Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1993] 3 FC 28

Date:	1993-02-09
Docket:	A-1240-87
Parallel citations:	1993 CanLII 2932 (FCA) • 100 DLR (4th) 504 • 61 FTR 240
URL:	http://www.canlii.org/en/ca/fca/doc/1993/1993canlii2932/1993canlii2932.html
Noteup:	Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Blueberry River Indian Band *v*. Canada

A-1240-87

Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Indian Band** and **all present descendants of the Beaver Band of Indians** (*Appellants*) (*Plaintiffs*)

v.

Her Majesty the Queen in right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the *Veterans Land Act* (*Respondent*) (*Defendant*)

Indexed as: Blueberry River Indian Band v. Canada ***(Department of Indian Affairs and Northern Development) (C.A.)***

Court of Appeal, Isaac C.J., Marceau and Stone JJ.A."Vancouver, October 26, 27, 28, 29, 30, 1992; Ottawa, February 9, 1993.

Native peoples " Lands " Title to former Indian reserve and mineral rights therein " Nature of fiduciary relationship between Crown and Indians and Crown's obligations thereunder with respect to surrender of Indian lands " Obligation to advise Indians whether in best interest to surrender for sale or lease " No reason to disturb Trial Judge's finding of fact no breach of above-mentioned fiduciary obligation " Failure to ensure compliance with statutory requirement of certification on oath not breach of fiduciary obligation " Crown did not breach post-surrender fiduciary obligations by selling rather than leasing lands " Surrender of reserve lands including mineral rights " Fiduciary obligations towards Indians not transferred to Director, Veterans' Land Act when lands conveyed to him " Crown not remaining subject to same fiduciary obligations after transfer " Breach of fiduciary duty by Department with respect to sufficiency of sale price.

Practice " Limitation of actions " Pursuant to Federal Court Act, s. 38, British Columbia limitation of actions legislation applicable and action against Crown for breach of fiduciary duty in surrender of Indian reserve statute-barred " S. 38 intended to incorporate provincial limitations laws in force from time to time.

This appeal concerns Indian Reserve No. 172 (I.R. 172), 28 square miles of land in northeastern British Columbia, and mineral rights under that land. In 1940, the appellants surrendered the mineral rights under I.R. 172, for leasing, to the Department of Indian Affairs (DIA). In 1945, the whole reserve was surrendered to the DIA. In 1948, the DIA transferred I.R. 172 to the Director, Veterans' Land Act (VLA) for the sum of $70,000, and the Director subsequently disposed of parts of that land, including mineral rights, to individual veterans and others. In 1976, there was a major oil find on what used to be I.R. 172.

This was an appeal from the Trial Division decision dismissing the plaintiffs' action. They had challenged the validity of the 1945 surrender and 1948 transfer of their reserve and of the mineral rights under it on the grounds that the Crown had breached its fiduciary obligations in various ways and that the formalities required for the surrender of the reserve had not been complied with. They also argued that the action was not statute barred. There was also a cross-appeal with respect to the finding that there had been a breach of a fiduciary obligation with respect to the undervaluation of the lands.

In this appeal, the appellants claimed compensation from the Crown for breach of its fiduciary obligations. The appellants contend that the Crown was under a fiduciary obligation previous to the 1945 surrender which required it to advise the Band against surrendering its interest in the reserve and that this obligation was breached; that the Crown breached a fiduciary obligation by failing to strictly comply with one of the formalities of the *Indian Act* for surrendering I.R. 172; that the Crown breached fiduciary obligations by selling I.R. 172 rather than leasing it and by failing to reserve the mineral rights if, indeed, those rights were capable of being surrendered in the 1945 surrender. The appellants also contend that the Crown's fiduciary obligations were not extinguished by the transfer of the reserve to the Director, VLA in March 1948, but remained outstanding until the various parcels were finally deeded to individual purchasers and that their claims were not statute barred.

The respondent attacked the Trial Judge's finding that there had been a breach of a fiduciary duty with respect to the undervaluation of the lands.

Held (Isaac C.J. dissenting), the appeal and cross-appeal should be dismissed.

Per Stone J.A.: The Indians were essentially trappers who had little or no formal education, lacked sophistication in matters of business and were most dependent on the Crown for advice in the management of their assets the chief of which was the interest they held in I.R. 172. They were thus in a position of considerable vulnerability *vis-à-vis* the Crown.

