FILE NO.: SCT-7005-11
CITATION: 2016 SCTC 12
DATE: 20160722

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
POPKUM FIRST NATION	)	
	)	Allan Donovan, John Burns and Amy Jo Scherman, for the Claimant
	)	
Claimant	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Rosemarie Schipizky and Aneil Singh, for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** Written Submissions

REASONS ON RECONSIDERATION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Popkum First Nation v Her Majesty the Queen in Right of Canada, 2014 SCTC 6; *Popkum First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 5; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA); *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, Preamble, ss 14, 20.
Indian Act, RSC 1952, c 149, s 17, as amended by SC 1956, c 40, s 7, ss 17, 35, 38.
Interpretation Act, RSC 1985, c I-21, s 12.

Headnote:

Aboriginal law – Statutory Interpretation – Specific Claims – Specific Claims Tribunal Act- Breach of Fiduciary Duties – Compensation Principles – Principles of Equitable Compensation – Restitution

This Specific Claim arises out of the 1959 reallocation of Seabird Island Reserve, by order of the Minister of Indian Affairs (the Minister) from several bands, including the Popkum First Nation, to the Seabird Island Band and the Minister's distribution of Popkum First Nation's one-seventh interest in the Seabird Island trust monies to non-beneficiaries.

The Claim was bifurcated to address validity first and then compensation if required. On the matter of the validity of the Claim, the Tribunal found that the Minister, in exercising her authority under section 17 of the *Indian Act*, RSC 1952, c 149, s 17, as amended by SC 1956, c 40, s 7 [*Indian Act*, 1956] failed to do so in accordance with her obligations as a fiduciary.

In preparation for the compensation hearing, the Parties brought a joint application for the prior determination of the applicable compensation provisions under section 20(1) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

The Tribunal issued a decision on the application on April 12, 2016, wherein it was held that subsection 20(1)(c) of the *SCTA* was the applicable provision upon which compensation would be determined. The Respondent requested a reconsideration of the April 12, 2016 Decision on the ground that the decision set out an analysis of the effect of subsection 20(1)(f) of the *SCTA*, on which the Respondent had not relied. Rather, the Respondent had asserted the application of subsection 20(1)(e). Reconsideration of the application was ordered on the consent of the Parties.

The issues before the Tribunal in this redetermination are as follows:

1) Is reserve land reallocated from one band to another under section 17(2) of the *Indian Act*, 1956, "taken" within the meaning of that term in subsections 20(1)(e) and (g) of the *SCTA*?
2) Do principles of equitable compensation apply to the assessment of compensation under the *SCTA*?

Lack of statutory authority was neither pled nor argued at the validity stage. Accepting the proposition that the reallocation is compensable under subsections 20(1)(g) and (h) of the *SCTA* on the basis that the Minister lacked the legal authority to reallocate Seabird Island to the

Seabird Island Band, would be prejudicial and unfair to the Respondent at this stage in the proceedings.

Further, the language of the Validity Decision (*Popkum First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 6) is conclusive. The Claim was found valid on the grounds of breach of fiduciary duty and not on a lack of statutory authority.

The Respondent asserts that section 20(1) of the *SCTA* is a codification of the compensation principles available to the Tribunal, wherein, other than when considering compensation under subsection 20(1)(c), prohibits the Tribunal from employing the principles of equitable compensation.

The *SCTA* establishes an alternative process to the courts. However, an alternative to the courts, as held in *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6 [*Kitselas*], there must be consistency on the adjudication of issues relating to fiduciary duties and relationships by the Tribunal and the courts. Further, in *Kitselas*, the Federal Court of Appeal rejected the argument that the *SCTA* was a codification of liability. The Federal Court confirmed that claims before the Tribunal are to be determined in accordance with the general legal principles applied by the courts.

The jurisprudence with respect to Crown actions affecting Indigenous interest in land, both reserve and Aboriginal title, is well established. In circumstances where a cognizable Indian interest is under the discretionary control of the Crown, fiduciary duties arise. This is rooted in the Honour of the Crown. Breaches of such duties give rise to equitable remedies. The equitable remedy to be applied depends on the factual context. In cases involving Crown administration of Indian interest in lands, the courts have consistently applied the principle of restitution, particularly in cases where the lost interest cannot be returned *in specie* (e.g. land, or lost opportunity with respect to the same). The objective being to put the beneficiary in "as good a position as he would have been in had the breach not occurred." In doing so, the courts call for the presumption of most advantageous use.

The Respondent's arguments call for the prohibition of the application of equitable remedies where Crown administration of Indian interest in land has been taken or damaged: the

factual context that attracts equitable remedies throughout the jurisprudence. This overlooks the findings in *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321, *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746, *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, and other decisions. It further results in an untenable interpretation of the *SCTA*.

