The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

In June, 2014, the Supreme Court of Canada released a significant judgment in *Tsilhqot'in Nation v. British Columbia*[1]. For now, *Tsilhqot'in Nation* represents a pinnacle in a long line of cases which have clarified aboriginal title and the concept of land as an entity which belongs to a first nation. However, this does not leave other rulings irrelevant or no longer important to consider – especially when it comes to surveying practice and boundaries. In this issue we explore how a reserve was surveyed and set aside as part of a specific treaty making process, and in the course of doing so, the Crown excluded a parcel within the reserve. In *Canada v. Kitselas First Nation*[2], the Federal Court of Appeal dismissed an appeal by Canada from a finding that Canada had breached its fiduciary obligation to the Kitselas First Nation by non-inclusion of a 10.5 acre parcel of land in a reserve in 1891. *Kitselas First Nation* is important in terms of defining the nature of that duty, but also in giving us better insight to surveying and the reserve creating process at that point in time.

Surveying First Nation Reserves and the Honour of the Crown

Key Words*: fiduciary duty, Honour of the Crown, survey instructions, exception, land tenure, aboriginal title*

In 1960 an archaeological dig along the banks of the Skeena River confirmed the presence of a settlement of significant size since about 5000 years ago. The site was just upriver from Terrace, British Columbia and, except for a recent decline, was estimated to have been as large as 6000 people. In 1972 the location of Kitselas Canyon was designated as a Canadian national historic

[1] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII), http://canlii.ca/t/g7mt9

[2] *Canada v. Kitselas First Nation*, 2014 FCA 150 (CanLII), http://canlii.ca/t/g7cd8 *Kitselas* was released only 9 days before the release of *Tsilhqot'in Nation* by the Supreme Court of Canada.

site[3]. Situated on the Skeena River with steep walls, the river narrowed and was a natural limit to the extent of navigation by steamers from Terrace.

British Columbia joined confederation in 1871, but the terms of that union made for special provision of reserves which, by that year, had already been set aside by British Columbia (Canada assumed ownership in trust for the first nations[4]), and future reserves to be set aside[5].

The process by which the decision in Kitselas reached the Federal Court of Appeal needs to be described. The Kitselas First Nation had submitted a specific claim to Canada through the Specific Claims Tribunal that was established in 2008[6]. Canada refused to recognize the claim or to negotiate, resulting in a hearing which took place before the tribunal to consider the claim.

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[3] Reasons for the designation included:

- it encompasses approximately 5000 years of Aboriginal history and is a place of major significance to the people now known as Tsimshian;
- in the 19th century, two permanent Tsimshian villages occupied a strategic position on the river, giving the people here control over the gateway between the coast and the interior, and therefore control of trade with the Hudson's Bay Company. The fact that Gitlaxdzok was a fortified village site makes it unique on the north coast; and,
- the cultural record is especially rich and has allowed detailed archaeological reconstruction of the culture history at Kitselas Canyon, including aspects of social change, the lasting relationship with people on the coast, vast trade networks, and changes in settlement patterns.

From: http://www.historicplaces.ca/en/rep-reg/place-lieu.aspx?id=10522

[4] *British Columbia Terms of Union*, RSC 1985, App II, No 10, states in part, at Article 13:

> "…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…"

[5] A Joint Indian Reserve Commission was established in 1875 which was constituted thus:

> "That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and Local Governments jointly."

[6] From the *Specific Claims Tribunal's* own website. Note also:

> "The term "specific claims" generally refers to monetary damage claims made by a First Nation against the Crown regarding the administration of land and other First Nation assets and to the fulfillment of Indian treaties that have not been accepted for negotiation or that have not been resolved through a negotiated settlement within a specified time frame."

All from: http://www.sct-trp.ca/hom/index_e.htm

The decision below is reported as *Kitselas First Nation v. Canada*[7]. In short, the tribunal concluded,

> The Kitselas First Nation has established a breach of legal obligation of the Crown due to the non-inclusion of land in excess of the requirements of the Hudson Bay Company (one acre) in Kitselas IR No. 1.[8]

Although the proceeding in the Federal Court of Appeal was described as a "judicial review"[9], it was in fact tantamount to an appeal. At the outset of the reasons, the court stated,

> The principal submission of Canada is that the Judge erred in law by holding that Canada had a fiduciary duty at the reserve allotment stage. Canada also submits that the Judge made unreasonable determinations of fact and of mixed fact and law in reaching his decision. It further submits that the Judge erred in finding that Canada was solely liable for breaches of Canada's alleged duty with respect to the excluded land.
>
> For the reasons set out below, I would dismiss this judicial review application[10].

