of two other Atikamekw: "[t]he Indians wish to remind you that one house has been overlooked, by the Commission, belonging to David Nikwi, and one under construction belonging to Pierre Nikwi, which François Satshaw has inherited . . ." (JBD, at tab 214).

[592] Lastly, on January 18, 1926, the HBC representative informed the QSC that the Chief of the Atikamekw of Opitciwan had informed him that an Atikamekw of the name of David Nequay had not been compensated for the loss of his house (JBD, at tab 266). On April 6, 1926, Father Guinard confirmed to the QSC that David Nequay had a house in Opitciwan (JBD, at tab 269).

[593] Having said that, in a letter from January 1926, after mentioning the house belonging to David Nequay, the HBC representative added that "as all other claims were satisfactorily settled, this particular claim must have been overlooked . . ." (JBD, at tab 266).

[594] According to the testimony of Jérémie Chachai, the families had built sheds next to their houses, which were destroyed by the water and for which they were not compensated. There had also been tents that the Atikamekw had made. The elders spoke of a total loss.

[595] Consequently, in light of all the circumstances, I recognize as losses on the reserve that were never compensated or inadequately compensated 31 houses, including the *misatokokiam*, and sheds and tents. The elders testified that not every family had a tent, but that every family had a shed. If necessary, additional evidence could be submitted at the second stage regarding all of these losses.

[596] Any compensation that could be claimed for the loss of houses resulting from the construction of new houses by the QSC will also be the subject of additional evidence at the second stage.

(b) Furniture or equipment on the provisional reserve

[597] The elders testified that the furniture built by the Atikamekw and kept in the houses or *misatokokiam* was not compensated. This furniture included beds, chairs, tables, mattresses and wood stoves.

[598] I recognize as a loss that was never compensated the furniture for 31 houses, including the *misatokokiam*. Additional evidence could be adduced at the second stage in order to identify more precisely, if necessary, the furniture furnishing the houses at the time.

(c) Other equipment located on the provisional reserve

[599] The elders testified that the waters rose very quickly and that, apart from a few personal effects, the Atikamekw were unable to save their belongings. They mentioned clothing, guns, hare snares, traps, fishing nets, tools and food derived from their hunting and trapping and which had been brought back from the hunting grounds. This food was kept at a location above the site and covered with bark.

[600] I recognize the loss of this equipment. Additional evidence could be adduced at the second stage in order to identify more specifically the belongings the Atikamekw kept on the reserve or brought back with them on their return from their hunting grounds.

(d) Camps and/or *misatokokiam* and/or houses and furniture located on the territory surrounding the provisional reserve

[601] The 1919 inventory refers to six camps claimed by three families and furniture claimed by one Atikamekw, as follows (JBD, at tab 183):

- Gabriel Awashish: one log cabin on the Oniganie River ($200)
- Jimmie Satshihaw: four log cabins on Oscalaneo Lake

- Johnie Iserhoff: one log cabin on the Jean-Pierre River, claim included in the Opitciwan claim

- Robert Satshihaw: loss of furniture ($300)

[602] The camp claimed by Gabriel Awashish was compensated later, although at a lesser cost than requested. Gabriel Awashish first claimed $200 in 1919 and 1922 (JBD, at tabs 183 and 214), and later $120 in 1925 (JBD, at tab 241), but he was only offered $60 (JBD, at tab 242), which he accepted (JBD, at tab 253).

[603] David Chachai does not remember exactly how many people lost their hunting camps on the territory after the 1918 Flood, but was able to name four other families in addition to the three families listed in the inventory (transcript of the hearing, September 12, 2013, at pp 88–89):

- Charles-Joseph Awashish

- Arthur Clary

- Onésime Weizineau

- Marc-Malek Awashish

[604] Also, in 1922, HBC employee Mr. DeLair wrote to the QSC to inform it of the claims of the Atikamekw for three camps on the territory belonging to two other families as well as other equipment that had not been mentioned in the inventory, as follows:

> (1) John Iserhoff, one house and contents $500.00
> (2) Gabriel Awashish One house and garden $200.00
> (3) Mathias Wejina Jr., One hunting shanty $150.00
> (4) James Satshaw two houses $400.00
> (5) Paul Megwesh two Bear traps 24.00
> (6) Jack Damé (Ketcimemi) Three bundles roofing, zinc, paint, one kitchen stove. $100.00
> [JBD, at tab 214]

[605] David Chachai testified that the Atikamekw who had houses and/or *misatokokiam* deeper into the territory did not lose them; only the houses and *misatokokiam* close to the shore were lost.