The *SCTA* was intended to "establish an independent tribunal…designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner." The modern approach to statutory construction requires that the words of an act "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193, citing Ruth Sullivan, Driedger on the Construction of Statues, 3rd ed, 1994 at 87). Interpretation must ensure the attainment of the objectives of the legislation. The provisions under the *SCTA*, specifically subsections 20(1)(e) and (h) call for losses to be "brought forward" to current values in accordance with the principles applied by the courts, not the ouster, of principles of equitable compensation.

The question, then, is whether a reallocation under section 17(2) of the *Indian Act*, 1956, constitutes a taking as contemplated under subsections 20(1)(e) and (g) of the *SCTA*. The interpretation of the term "taking" must be interpreted in the context of the legal nature of the Indian interest in reserve lands. It is inalienable but to the Crown and only in accordance with the surrender and expropriation provisions under the *Indian Act*: respectively, sections 38 and 35.

A transfer of reserve land under section 17 on the *Indian Act*, 1956, does not have the same purpose or effect as a surrender or an expropriation. There is no taking in the sense of the alienation of the Indian interest to the Crown. Nor was the land in whole or in part expropriated. The Indian interest in reserve land in a section 17 reallocation is transferred from one band to another band where the two have, in whole or in part, a membership in common.

Held: The reallocation of Seabird Island was not a taking as contemplated under subsections 20(1)(e) or (g) of the *SCTA*, as such the applicable compensation principles to be applied in compensating the Popkum First Nation for the breaches of fiduciary duties found by the validity judge are those in subsection 20(1)(c) of the *SCTA*.

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I. THE APPLICATION

[1] This Specific Claim arises out of the 1959 reallocation of the Seabird Island Reserve by order of the Minister of Indian Affairs (the Minister) from several bands, including the Popkum Band, to the newly formed Seabird Island Band and the Minister's distribution of Popkum First Nation's one-seventh interest in the Seabird Island trust monies to non-beneficiaries.

[2] The Claim was bifurcated into validity and compensation phases. The latter was to proceed if liability was found in the validity stage.

[3] Justice Patrick Smith (the validity judge) found that the Crown was in breach of lawful obligations owed to the Claimant (*Popkum First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 6 (Validity Decision)).

[4] Following the release of the Validity Decision, the Parties, Popkum First Nation (Claimant) and Her Majesty the Queen in Right of Canada (Respondent), applied for a determination of the applicable compensation provisions under the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] for the breaches of fiduciary duties related to the reallocation of Seabird Island.

A. Claimant's Position

[5] The Claimant's primary submission is that subsection 20(1)(g) of the *SCTA* applies:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> ...
>
> **(g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;... [emphasis added]

[6] If this is correct, the base value for compensation is the present unimproved market value of the land.

[7] If subsection 20(1)(g) of the *SCTA* applies, subsection 20(1)(h) does as well:

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

B. Respondent's Position

[8] The Respondent submits that subsection 20(1)(e) of the *SCTA* applies:

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

[9] If this is correct, the base value for compensation is the value of the land in 1959.

C. Claimant's Alternative Position

[10] The Claimant relies, in the alternative, on subsection 20(1)(c) of the *SCTA*:

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

[11] If this is correct, the *SCTA* does not fix a date for valuation of the land.

D. Equitable Compensation

[12] The Claimant contends that equitable compensation, in particular the remedy of restitution, applies where compensation is governed by any of subsections 20(1)(c), (e) or (g) of the *SCTA*.

[13] The Respondent agrees that subsection 20(1)(c) of the *SCTA* calls for the payment of equitable compensation, but says that subsection 20(1)(c) does not apply in the present matter.

[14] The Respondent argues that subsection 20(1)(e) of the *SCTA* applies, and that equitable compensation principles do not apply where land is "taken," whether under legal authority or not.

II. APPLICATION FOR RECONSIDERATION

[15] My Reasons for Decision (*Popkum First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 5 (April 12 Decision)) on the application were released on April 12, 2016. I found that subsection 20(1)(c) of the *SCTA* governed the assessment of compensation.

[16] The Respondent requested reconsideration of the April 12 Decision in its totality, on the ground that it set out an analysis of the effect of subsection 20(1)(f) of the *SCTA*, on which the Respondent had not relied, and did not consider the application of subsection 20(1)(e), on which it had in fact relied.

[17] A Case Management Conference (CMC) was convened. An order for reconsideration was granted without the need for a formal application, and by consent. The Parties were permitted to file further written submissions.

III. QUESTION FROM THE TRIBUNAL

[18] The validity judge found, as fact, that the reallocation of the reserve land was made by the Minister in 1959 under the ostensible authority of section 17(2) of the *Indian Act*, RSC 1952, c 149, s 17, as amended by SC 1956, c 40, s 7 [*Indian Act*, 1956] which provided:

> **17.** (1) The Minister may, whenever he considers it desirable,
>
> *(a)* constitute new bands and establish Band Lists with respect thereto from existing Band Lists or General Lists, or both,
>
> ...
>
> (2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.
>
> ...