If there existed a fiduciary relationship between the Crown and the Indians previous to the 1945 surrender, this relationship was capable of imposing an obligation on the Crown. This obligation consisted of a duty to advise the Indians whether it was in their best interests to surrender I.R. 172 for sale or lease, having regard to the fact that the Crown itself sought the surrender of the reserve so as to make the lands available for the settlement of returning war veterans. However, since the Trial Judge found as a fact that there was no breach of duty in that regard, and since there was no palpable or overriding error on his part in his assessment of the facts, that finding should not be disturbed.

The failure to comply with a statutory requirement (certification on oath of the fact that the surrender has been assented to by the band: subsection 51(3) of the *Indian Act*) did not constitute breach of a specific fiduciary obligation since it was not essential to the validity of the surrender. Section 51 was meant to ensure that no surrender could be effected without the prior assent of the concerned Indians. The formality in question, although stated to be imperative, should be taken as directory.

It was argued that the Crown, as a fiduciary, was duty bound to consider whether a lease of I.R. 172 rather than an outright sale was in the Band's best interests. However, the Crown could not ignore the wishes of the Band itself, as expressed at the surrender meeting, that the lands should be sold. There was therefore no breach of a fiduciary

obligation in that regard.

There was no breach of an alleged fiduciary obligation by allowing the mineral rights in the reserve lands to be transferred to the Director, VLA and in transferring those rights without additional consideration in terms of the purchase price. On the evidence, the respondent could not reasonably have anticipated that any potential mineral rights would have had real value.

There was no basis to the argument that the mineral rights in I.R. 172 did not pass under the 1945 surrender. Upon a proper interpretation of section 54 and paragraphs 2(*j*) and (*e*), the surrender of the reserve included the mineral rights in I.R. 172. Furthermore, nothing in the 1945 surrender instrument itself suggests that the Band intended to exclude the mineral rights from the 1945 surrender.

Nor was there any breach of a fiduciary obligation in the Crown's dealing with the mineral rights. The federal Crown's policy at the time was to retain mineral rights in such lands only if minerals were known or likely to exist and to be of value. Potential mineral rights at the time had minimal value, so there was no breach of a fiduciary obligation in failing to obtain monetary consideration.

The argument that, even after the transfer of the reserve to the Director, VLA in 1948, the Crown continued to be subject to a fiduciary obligation because the land in question remained vested in the Crown, was without foundation. Given the statutory framework under which the Director operated in acquiring, holding and conveying land as a corporation sole, he was not saddled with the burden of the Crown's fiduciary obligation. There was an acquisition by the Director pursuant to negotiations, and the vesting of the title in the Director as a corporation sole without any apparent notice of a fiduciary obligation. While it was true that the Director acted as an agent of His Majesty, he did so only in respect of the things he was expressly authorized to do under *The Veterans' Lands Act, 1942*.

There was no basis to the submission that any fiduciary obligation on the Crown was transmitted to the Director, VLA because he was aware of the existence of the duty and of its breach. There was no evidence that the Director knew of the duty or of its alleged breach.

There was no reason to disturb the Trial Judge's finding that the Crown did breach a fiduciary obligation by agreeing to a purchase price of $70,000 upon the sale of I.R. 172 to the Director, VLA without investigating the possibility of obtaining a better price.

That claim, however, was statute barred in March 1978 (30 years) pursuant to subsection 8(1) of the 1975 *Limitations Act* of British Columbia, applicable by virtue of subsection 38(1) of the *Federal Court Act*. The limitation of action legislation incorporated by the *Federal Court Act* was not only the one in effect when it was enacted in 1971, but the provincial statutes as they exist from time to time, with the result that the 1975 British Columbia *Limitations Act* was also incorporated. The Act did contain an express provision to give it retroactive effect, and the ultimate limitation period of 30 years was applicable.

Per Marceau J.A. (concurring in the result): A correct reading of the case law leads to the conclusion that even prior to surrender of the reserve land, there existed between the Indians and the Crown a fiduciary relationship with a corresponding fiduciary duty.

In this case, the fiduciary duty coincided with the duty of care found by the Trial Judge to be owed by the Crown to the Indians. And there was no reason to challenge the Trial Judge's finding of fact that there had been no breach by the Crown of its legal duty towards the Indians.

The fact that the lands were eventually transferred to the Director, VLA does not prove that there was a conflict of interest. There was nothing in the evidence to suggest that the surrender could not be advantageous to the Band and to some veterans simultaneously, or that the interest of the latter prevailed, in the minds of the officers of the

Crown, over that of the Band at the time of the surrender.