[606] I recognize as losses 13 camps and/or houses and/or *misatokokiam* on the territory surrounding the provisional reserve for which the Atikamekw were never or inadequately compensated. I also recognize as a loss the furniture in these camps and the equipment claimed, as listed above.

[607] The elders also testified that tools, traps, nets, shovels, harnesses, bark canoes, guns and the snowshoes and sleds they had made to travel during winter were lost. I recognize these equipment losses. Additional evidence could be adduced at the second stage in order to demonstrate the type of furniture that would generally be found in the camps or houses on the surrounding territory and the equipment that would be left there, etc.

(e) Other recognized damage and inconvenience

[608] The following damage and inconvenience suffered by the Atikamekw of Opitciwan after the 1918 Flood and for which they were never compensated can also be dealt with at the second stage:

- the transfer of the remains from the cemetery;
- the damage and inconvenience related to the clearing of the new site for the village and the rebuilding of the houses and for which the Atikamekw were inadequately compensated;
- the poor response from the QSC with respect to the material supplied for the houses and the undue delay with which the QSC honoured its undertakings;
- the undertakings that were not honoured by the QSC, with respect to the digging of the wells and the sending of workers to build the houses for example;

- the inconvenience caused by the contaminated, unclean water of Lake Obedjiuan, including the long walks through the forest to fetch water, the need to establish water points, the health problems caused by the water and the many other inconveniences resulting from the foul water;

- the loss of enjoyment of the lands flooded in the village of Opitciwan and the inconvenience related to moving to the new location.

[609] Lastly, the issue of the burden of proof as to the quantum of damages will be determined at the second stage.

IX. DECISION

FOR THESE REASONS:

[610] I dismiss the Claimant's motion regarding the contents of the severance order rendered on March 20, 2013.

[611] I reject the Respondent's objection to the admissibility of certain parts of the expert report and testimony of Mr. Frenette.

[612] I reject the Respondent's objection to the admissibility of the expert report and testimony of Dr. Marche, for the reasons set out in decision 2016 SCTC 9 in File No. SCT-2007-11.

[613] I allow in part the Respondent's motion to strike and conclude that the Tribunal lacks jurisdiction to dispose of the Claimant's declaration of claim regarding the damage caused outside the territory surrounding the provisional reserve, except with respect to the camps and the equipment and furniture at these camps.

[614] Regarding the validity of the claim, I conclude as follows:

a. The federal Crown had enforceable legal and fiduciary obligations to ensure that the process for creating the Opitciwan Reserve was implemented.

b. The federal Crown failed to honour its basic obligations of loyalty in the discharge of its mandate, providing full disclosure and acting with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan to which it was bound under its enforceable legal and fiduciary obligations towards the Atikamekw of Opitciwan.

c. The federal Crown owed enforceable fiduciary duties under the QSC's compensation proposal to the Atikamekw of Opitciwan, including the duty to act in their best interests when approving the agreement resulting from this proposal.

d. The federal Crown failed to honour its obligations in this regard.

[615] I recognize the losses set out in paragraphs 588 to 608 of this decision.

[616] I will determine the amount of the losses suffered by the Claimant and which I have recognized, and allocate liability between the federal Crown and the Province of Quebec at the second stage.

JOHANNE MAINVILLE

_____

Honourable Johanne Mainville

Certified translation
Johanna Kratz

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160520

File No.: SCT-2004-11

OTTAWA, ONTARIO May 20, 2016

PRESENT: Honourable Johanne Mainville

BETWEEN:

ATIKAMEKW D'OPITCIWAN FIRST NATION

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant**
As represented by Paul Dionne and Marie-Ève Dumont

AND TO: **Counsel for the Respondent**
As represented by Éric Gingras, Dah Yoon Min and Ann Snow