[19] The Claimant did not plead or otherwise raise an issue in proceedings before the validity judge over the authority of the Minister, in the circumstances extant, to effect the reallocation under the authority of section 17(2) of the *Indian Act*, 1956. This, a question of law, was not before the validity judge. However, the facts as found by the validity judge support an argument

that section 17(2) could not have been relied on by the Minister, and that the reallocation was made without statutory authority.

[20] The primary argument of the Claimant on the present application is that subsection 20(1)(g) of the *SCTA* applies as the reallocation was made without statutory authority. As noted above, the result would call for the valuation of the reallocated land, for the purpose of compensation, at present unimproved market value.

[21] The Respondent argues for the application of subsection 20(1)(e) of the *SCTA* on the basis that the reallocation was made with statutory authority, but with "inadequate compensation." The result would call for valuation of the land at its value in 1959.

[22] In the course of the CMC, Counsel were asked whether they wished to make submissions on a question that had not been raised previously. In particular whether, on the facts as found by the validity judge, subsections 20(1)(e) and (g) of the *SCTA* have any application. Both apply where there is a taking of reserve land. Were the reserve lands "taken" within the meaning of the term as found in section 20 of the *SCTA*?

[23] The focus of the question was on the term "taken," as the question whether there was legal authority for the reallocation of the reserve to the Seabird Island Band was not in issue before the Tribunal in the validity stage. For reasons explained below, the question whether there was legal authority for the reallocation of Popkum's interest in the reserve to the Seabird Island Band is not presently before the Tribunal.

[24] The Parties were at liberty to make submissions generally on matters for reconsideration of the April 12 Decision. It was also left to the Parties whether to make further submissions on the applicability of subsections 20(1)(e) and (g) of the *SCTA* in light of my question.

[25] On the matter of reconsideration, both Parties relied on their previous submissions in their entirety. The Claimant presented written submissions on whether the reallocation of the reserve from Popkum to the Seabird Island Band constituted a "taking." The Respondent presented written submissions in response.

IV. THE MATTER FOR DETERMINATION

[26] These, in light of the positions advanced by the Parties, are the issues:

1) Is reserve land reallocated from one band to another under the section 17(2) of the *Indian Act*, 1956, "taken" within the meaning of that term in subsections 20(1)(e) and (g) of the *SCTA*?

2) Irrespective of whether a reallocation of reserve land from one band to another is a "taking," do equitable principles apply to the assessment of compensation under the *SCTA*?

V. ANALYSIS

[27] The only provision of the *Indian Act*, 1956, referred to by the validity judge was section 17(2).

[28] The Parties disagree on the legal effect of the findings of the validity judge. The Claimant argues that he found that the Minister acted without statutory authority. The Respondent argues that no such finding was made, and that the Claimant cannot, at this stage in the proceeding, advance an argument that the Minister acted without statutory authority.

A. Claimant's Position

[29] The Claimant points to the discussion in the Validity Decision regarding the purpose of section 17 of the *Indian Act*, 1956:

> My reading of section 17 and its purpose is that it is intended to give the Minister authority to manage the redistribution of an "existing band's" assets when a "new band" is being created from that "existing band or part thereof" that is, when descent-derived interests arise. [at para 149]

[30] Among the seven distinct breaches of duty found by the validity judge, six were breaches of fiduciary duty, and one was expressed as acting in excess of the discretion of the Crown under section 17(2) of the *Indian Act*, 1956. These are summarized by the Claimant thusly:

> a. Canada <u>failed to meet the required fiduciary standard of ordinary prudence and accountability when it failed to identify the true beneficiaries of the</u>

Reserve, and instead transferred Popkum's interest in the Reserve to non-beneficiaries (paras 177-178);

b. Canada breached its fiduciary duty to protect and preserve a confirmed reserve from exploitation when Canada prioritized its interest in avoiding administrative complexities related to the Reserve over Popkum's ownership interest in the Reserve (para 184);

c. Canada breached its fiduciary duty to evaluate, fully inform, seek directions, and reject improvident transactions with respect to Popkum's interest in the Reserve (para 181);

d. Canada exceeded its statutory discretion under s. 17(2) of the *Indian Act*, and further breached its fiduciary duty, when it transferred Popkum's interest in the Reserve to non-beneficiaries (para 177);

e. Canada breached its fiduciary duty by divesting Popkum of its interest in the Reserve without any compensation (para 205);

f. Canada breached its fiduciary duty by distributing trust monies to non-beneficiaries (para 197); and

g. Canada breached its fiduciary duty by distributing trust monies on a *per capita* basis, rather than on a *per band* basis (paras 203-204). [emphasis added; Claimant's Written Submissions, at para 8]

[31] The Claimant submits that the validity judge's statement that the Minister "exceeded her statutory authority pursuant to section 17(2)" (Validity Decision, at para 177), taken together with references to an absence of "familial" relations and "beneficiaries" between Popkum Band members and Seabird Island residents and the absence of evidence placing Popkum members at Seabird Island at the time of the Minister's decision, invite the application of subsection 20(1)(g) of the *SCTA*. In short, a taking without legal (i.e. statutory) authority.

