

# TRIBUNAL HOLDS THAT CANADA BREACHED DUTY OF MINIMAL IMPAIRMENT

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On November 28, 2017, the Specific Claims Tribunal ("Tribunal") released its decision regarding a taking of lands from the Tobacco Plains Indian Band ("Claimant") in 1915. The lands were located in British Columbia on the Canada-United States border and expropriated for the purposes of a Customs house and garden ("Claim Lands"). The Claimant was paid \$150 for 2.97 acres of land, however, the Parties subsequently agreed that the historic value of the lands should have been assessed at \$208.

The Claim also concerned a second parcel of land in which a breach of a fiduciary duty had been acknowledged by the Crown at the outset of proceedings. Accordingly, this aspect of the Claim will be assessed, along with any other compensation-related issues, during the compensation phase of the Tribunal proceedings.

This decision is significant as it represents the first instance in which the Tribunal has applied the duty of minimal impairment to lands in British Columbia known as provisional reserves. Provisional reserves were first identified in the Supreme Court of Canada decision *Weywaykum Indian Band v Canada*, 2002 SCC 79 [Weywaykum], and refer to those allotted reserves in which British Columbia had not yet transferred administration and control of those lands to the Crown in right of Canada.

## Overview of the Claim

The Claimant argued that Canada had breached both statutory and fiduciary duties. In particular, the Claimant argued that the Crown failed to: (i) minimally impair the Claimant's interest in the Claim Lands; (ii) properly value and obtain adequate compensation for the Claim Lands; and (iii) consult with and obtain the Claimant's consent on the amount of compensation.

With respect to the legal status of the Claim Lands at the time of the taking, the Tribunal

determined that an analysis of whether the Indian Act applied or whether the Claim Lands were confirmed as reserve lands was unnecessary. Rather, an analysis that focused on fiduciary duties was all that was necessary to the disposition of this Claim. On this point the Tribunal ruled that Canada was acting in a fiduciary capacity to the Claimant and breached "the expected standard of conduct owed as a fiduciary in respect of the protection of the Claimant's significant and cognizable interest in its reserve, even if it was provisional at the time of taking."

## Minimal Impairment

In the decision, the Tribunal reviews the direction of the Supreme Court of Canada in *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 [Osoyoos], in which it described the duty of minimal impairment as the duty of the Crown to minimally impair reserve lands when administering expropriations. Described as a two-step process, the Crown is limited to taking only the interest in land reasonably required to fulfill the public purpose.

Relying on *Weywaykum*, which holds that fiduciary duties attach to the Crown's administration of provisional reserves, the Tribunal found that since "fiduciary duties applied during reserve creation, this concern also exists when the Crown removes land from a provisional reserve to serve a competing public purpose." On this basis the Tribunal ruled that the duty of minimal impairment applied to the provisional reserve lands. The Tribunal states, "*Weywaykum* also affirmed that core fiduciary duties apply during the reserve creation process... In an expropriation setting, these duties apply to the second step in the *Osoyoos* analysis."

Having found that the duty of minimal impairment applied to provisional reserve lands, the Tribunal next considered whether the Crown had satisfied its obligations to the Claimant. To that end, the Tribunal ruled that there was ample evidence demonstrating that the Crown had failed to satisfy its fiduciary obligations.

The Tribunal found that when the Department of Customs ("DOC") first approached the Department of Indian Affairs ("DIA") about the possibility of building a customs facility on the Claim Lands, the DIA was quick to suggest that the DOC could expropriate the land under the Indian Act. Rather than consulting the Claimant first, the Tribunal found that the DIA moved quickly to facilitate a full taking of the Claimant's interest in the Claim Lands. Summarizing the conduct of the DIA Agency Inspector, the Tribunal found that overall the Inspector "gave the impression that he was more interested in promoting the interests of the DOC than the interests of the Band."