Crucial to the claim was a consideration of the reserve creating process. In British Columbia in 1891, the process was a joint undertaking between Canada and the province as a result of the terms of British Columbia's joining in confederation in 1871. The following description of the historical context sets the stage:

> The territory historically occupied by the Kitselas is along the Skeena River in British Columbia, upstream from Port Essington which is located near the mouth of the River.
>
> When British Columbia entered Confederation in 1871, the *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10 addressed aboriginal matters in Article 13, which notably provided for the appropriation of tracts of land to be conveyed from the provincial government to the federal government in trust for the use and benefit of the various aboriginal populations of the province.

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[7] *Kitselas First Nation v. Canada*, 2013 SCTC 1 http://205.193.184.246/apption/cms/UploadedDocuments/20117003/054-SCT-7003-11-Doc22.pdf

[8] *Ibid.*, at para 205

[9] The distinction between judicial review and appeal is not always clear. Generally speaking, judicial review in Canada is a reference to the overriding supervisory jurisdiction of the courts with respect to decision makers at a tribunal or lower court level. Although concerned primarily with fairness of procedure, illegality and unreasonableness of decision can relate to the substance of the disputed decision. Procedural impropriety is a procedural basis for judicial review because it is aimed at the decision-making *procedure* rather than the *substantive content* of the decision itself. Derived in part from: http://en.wikipedia.org/wiki/Judicial_review_in_English_law

[10] *Canada v. Kitselas First Nation*, 2014 FCA 150 (CanLII), http://canlii.ca/t/g7cd8 at paras 2 and 3

For that purpose, Canada and British Columbia established a Joint Indian Reserve Commission which was to visit each aboriginal nation in British Columbia to inquire into reserve allotments and to fix and determine separately for each nation the number, extent and locality of reserves taking into account their habits, wants, pursuits, and the amount of territory available in the region occupied by them, as well as the claims of the White settlers.

In September 1891, the sole commissioner of the Joint Indian Reserve Commission was Mr. Peter O'Reilly. In September 1891, Commissioner O'Reilly traveled along the Skeena River to identify land to be set apart as reserves for the Kitselas and other aboriginal nations. Various exchanges and meetings between Commissioner O'Reilly and representatives of the Kitselas ensued, leading to a recommendation by the Commissioner to set aside six reserves for this First Nation, totaling 2910 acres, including Kitselas I.R. No. 1 comprising 2110 acres.

Commissioner O'Reilly excluded from Kitselas IR No. 1 approximately 10 acres on the left bank of the Skeena River, on which a storehouse of the Hudson's Bay Company then stood. When he wrote to British Columbia's Chief Commissioner of Lands and Works on January 28, 1892 seeking approval of his recommended reserve allotments, Commissioner O'Reilly noted that "[t]here are no settlements in the neighborhood of any of these reserves and should any such occur, the interest of the whites and the Indian are not likely to clash." He further explained the exclusion of approximately 10 acres from Kitselas I.R. No. 1 as follows:

> I have omitted from Reserve No. 1 Kitselas ten acres on the left bank of the river immediately below the [canyon] as I believe it would prove a convenience to the public to have this land declared a public reserve, and that you might think it advisable to act on my suggestion. The Hudsons Bay Company have already erected a small storehouse thereon.

British Columbia and Canada eventually approved the reserves recommended by Commissioner O'Reilly. Once proposed reserve allotments were approved by both governments, they were deemed "provisionally approved" and withdrawn from inconsistent uses. Provisionally approved reserves, such as Kitselas I.R. No. 1, did not become legally established reserves within the meaning of the *Indian Act*, R.S.C. 1985 c. I-5, until July 29, 1938, when British Columbia transferred the administration and control of the lands to Canada[11].

The first survey of the reserves took place in 1901. In all there were 6 reserves set aside – the largest being Reserve No. 1. The 10.5 acre parcel within that reserve was also surveyed and set

[11] *Ibid.*, at paras 5 to 10

aside for The Hudson's Bay Company. Over time, the government of British Columbia identified the 10.5 acres as "Lot 113".