B. Respondent's Position

[32] The Respondent submits that the Claimant cannot invite the Tribunal in the compensation phase of the proceeding, to find that the Crown acted without legal authority when it transferred the interest of the Popkum Band to the Seabird Island Band. The Claimant had advanced its case in the validity phase on the basis that there was statutory authority for the actions of the Crown. The Claimant rested its case on the allegations that, in proceeding under statutory authority, it owed fiduciary duties to the Claimant and failed, to the detriment of the Claimant, to perform its duties.

[33] The Respondent refers to page 68 from the Claimant's Written Submissions at the hearing on validity:

> As in many of the fiduciary duty cases that will be canvassed in this argument, when Canada divested Popkum of their land and trust funds in 1959, they did so in accordance with legal authority. The problem with Canada's actions is that its conduct must also be in accordance with Canada's private law fiduciary duty which overlies the public function of statutory implementation (*Guerin*). Because statutes create relationships of exacerbated power imbalance, exercising statutory authority without regard for the overlying fiduciary obligation can readily, as here, result in a breached fiduciary duty and resulting damage to a beneficiary. [emphasis added]

[34] Counsel for the Respondent says that the change in the Claimant's position on the question of statutory authority at the compensation phase would be prejudicial, as it would have prepared its case differently if the question had previously been raised. It would have called evidence of the presence of Popkum members on the Seabird Island Reserve at the date of the re-allocation, and have addressed the matter in submissions before the validity judge.

[35] Lack of statutory authority was not pled or argued in the hearing on validity. The validity judge would not have based his decision on a lack of statutory authority without first inviting submissions.

[36] It would, I find, be prejudicial and unfair to the Respondent to base compensation on the application of subsections 20(1)(g) and (h) of the *SCTA* on the basis that the Minister acted without statutory authority.

VI. ON WHAT LEGAL GROUND WAS VALIDITY DECIDED?

[37] The Claimant raised breach of fiduciary duty in its Declaration of Claim. It also asserted the application of subsection 20(1)(c) of the *SCTA* as the basis for an award of compensation in the alternative to subsection 20(1)(g).

[38] While the validity judge found at paragraph 177 that "[t]he Minister...exceeded her statutory authority pursuant to section 17(2)" (emphasis added), in the same paragraph, and the paragraph following, the validity judge also referred to breaches of fiduciary duty:

> The Minister breached the ordinary accountability of a fiduciary when she reallocated Popkum's one-seventh interest in the SI Reserve to the SI Band...The

> Minister failed to exercise her statutory discretion with ordinary prudence when she failed to identify the true beneficiaries,...and divested the Claimant of its reserve interest.
>
> The Minister failed to administer the Claimant's assets for the benefit of the Claimant when she transferred the Claimant's assets to the SI Band,...Upholding a non-beneficiary as having a superior entitlement to a beneficiary does not reflect ordinary prudence regarding the management of the SI Reserve. [at paras 177–78]

[39] It is not clear from the Validity Decision, at least up to this point, whether the validity judge based his finding that the Claim is valid based on breach of fiduciary duty, acting without statutory authority, or both.

[40] The matter is, however, resolved further along in the Validity Decision. The ground on which the validity judge found a breach of legal obligation is set out in the paragraph under the heading "Conclusion." The Claim was found valid on the ground of breach of fiduciary duty, not lack of statutory authority:

> The action of the Crown in divesting Popkum of its one-seventh interest in the SI Reserve without compensation and distributing part of its one-seventh share in the Seabird Island trust monies to non-beneficiaries was a breach of the Crown's ordinary accountability as a fiduciary and a breach of the Crown's duty to preserve and protect the Claimant's confirmed reserve interest from exploitation by the Crown. [emphasis added; at para 205]

[41] Accordingly, I repeat my holding from my April 12 Decision and find that the Claim was found valid on the grounds of breach of fiduciary duty and not on a lack of statutory authority. Compensation and the principles to be applied will reflect and be consistent with this finding.

VII. RECONSIDERATION

[42] In submissions on the scope of reconsideration of the April 12 Decision, the Respondent sought and received liberty to make further submissions without limitation to the issue raised by the error in the April 12 Decision. Reconsideration in totality may be made.

A. Overview of Respondent's Argument

[43] The Respondent does not say that the Tribunal is in all cases barred from awarding equitable compensation. Take, for example, subsection 20(1)(c) of the *SCTA*, which provides that compensation is, "subject to this Act," to be in a sum that the Tribunal "considers just, based

on the principles of compensation applied by the courts." This, says the Respondent, calls for equitable compensation.