The failure to comply with the statutory requirements for surrendering the reserve lands set forth in section 51 of the *Indian Act* did not constitute a breach of the Crown's fiduciary duty. It was not possible to arrive at the conclusion that there was a breach of an obligation imposed by the fiduciary relationship from the sole existence of the irregularity without considering the circumstances leading to the irregularity. Above all, the compensation to which such breach would give rise would have to go to a victim thereof and relate solely to a loss that, even if not foreseen, had been directly caused by the breach.

After the surrender, the Crown is alleged to have breached its fiduciary obligation: 1) when it failed to consider the possibility of leasing the land prior to resorting to an outright sale; 2) when it failed to demand a higher price and retain the mineral rights; 3) when the Director, VLA failed to retain the mineral rights when he contracted with the veterans. Allegations 1) and 2) involve mostly questions of fact, and there was no reason to interfere with the findings of the Trial Judge. And the Director, VLA could not have breached a fiduciary obligation towards the Indians for the simple reason that he was not under any such obligation. Only the Minister of Mines and Resources (now the Minister of Indian and Northern Affairs) was charged with the duty to see that the obligation of the Crown towards the Indians was fulfilled, and only he was entitled to hold surrendered land, or the proceeds from its disposition, for the use and benefit of the Indians.

The Crown breached its fiduciary obligation by accepting a price which was inferior to the market value of the land. That claim, however, was statute barred in March 1978 (30 years) pursuant to subsection 8(1) of the 1975 *Limitations Act* of British Columbia, applicable by virtue of subsection 38(1) of the *Federal Court Act*.

Per Isaac C.J. (dissenting): Native title to land is a matter *sui generis*. It is more than the right to enjoyment and occupancy, although, it is difficult to describe what more in traditional property law terminology. The nature of the Indians' interest in land is intertwined with their peculiar relationship with the Crown.

The effect of the 1940 surrender of mineral rights in these particular circumstances was to remove them from further consideration unless they were specifically addressed. It was therefore wrong to apply presumptions (that failing evidence to the contrary, all of the interest in the lands is presumed to be the subject-matter of the grant), developed at common law to protect the interests of innocent purchasers dealing at arm's length in real property transactions, to a transaction in which a disadvantaged party is surrendering for a specified purpose a legally unique interest in land to another who has pledged to act only in the disadvantaged party's best interests and in accordance with the purpose for which the land was surrendered.

The Trial Judge erred in not considering the fact that prior to the 1945 surrender, the Crown was in a fiduciary relationship to the Indians with respect to the mineral rights to I.R. 172. It was therefore incumbent upon the Crown to inform the Indians of the effect of the 1945 surrender with respect to the mineral rights. Because of the fiduciary obligation, in the absence of full disclosure, the Crown must be presumed not to have intended to have included the mineral rights in the 1945 surrender. The Trial Judge's conclusions in this respect are not supported by the evidence that was before him. The evidence established that the Crown had not done what was necessary, given its position as a fiduciary, to prove that the parties intended that the 1945 surrender would overtake the previous surrender of the mineral rights for lease. Furthermore, reading the relevant provisions of the *Indian Act*, it was apparent that, on surrender, the mineral rights became Indian lands as defined by the Act and were not capable of further surrender without specific consent thereto from the Band and without the prior revocation of the 1940 surrender of mineral rights for lease.

For the same reason that the mineral rights were not subsumed within the terms of the 1945 surrender, they did not pass to the Director, VLA in the 1948 transfer. Since the Crown was a fiduciary, and since the self-imposed obligation to lease the mineral rights had not been lifted, it could not have been avoided by the simple issue of letters patent to another creature of the Crown. Furthermore, as a Crown actor, the Director, VLA could acquire

the burden on the land (the obligation to lease the mineral rights for the Indians' benefit) along with the benefits. Also, there is a presumption that in enacting *The Veterans' Land Act, 1942*, Parliament did not intend to divest the Indians of their rights. So when the Director, VLA purported to acquire title to land comprising I.R. 172, he did so as a representative of the Crown. In the end, the correct interpretation is that there was one party"the Crown"and that because the mineral rights had been surrendered in 1940 and thereby severed from the surface rights to the reserved lands, the Crown still held them in trust for lease, even after the transfer of active control of the surface rights from the Director of Indian Affairs to the Director, VLA.

Because of subsection 5(2) of *The Veterans' Land Act, 1942*, the veterans enjoyed fee simple absolute over their property when the purchase price was paid in full. Furthermore, the veterans were *bona fide* purchasers for value without notice and it would be unjust to grant any remedy against them.