The Tribunal also found that the DIA had failed to consult the Band, nor explain to them, the possible "ongoing long-term economic benefit" of leasing the land rather than an outright sale. More importantly, the Tribunal also found that the DIA had failed to inquire whether there was an alternative off-reserve location that would have been equally suitable for purposes of the DOC. With respect to the portion of the Claim Lands that were taken for gardening purposes by the customs manager (1 acre), the Tribunal questioned whether these lands were really "needed for a customs facility." Indeed, the Tribunal observed that this question was completely overlooked by DIA officials.

Of significance, the Tribunal also questioned why the DIA did not inform the Band nor attempt to negotiate with the DOC, a leasing arrangement rather than an outright sale of the Claim Lands, despite the fact that the DOC had recently established two other Customs facilities on reserve lands in British Columbia on the basis of a limited right of occupation.

Taken together, all of these considerations led the Tribunal to conclude that "the DIA did not seriously consider its fiduciary duty or make any reasonable efforts to satisfy the Crown's 'minimal impairment' obligation to the Band." As a result, the Tribunal concluded that Canada breached its fiduciary obligations owed to the Claimant.

## **Proper Compensation**

The Claimant also challenged the manner by which the Crown had valued the Claim Lands. Here too the Tribunal found in favour of the Claimant, finding that the manner in which the Crown officials dealt with the issue of compensation also amounted to a breach of fiduciary duty.

The Tribunal highlighted several factors which were determinative of this issue. First and foremost, the Tribunal found that with respect to the conduct of the DIA officials, the evidence revealed that the DIA did not act in the interests of the Claimant, but rather they acted in the interests of the DIC. In the words of the Tribunal, the DIA "were working to advance the interests of the DOC." The Tribunal also observed how the DIA "did not engage an objective appraiser to give an independent appraisal of the land which would have taken into account all of the relevant factors in a takings case." Without any consultation with Claimant, the DIA determined that an objective opinion of the value of the land was totally unnecessary.

Lastly, the Tribunal also referenced the DIA policy requiring the consent of the band as it relates to compensation. The Tribunal referred to internal correspondence detailing how

the DIA specifically chose to disregard that requirement. Instead, the DIA, without consultation with the Claimant: (1) agreed to the taking by purchase rather than lease; (2) agreed to the taking of 2.97 acres which included one acre for gardening purposes; (3) agreed that the Claim Land was only worth \$150 based on an internal valuation undertaken by a DIA official; and (4) decided that an objective opinion on valuation was unnecessary.

All of these factors lead the Tribunal to the conclusion that the Crown did not satisfy its fiduciary obligations with respect to the issue of compensation.

## Payment of the Compensation

The Tribunal also found that the Crown breached its fiduciary obligation to the Band by paying 90% of compensation to Chief and only 10% to the Band. Relying upon DIA officials who had reported that the Claim Lands were "all owned by Chief Paul," the Crown argued that the payment of compensation in this manner was consistent with DIA policy at the time, including the Indian Act. The Tribunal did not accept these arguments, instead reasoning that since Chief Paul did not have a Certificate of Possession for the Claim Lands, it was the Band who therefore held "the full cognizable interest" in the Claim Lands. In proceeding by this manner, the Tribunal ruled that the Crown had overlooked its fiduciary duty to the Band.

## Conclusion

This decision will have particular significance to Specific Claims involving the taking of lands from provisional reserves. In these claims, the Tribunal has indicated that it is prepared to apply the duty of minimum impairment. This decision will also have implications in respect to Crown valuations of reserve lands in the context of expropriations and like proceedings. Consistent with the standard expected of a fiduciary, it is arguable that the Crown can no longer rely upon internal land valuations as representing the proper measure of compensation. Rather this decision strongly suggests that proper compensation must be assessed by way of an objective and independent appraisal.

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## Authors

### Robert Winogron

Partner - Ottawa

 Email

[robert.winogron@gowlingwlg.com](mailto:robert.winogron@gowlingwlg.com)

 Phone


+1 613-786-0176

 vCard

Robert Winogron

### Jeremy Bouchard

Partner - Ottawa

 Email

[jeremy.bouchard@gowlingwlg.com](mailto:jeremy.bouchard@gowlingwlg.com)

 Phone

+1 613-786-0246

 vCard

Jeremy Bouchard