[44] However, the Respondent contends that an award of equitable compensation where subsections 20(1)(e), (g) and (h) of the *SCTA* apply would be contrary to the scheme of the *SCTA*.

[45] The Respondent advances two related propositions:

> 1) That the words "subject to this Act" reveals Parliament's intention to create exceptions to the general application of subsection 20(1)(c) of the *SCTA*. Put another way, Parliament, it is contended, intended that in the case of some breaches of lawful obligation equitable compensation must not be awarded. The Respondent places subsections 20(1)(e) and (g) in the category of claims which, if found valid, do not attract equitable compensation.
>
> 2) A finding that equitable principles apply would protract proceedings before the Tribunal, contrary to the intention of Parliament that specific claims be expeditiously resolved.

[46] The connection between these propositions is said to be that subsections 20(1)(e), (g) and (h) of the *SCTA* codify the approach to be taken by the Tribunal when determining the compensation payable in cases of unlawful takings of interests in reserve land. As I understand the Respondent's position, it is that the assessment of equitable compensation would be more complex and time consuming than simply applying the code.

[47] The Respondent offered no analysis of how the application of the "code" said to be established by subsections 20(1)(e), (g) and (h) of the *SCTA* would be more expeditious than the application of principles of equitable compensation. I reject this argument as unsupported by evidence or logic.

[48] The question whether subsections 20(1)(e), (g) and (h) of the *SCTA* bar an award of equitable compensation remains.

B. Equitable Compensation and the *SCTA*

[49] It is the case that the *SCTA* contains provisions that expressly bar or limit remedies that equity could otherwise provide. Compensation awarded under any subsection of section 20(1) of the *SCTA* would, for example, be subject to subsection 20(1)(a) which bars all but an award of monetary compensation. Subsection 20(1)(b) bars an award exceeding $150,000,000. Subsection 20(1)(d)(i) and (ii) bars awards of punitive or exemplary damages and non-pecuniary losses. These apply to all awards of compensation. The Respondent says that there are additional exclusions that apply where reserve land has been "taken." These, the Respondent argues, are based on the prescriptive language in subsections 20(1)(e), (g) and (h) of the *SCTA*.

[50] Subsections 20(1)(e) and (g) of the *SCTA* direct the Tribunal to determine the market value of land "taken." Subsection 20(1)(e) applies where reserve land is taken pursuant to legal authority, but with "inadequate compensation." It calls for an award of market value at the time of taking, "brought forward to the current value of the loss." Subsection 20(1)(g) applies where reserve land was taken without legal authority. It calls for an award based on the current unimproved market value of the land. Where subsection 20(1)(g) is found to apply, subsection 20(1)(h) calls for "compensation...of the loss of use of a claimant's lands brought forward to the current value of the loss."

[51] The Respondent says that the specificity of the regime for compensation set out in subsections 20(1)(e), (g) and (h) of the *SCTA* operate as a bar to the award of equitable compensation.

[52] This seems somewhat novel. If correct, there would be disparity in the assessment of compensation on grounds of reserve land being taken or damaged while under Crown administration and all other grounds for claims under the *SCTA*. Compensation for all other grounds found valid is governed by subsection 20(1)(c) of the *SCTA*, which, according to the Respondent, provides for equitable compensation.

[53] To illustrate the point, consider subsection 14(1)(c) of the *SCTA*, which makes a breach of a legal obligation arising from "...its [i.e. Crown] administration of reserve lands..." a ground for a specific claim. Reserve lands are, in fact and in law, administered by the Crown under the

provisions of the *Indian Act*. The regime of land holding remains largely unchanged since the *Indian Act* was first introduced in 1867.

[54] There are many ways in which a claim may arise based on alleged breaches of Crown duties in the administration of reserve lands. Of these, the most serious would be Crown acts or omissions that result in the loss to a First Nation of its reserve land or an interest in the land. Yet it is only those losses that the Respondent says do not attract an award of equitable compensation. The Respondent would of course make the same argument in relation to subsection 20(1)(f) of the *SCTA*, which applies in cases of "damage" to reserve land.

[55] In any case, the outcome turns on statutory interpretation and precedent, discussed below.

VIII. COMMON LAW, EQUITY, AND THE *SCTA*

A. Consistency: Courts and the Tribunal

[56] The *SCTA* establishes an alternative process to the courts for claims against the Crown. In *Canada v Kitselas First Nation*, 2014 FCA 150 at para 34, [2014] 4 CNLR 6 [*Kitselas*], Mainville J.A. found:

> Indeed, it is most important that there be consistency in adjudications by the Specific Claims Tribunal and courts on issues regarding the fiduciary relationship between the Crown and aboriginal peoples and the circumstances in which that relationship entails fiduciary duties. These issues have deep underlying constitutional underpinnings stemming notably from the *Royal Proclamation, 1763*, paragraph 91(24) and section 109 of the *Constitution Act, 1867*, section 35 of the *Constitution Act, 1982*, and other constitutional instruments.