> British Columbia subsequently subdivided Lot 113 into 50 lots. Some were purchased by speculators. The land remained undeveloped until 1907, when it became a service centre for workers employed in the construction of a railway. The work was completed in 1913, and the land was then abandoned. The subdivided lots eventually reverted to British Columbia for non-payment of taxes. The land comprising Lot 113 is now a provincial park[12].

A copy of the resulting plan appears below at Figure 1. An enlargement of the portion depicting the 10.5 acre parcel appears in Figure 2.

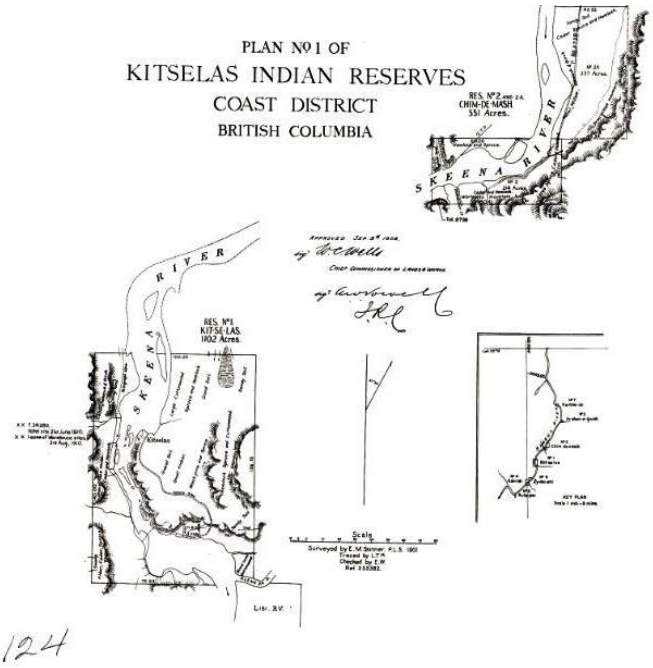

Figure 1: Plan No. 1 of Kitselas Indian Reserves by E.M. Skinner, P.L.S.[13]

[12] *Ibid.*, at para 12

[13] From: Canada Lands Survey System at: http://clss.nrcan.gc.ca/plan-eng.php?id=BC124+CLSR+BC

