

TOP FIVE 2018

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

WILLIAMS LAKE INDIAN BAND v CANADA (ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT), 2018 SCC 4

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16969/index.do>

Facts

The traditional territory of the Williams Lake Indian Band ("Band") includes a village near Williams Lake in British Columbia ("Village Lands"). When settlers began to arrive to the Colony of British Columbia ("Colony"), they pre-emptively took parts of this unsurveyed land. In other words, settlers who arrived took land from the Village Lands before other settlers had the opportunity to, and without acknowledging that this land belonged to the Band. In response to this, the Colony enacted the *Proclamation relating to acquisition of Land, 1860* (*Proclamation No. 15*). This Proclamation was an attempt to ensure that settlers could not pre-emptively take land from bands. However, when land was taken from the Band by settlers, officials responsible for protecting the Band took no steps to prevent it. When British Columbia joined Confederation in 1871, Canada inherited this history. In 1881, the Federal Crown acknowledged that pre-emptively taking land from bands was a

mistake but they were not prepared to interfere with the rights of settlers. The Band was allocated another piece of land.

In 2008, Canada enacted the *Specific Claims Tribunal Act*. This Tribunal was focused on resolving issues that arose from the Crown's failure to honour its historical legal obligation to Indigenous people by awarding monetary compensation. After repeated but failed attempts to negotiate with Canada, the Band filed a claim with the Tribunal. In 2014, the Tribunal found that the pre-Confederation Colony and Canada breached their legal obligations to the Band, and that modern Canada was responsible for this breach.

Procedural History

Canada filed for judicial review before the Tribunal reached a decision on compensation. The judicial review effectively halted proceedings before compensation was determined.



When a judicial review takes place, there are two ways to review a decision. The first way is to consider the reasonableness of the decision. The second is to consider the correctness of the decision. The standard of review for reasonableness focuses on whether there is a reasonable decision, supported by evidence and reasons. The standard of review for correctness focuses more on procedural fairness, legal questions, and jurisdiction issues.

On a standard of reasonableness, the Federal Court of Appeal dismissed the Band's claim. The Band appealed to the Supreme Court of Canada (SCC).

Issues

There were two main issues that arose at the SCC:

1. Was the Tribunal's decision reasonable?
2. Should the Band be awarded monetary compensation?

Decision

The majority held that the standard of review in this case was reasonableness, and ruled in favour of the band. According to the SCC, the Tribunal's decision was reasonable. The SCC re-instated the Tribunal's decision. The damages were to be determined by the Tribunal.

Ratio

Canada has an inherited legal obligation to Indigenous peoples, and can be held in breach in the place of the Colony. The approach to Crown liability is "backward-looking," which is both consistent with Indigenous views of continuity and Canada's acceptance of its historical wrongs.

Reasons

The SCC had to assess whether a special duty, known in law as a *fiduciary duty*, existed between the Colony and the Band. In general, a fiduciary relationship exists when one party has assumed control or direction over the interests of another, creating a duty to look out for those interests. The Colony took discretionary control over a particular Indigenous interest through enactments and policies around collective use and occupation of land. This means that the Colony's obligation to protect the Band's land was broader than of *Proclamation 15*. This obligation towards the Band created a particular and higher standard of care; the Colony fell below this standard and ultimately failed to protect the Band when settlers pre-emptively took land. On this basis, the Tribunal's finding was reasonable against the Colony.



The SCC then had to assess whether Canada inherited that fiduciary duty. Given that the Canadian government has the responsibility to create reserves as per the Constitution, there exists a continuation of discretionary control. This means that a special fiduciary duty exists. Had Canada been in the place of the Colony at the time the settlers were pre-emptively taking land, Canada would have breached their duty to the Band. As a result of this, the SCC found that the Tribunal was reasonable in its finding against Canada.

The SCC decided that the legal obligation to the band was one that continued post-Confederation. Canada passively allowed settlers to occupy the Village Lands while acknowledging a mistake had occurred, and thus, a clear breach had taken place. Ultimately, they ruled that the relationship between Canada and Indigenous communities is one unlike any other relationship in the law – a fact that must be remembered in assessing legal obligations to their communities and rectifying historical wrongs.

The dissent agreed with the majority in that the standard of review should be reasonableness, and that there was a breach by the Colony. However, they were not persuaded that a breach had taken place post-Confederation. The dissent would send the issue back to the Tribunal to assess how Canada assumed the liability of this particular historical wrong.



DISCUSSION

1. What was the purpose of the *Proclamation relating to acquisition of Land, 1860*?
2. Was it effective?
3. Do you think that Canada should have been found to owe a duty to Williams Lake Indian Band post-Confederation?
4. Should Canada have returned the land to the Band when British Columbia joined Confederation in 1871?
5. What is the advantage to the government in honouring its fiduciary commitments? What advantage is there in not paying attention to them?
6. This particular Tribunal awards monetary compensation based on historical wrongs the Indigenous community has faced at the hands of the Canadian government. What other ways might exist to correct these historical wrongs?