[57] Further, the notion that the *SCTA* establishes a code of liability has been rejected by the Federal Court of Appeal in *Kitselas*:

> The validity of a claim must be determined in accordance with general legal principles, notably the principles of fiduciary law as applicable to the Crown-aboriginal relationship: paragraph 14(1)(*c*) of the *SCT Act*. The *SCT Act* does not establish a code of liability with respect to specific claims, which are rather adjudicated in accordance with the general principles of the federal common law pertaining to aboriginal matters. [emphasis added; at para 28]

[58] In *Kitselas*, the question on Judicial Review was whether the Tribunal's finding on validity was correct in law. While Mainville J.A.'s findings do not refer to the assessment of compensation in fiduciary law, his findings flag a concern over consistency in the law applied by

the courts and the Tribunal, as the Tribunal was intended to serve as an alternative to the courts for First Nations seeking a forum for their historical claims, "by independent superior court judges" (at para 26).

B. Principles Applied by Courts

[59] Federal common law applicable to Indigenous interests has developed in cases concerned with Crown actions affecting interests in land. This is the case with respect to both reserves, which are administered by the Crown, and land subject to claims of Aboriginal title.

[60] The central precept in the Indigenous-Crown relationship is the Honour of the Crown (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623). In some circumstances fiduciary duties arise. One such circumstance is where a cognizable Indian interest is under the discretionary control of the Crown (*Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]). Where First Nations have cognizable interests in land held by the Crown for their use and benefit, and the Crown exercises discretionary control as the administrator, the Crown is a fiduciary.

[61] Subsections 20(1)(c), (e), (f) and (h) of the *SCTA* all call for the assessment of compensation based on the principles "applied by the courts."

[62] Although the Respondent did not advance its argument on these terms, it seems to be saying that subsections 20(1)(e), (g) and (h) of the *SCTA* apply when the Crown has permitted a taking of a First Nation's interest in reserve land in circumstances that amount to a breach of specific provisions of the *Indian Act*. Examples would include a taking without a surrender (section 38 of the *Indian Act*), or a lawful expropriation (section 35 of the *Indian Act*). If this is so, liability could be grounded in breach of the statute. The argument, it seems, is that equitable compensation is not required, as liability is grounded in the breach of a statute, not breach of fiduciary duty.

[63] If this is the Respondent's contention, it must fail. A failure by the Crown to enforce the requirements of a statute governing the taking of an interest in reserve land would amount to a breach of fiduciary duty. The Crown is a fiduciary in relation to reserve lands (*Wewaykum*). A

failure to enforce statutory protection of the First Nation's interest would be a breach of fiduciary duty.

[64] In the common law, when liability is grounded in breach of fiduciary duty, an equitable remedy is indicated. In *Hodgkinson v Simms*, [1994] 3 SCR 377 at para 73, 117 DLR (4th) 161 [*Hodgkinson*] the Supreme Court of Canada said: "[i]t is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred" (also see *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at para 70, 85 DLR (4th) 129), and *Guerin v R*, [1984] 2 SCR 335 at 361–63, 13 DLR (4th) 321 [*Guerin*]). This principle was accepted by this Tribunal in *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7 at para 139 [*Huu-Ay-Aht*].

C. Breach of Fiduciary Duty in Relation to Reserve Lands

[65] It is well established within the common law, that breaches of fiduciary duties in relation to Crown management of Indigenous interests are to be compensated in accordance with principles of equitable compensation. The remedy applied varies depending on the factual context.

[66] A "cognizable Indian interest" under the discretionary control of the Crown is present in relation to reserves, as reserve lands are administered under the *Indian Act*. In *Wewaykum*, Binnie J. spoke of the fiduciary duty of the Crown in relation to "created" reserves:

> The content of the fiduciary duty changes somewhat after reserve creation, at which the time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands. In *Guerin*, Dickson J. said the fiduciary "interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown" (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85. See also *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.). [emphasis in original; at para 98]

[67] In *Guerin*, the seminal decision on the application of fiduciary law in the administration of reserve lands, the Supreme Court of Canada called for restitution where promises made by government officials for the economic use of land surrendered for leasing were not fulfilled.

Restitution is the central concept where an interest, over which a fiduciary has control, is affected by a breach (applying *Hodgkinson*).

[68] The same remedy has been held to apply in cases in which Ministry of Indian Affairs officials permitted the expropriation of interests in reserve land (*Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA) [*Semiahmoo*]; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 [*Osoyoos*]).

[69] Canadian case law concerning Indigenous interests in reserve lands affirms that where a breach of fiduciary duty has resulted in the loss of an asset that cannot be returned *in specie* (e.g. land, or lost opportunity with respect to the same), remedies are available to put the beneficiary in "as good a position as he would have been in had the breach not occurred" (*Hodgkinson* at 73; *Guerin* at 362; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 103, [1996] 2 CNLR 25).