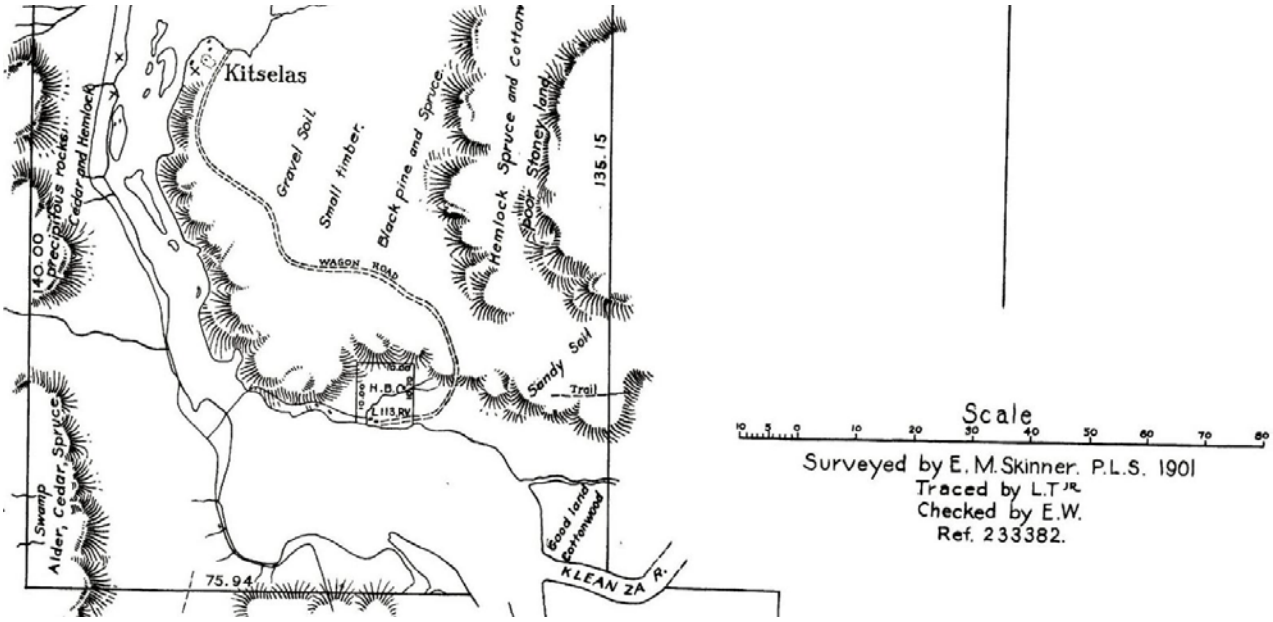

Figure 2: Enlargement of a portion of Plan No. 1 in Figure 1, depicting the 10.5 acre parcel

Before this decision was released, the *Land Use Plan* adopted by the Kitselas First Nation identified the 10.5 acre parcel as an entity which was situated ***outside*** the reserve boundary. Below, in Figure 3, the parcel is labelled as "Kleanza Creek Park".

Figure 3: Part of the *Kitselas Land Use Plan* at page 12[14]

[14] *Kitselas Land Use Plan*, available at: http://www.kitselas.com/images/uploads/docs/Kitselas_Land_Use_Plan.pdf

Likewise, the site is depicted on a map of the Kitselas First Nation Reserve No. 1. A map of the reserve, focussed on the specific area of concern, can be found on the CLSS browser and appears below in Figure 4.

Figure 4: Indentation of 10.5 acre parcel fronting on the Skeena River[15]

Since this Federal Court of Appeal decision was in the nature of judicial review, the standard of review which applied to its consideration of the decision below from Specific Claims Tribunal was articulated. While perhaps interesting, the important and substantive findings by the appellate court was in respect of the very ***existence*** of a fiduciary duty in respect of the reserve creating process. Citing an earlier decision in *Wewaykum*[16], the court concluded:

> Though a judicially enforceable fiduciary duty does not arise in every facet of the relationship between the Crown and aboriginal peoples, the courts have found a fiduciary duty in varied circumstances. Of particular pertinence to these proceedings, in *Ross River Dena Council Band v. Canada*, 2002 SCC 54 (CanLII), 2002 SCC 54, [2002] 2 S.C.R. 816 (*Ross River*) at para. 68, LeBel J. recognized that the reserve creation process presumptively engages 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.

[15] From the CLSS Map Browser (plan search tool), available at: http://clss.nrcan.gc.ca/map-carte/mapbrowser-navigateurcartographique-eng.php

[16] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245, 2002 SCC 79 (CanLII), http://canlii.ca/t/1fwx2

As Binnie J. further noted in *Wewaykum* at para. 89, aboriginal peoples were "entirely dependent on the Crown to see the reserve-creation process through to completion." This is why the Crown was found to have a fiduciary duty in the reserve creation process described in that case even though the land at issue was not formally recognized as reserve land under the *Indian Act*, but was only "provisionally approved" under the reserve creation process which was applied in British Columbia.

As noted by Binnie J. at para. 79 of *Wewaykum*, "[a]ll members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, 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 concerned the scope of the fiduciary duty of the Crown in the process of the creation of Indian reserve lands in British Columbia out of an area which – contrary to the land at issue in this case - was not part of traditional tribal lands: *Wewaykum* at paras. 5 and 77. Binnie J. noted that the fiduciary relationship between the Crown and aboriginal peoples morphs into a fiduciary duty incumbent on the Crown where a cognizable Indian interest is at issue and the Crown undertakes discretionary control in relation thereto in a way that invokes responsibility in the nature of a private law duty: *Wewaykum* at para. 85. With those considerations in mind, Binnie J. concluded the following with respect to the Crown's fiduciary duty prior to reserve creation (at paragraph 86 of *Wewaykum*):

> 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.

Binnie J. further expanded on the fiduciary duty of the Crown prior to reserve creation at paras. 94 to 97 of *Wewaykum*. He reiterated that in addition to public law duties, the imposition of a fiduciary duty attaches to the Crown the obligations of loyalty, good faith, and full disclosure appropriate to the matter at hand, and of acting reasonably and with diligence in the best interest of the beneficiary. This results in opening access to an array of equitable remedies in cases where this duty is breached by the Crown.