[70] The jurisprudence establishes that where the fiduciary breach has resulted in a lost opportunity to use the lands, the plaintiff is entitled to be compensated for that loss of use based on the presumption that those lands would have been put to the "most advantageous" use. In *Guerin*, this meant that the court measured damages in accordance with the band's lost opportunity to develop the land for residential purposes, since that was the "most advantageous" use of that land at the time of the breach (*Guerin* at 362–63; *Semiahmoo* at para 112; *Huu-Ay-Aht* at para 140).

[71] Restitution is an equitable remedy. The only restitutionary remedy available is monetary compensation (subsection 20(1)(a) of the *SCTA*).

D. Statutory Construction

[72] The modern approach to statutory construction requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 [*Rizzo & Rizzo*] citing Ruth Sullivan, Driedger on the Construction of Statues, 3rd ed, 1994 at 87).

[73] Moreover, section 12 of the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*] provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[74] The *SCTA* was intended to "establish an independent tribunal...designed to respond to the distinctive task of adjudicating...claims in accordance with law and in a just and timely manner" (emphasis added; Preamble). The applicable law at the time of enactment was the law of equity. The remedies were equitable remedies.

[75] The general rule governing compensation is set out in subsection 20(1)(c) of the *SCTA*, which connects the term "just" to principles of compensation applied by the courts:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> ...
>
> **(c)** shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;... [emphasis added]

[76] The Respondent agrees that subsection 20(1)(c) of the *SCTA* calls for equitable compensation. This conforms with federal common law applicable to Indigenous interests under Crown control.

[77] Subsections 20(1)(e) and (h) of the *SCTA* repeat the phrase "in accordance with legal principles applied by the courts" above to modify, respectively, the words "brought forward to the current value of the loss" and "loss of use of a claimant's lands brought forward to the current value of the loss."

[78] The Respondent says, in effect, that the absence of the term "just" in the text of subsections 20(1)(e), (g) and (h) of the *SCTA*, and the proximity of the phrase "in accordance with legal principles applied by the courts" to the phrases "brought forward to the current value of the loss" and "loss of use...brought forward" exclude the application of principles of equitable compensation. However, the Respondent does not set out the "principles applied by the courts" that it does consider applicable.

[79] The Respondent overlooks the findings in *Guerin*, *Osoyoos*, *Wewaykum*, and other decisions cited above, that the Crown is bound by fiduciary duties in relation to its administration of reserve lands.

[80] The following paragraph from *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14 reveals the inextricable connection between fiduciary law concepts of duty and the remedy of restitution:

> In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by Lac, Corona would have acquired the property. In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. [emphasis added; at 669]

[81] There, a restitutionary claim resulted in the imposition of a constructive trust. Had this remedy not been available, the value that would have accrued to the plaintiff's benefit would have been awarded. This is how equity compensates for a loss.

[82] Bringing forward the value of a loss is restitutionary. It connotes more than the application of a simple interest or an adjustment for the time value of a dollar. It is directed to putting the claimant in as good a position as it would have been in had the breach not occurred. The requirement of subsections 20(1)(e), (g) and (h) of the *SCTA* that losses be "brought forward" to current value calls for the application, not the ouster, of principles resulting in equitable compensation.

[83] An interpretation to the contrary would be contrary to the principles of interpretation prescribed in the *Interpretation Act* and *Rizzo & Rizzo*, as it would frustrate and undermine the objectives of the *SCTA*. It would further be inconsistent with the Honour of the Crown to interpret Parliament's intentions in enacting section 20(1) of the *SCTA* to narrowing the scope of remedies available before the Tribunal so drastically from those remedies available before the

courts. The objective of Parliament was to allow for the expeditious resolutions of claims, not to shield the Crown from remedies otherwise available.

IX. WAS THE REALLOCATION OF THE RESERVE A TAKING?

[84] If the reallocation of the reserve was not a "taking" within the meaning of the term "taken" in subsections 20(1)(e) and (g) of the *SCTA*, neither apply to the assessment of compensation. Subsection 20(1)(c) would apply. This calls for compensation that the Tribunal "considers just, based on the principles of compensation applied by the courts." Unlike subsections 20(1)(e) and (g), subsection 20(1)(c) does not direct the Tribunal to order compensation based on the market value of land that is the subject of the claim.

[85] It is apparent from the findings of the validity judge that the Minister purported to effect the reallocation in an exercise of her authority under the section 17(2) of the *Indian Act*, 1956.

[86] The question, then, is whether a reallocation of reserve lands among bands under section 17(2) of the *Indian Act*, 1956, constitutes a "taking." In short, was land, in the words of subsection 20(1)(e) of the S*CTA*, "taken under legal authority" or in the words of subsection 20(1)(g), "never...taken under legal authority" (emphasis added).

A. Position of the Parties

1. Claimant

[87] The Claimant submits that the term "taken" applies when land is alienated from a reserve by surrender to the Crown or by the Crown's authorized expropriation of an interest in reserve land. In the case of a surrender, the land or an interest in the land can be lawfully granted to a person who is not a band member. An expropriation likewise results in the acquisition of a proprietary interest by a non-member. In both cases the land is, to the extent of the interest granted, "taken." A reallocation of reserve land from one band to another does not affect the Indian interest, but merely reassigns it.

2. Respondent

[88] The Respondent submits that the *SCTA* codifies the grounds on which a specific claim may be brought before the Tribunal and the compensatory principles or factors that the Tribunal may apply for each scenario of liability described in section 20(1). Where reserve land is concerned, the only question is whether the Claimant's interest in reserve land was lost or damaged. If it was, the only question is whether or not there was statutory authority for the loss or damage. To look further than this in construing the term "taken" would ignore the plain meaning of the term.

3. Analysis

[89] The interpretation of the term "taken" in subsections 20(1)(e) and (g) of the *SCTA* requires a contextual analysis. The context is the legal nature of the Indian interest in reserve land. In *Guerin* it is described thusly:

> The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading. [at 382]

[90] Reserve land is administered by the Crown in accordance with the provisions of the *Indian Act*. The *Indian Act* establishes the means by which an interest in reserve land may be "sold, alienated, leased or otherwise disposed of," or in other words, acquired by someone other than the Crown (*Guerin* at 365):

> Before adverting to the facts, reference should be made to several of the relevant sections of the *Indian Act*, R.S.C. 1952, c. 149, as amended. Section 18(1) provides in part that reserves shall be held by Her Majesty for the use of the respective Indian Bands for which they were set apart. Generally, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the Band for whose use and benefit in common the reserve was set apart (s. 37). A surrender may be absolute or qualified, conditional or unconditional (s. 38(2)). To be valid, a surrender must be made to Her Majesty, assented to by a majority of the electors of the Band, and accepted by the Governor in Council (s. 39(1)).

[91] The surrender provisions in the *Indian Act* as outlined by *Guerin* were in force in 1959 at the time of the reallocation.

[92] The *Indian Act* provides another means by which an interest in reserve lands may be acquired. Section 35 of the *Indian Act*, RCS 1952, c 149 in force in 1959, provided for the taking of reserve land for public purposes by expropriation:

> **35.** (1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> ...
>
> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

[93] The lands in question were neither surrendered nor expropriated. The validity judge found that in 1959 the Minister applied section 17 of the *Indian Act*, 1956, to reallocate the Seabird Island Reserve from the seven bands for which the reserve had been created, one being the Popkum Band, to the newly formed Seabird Island Band.

[94] Section 17 of the *Indian Act*, 1956, provides:

> **17.** (1) The Minister may, whenever he considers it desirable,
>
> *(a)* constitute new bands and establish Band Lists with respect thereto from existing Band Lists or General Lists, or both,
>
> ...
>
> (2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.
>
> ...

[95] A transfer of reserve land under section 17 of the *Indian Act*, 1956, does not have the same purpose or effect as a surrender or an expropriation under the *Indian Act* (respectively, sections 38 and 35). There is no "taking" in the sense of the alienation of the Indian interest to the Crown in order that the land may be "sold, alienated, leased or otherwise disposed of"

(*Guerin* at 365). Nor is there a taking of the Indian interest, in whole or in part, by expropriation. Ministerial action taken under section 17 does not affect the Indian interest in the land, it reallocates the interest from one band to another band where the two have, in whole or in part, a membership in common.

X. CONCLUSION

[96] If subsections 20(1)(e), (g) or (h) of the *SCTA* applied in respect of the reallocation of the interest of the Popkum Band in the Seabird Island Reserve to the Seabird Island Band, principles of equitable compensation, in particular restitutionary principles, would apply to the assessment of compensation for the Crown's breach of fiduciary duties in this matter. However, the reallocation under section 17(2) of the *Indian Act*, 1956, did not result in land being "taken" within the meaning of the term in section 20(1), subsections (e), (g) and (h). In the result, the *SCTA* does not require the valuation of the reallocated land in 1959 or at present.

[97] The validity judge found the Claim valid based on breach of fiduciary duty in the application of section 17 of the *Indian Act*, 1956, not on the basis of an illegal or legal "taking." Hence, compensation is to be assessed, under subsection 20(1)(c) of the *SCTA*, in accordance with the principles of equitable compensation as called for by the common law, more specifically in accordance with the principles of restitution as applied by the courts.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160722

File No.: SCT-7005-11

OTTAWA, ONTARIO July 22, 2016

PRESENT: Honourable Harry Slade

BETWEEN:

POPKUM 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 POPKUM FIRST NATION**
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AND TO: **Counsel for the Respondent**
Deputy Attorney General, per Rosemarie Schipizky and Aneil Singh
Department of Justice