This is precisely the approach followed by the Judge in this case. Relying principally on the teachings of the Supreme Court of Canada in *Wewaykum*, the Judge found, at para. 111 of his Reasons, that the high degree of discretionary control assumed by the Crown over the lives of aboriginal peoples expressed in Article 13 of the *British Columbia Terms of Union*

> could, in appropriate circumstances, give rise to a fiduciary duty with respect to the provision or non-provision of reserve lands[17].

Wewaykum was not referred to by the Supreme Court of Canada in *Tsilhqot'in Nation*[18]. However, this is not surprising. The basis and source of aboriginal title in *Tsilhqot'in Nation* was a finding that there had never been a treaty for the surrender of the lands at issue with the first nation. In *Kitselas First Nation*, as a culmination of a line of cases stretching back to *Wewaykum*, the source of title was the identification of lands set aside for reserve purposes and that in so doing, it was incumbent on the Crown to act in good faith. The court noted that the reserve creating process in British Columbia was different from other provinces, such as Ontario.

> …reserve creation in British Columbia did not result from a treaty process, but rather from a unilateral undertaking of the Crown, notably set out in Article 13 of the *British Columbia Terms of Union* and in the various Crown instructions issued to implement that Article. As a result, there were no negotiations with aboriginal peoples to determine the parameters of the reserve allotment policy, and the actual allocation of land for reserve creation purposes was largely left to the discretion of Crown officials acting pursuant to the instructions they received[19].

What was it, then, that constituted the lack of good faith? The Specific Claims Tribunal made these findings and, in turn, was endorsed by the Federal Court of Appeal as follows:

> In this case, the Judge found, as a matter of fact that: (1) the 10.5 acres excluded from Kitselas I.R. No. 1 included the site of an ancient village of the Kitselas known as Gitaus; (2) from the aboriginal perspective, this ancient village site had never been abandoned; (3) Indian dwellings were on the Gitaus site when Commissioner O'Reilly decided to exclude the land from the reserve; (4) there were no claims of White settlers over the excluded land; (5) the concerned land was not excluded in anticipation of the use of the land for public transportation purposes; and (6) had Commissioner O'Reilly recommended the inclusion of that land in the reserve, that recommendation would have subsequently been followed by both Canada and British Columbia.
>
> 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

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[17] *Canada v. Kitselas First Nation*, 2014 FCA 150 (CanLII), http://canlii.ca/t/g7cd8 at paras 43 to 48

[18] For an excellent summary of the decision in *Tsilhqot'in Nation*, and a discussion of its implications, see Ballantyne, B., *Definite tracts of land: Tsilhqot'in Nation & Aboriginal title*, Geomatics and the Law, *Geomatica*, Vol. 68(3), September, 2014

[19] *Canada v. Kitselas First Nation*, 2014 FCA 150 (CanLII), at para. 51

cognizable interest in that land was its historic and contemporary use and occupation as a settlement by the Kitselas themselves[20].

Kitselas First Nation is a decision which gives insights to the broader, if not deeper, range of duties in the relationships between the Crown and first nations in historic land dealings. The duties of the Crown which existed in respect of treaty making and the process of setting aside reserves are not only broadly applicable, but run deep.

Editor: Izaak de Rijcke

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[21] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota, and are expanding in number as more opportunities are added. Only a select few and immediately upcoming CPD opportunities are detailed below.

Second Annual Boundary Law Conference

This year's conference theme is: *Linking Parcel Title and Parcel Boundary: Improving Title Certainty*.[22] This one day event (November 17, 2014) reviews recent developments in boundary law as emerging from courts. The format consists of a series of speakers focusing on topics of interest to both lawyers and surveyors. Please note that a pre-conference meet and greet will be held on Sunday evening (November 16, from 7-9pm) to foster socializing and networking.

The Professional Land Surveyor in Canada as Expert Witness

Developed with the support of ACLS and GeoEd, this online, self-paced course[23] explores all aspects surrounding the role of the professional land surveyor in Canada in assisting – as an expert witness – the decision maker in a legal proceeding. From retainer to report writing to court room, this course is a must if planning to assist in a legal proceeding as expert witness.

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[20] *Ibid.*, at paras. 53 and 54

[21] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[22] This conference qualifies for 12 *Formal Activity* AOLS CPD credits.

[23] This course qualifies for 12 *Formal Activity* AOLS CPD credits.

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