The Crown, however, was in breach of its fiduciary obligation towards the appellants as of the date of conveyance of fee simple absolute in the lands to the veterans. The Crown was therefore liable to the appellants for damages flowing from this breach.

The action was within the limits prescribed by the British Columbia *Limitation Act*. It was not statute barred because the circumstances of this case amounted to fraud in the equitable sense. Futhermore, there was no doubt that until at least the mid-1970s, the appellants were unable to exercise the same degree of diligence with respect to their legal rights as might be expected of an ordinary member of society. The discussion as to the applicability of statutes of limitations to sexual abuse cases in the recent Supreme Court of Canada case *M.(K) v. M.(H.)* was of some relevance here. Having regard to all the circumstances, the action was within the basic limitation period prescribed by subsection 3(4) of the *Limitation Act* or within the ultimate 30-year limitation period prescribed by section 8 of the Act.

statutes and regulations judicially considered

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35(1).

Dominion Lands Act, R.S.C. 1927, c. 113 , ss. 8, 74(*a*).

Exchequer Court Act, R.S.C. 1927, c. 34 , ss. 31, 32.

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 38(1).

Federal Court Act, R.S.C., 1985, c. F-7 , ss. 17 (as am. by S.C. 1990, c. 8, s. 3), 39.

Indian Act, R.S.C. 1927, c. 98 , ss. 2(*e*),(*j*), 4, 51, 54.

Indian Act, R.S.C. 1952, c. 149 , s. 18(1).

Interpretation Act, R.S.C. 1927, c. 1 , s. 15.

Land Act, R.S.B.C. 1948, c. 175.

Lands Act, R.S.B.C. 1924, c. 131, ss. 119, 120.

Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(4), 6(3),(4), 8.

Limitations Act, S.B.C. 1975, c. 37, ss. 3(4), 6, 7, 8, 14.

Limitations Act, R.S.O. 1980, c. 240, s. 45(1)(*j*).

Mechanics' Lien Act, R.S.O. 1950, c. 227.

Ministers of the Crown (Transfer of Functions) Act, 1946 (U.K.), 9 & 10 Geo. VI, c. 31, s. 1A (as enacted by 1974, c. 21, Sch. 2, s. 1).

Petition of Right Act, R.S.C. 1927, c. 158 , s. 8.

Public Lands Grants Act, R.S.C. 1927, c. 114 , s. 3.

Statute of Limitations, R.S.B.C. 1911, c. 145.

Statute of Limitations, R.S.B.C. 1924, c. 145.

Statute of Limitations, R.S.B.C. 1936, c. 159.

Statute of Limitations, R.S.B.C. 1948, c. 191.

The Department of Mines and Resources Act, S.C. 1936, c. 33, s. 5.

The Department of Veterans' Affairs Act, S.C. 1944-45, c. 19, s. 8(1).

The Royal Proclamation of 1763 (U.K.), R.S.C., 1985, Appendix II, No. 1.

The Soldier Settlement Act, 1919, S.C. 1919, c. 71, s. 57.

The Veterans' Land Act, 1942, S.C. 1942-43, c. 33, ss. 2, 3, 5, 7, 9, 10, 11.

Treasury Solicitor Act, 1876 (U.K.), 39 & 40 Vict., c. 18, s. 1.

cases judicially considered

applied:

M.(K.) v. M.(H.), 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6; (1992), 142 N.R. 321; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574; (1989), 69 O.R. (2d) 287; 61 D.L.R. (4th) 14; 26 C.P.R. (3d) 97; *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99; (1987), 42 D.L.R. (4th) 81; 42 C.C.L.T. 1; [1988] 1 C.N.L.R. 152; 78 N.R. 40; 23 O.A.C. 84; 9 R.F.L. (3d) 225; *Stein et al. v. The Ship "Kathy K" et al.*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802; (1975), 62 D.L.R. (3d) 1; 6 N.R. 359; *Montreal Street Railway Company v. Normandin*, [1917] A.C. 170 (P.C.); *Zakrzewski, Peter v. The King*, [1944] Ex.C.R. 163; [1944] 4 D.L.R. 281; *Parmenter, Leonard A. v. The Queen*, [1953-1960] Ex.C.R. 66; *Bera v. Marr* 1986 CanLII 173 (BC CA), (1986), 27 D.L.R. (4th) 161; [1986] 3 W.W.R. 142; 1 B.C.L.R. (2d) 1; 37 C.C.L.T. 21 (B.C.C.A.); *Wittman (Guardian Ad Litem) v. Emmott* 1991 CanLII 1119 (BC CA), (1991), 77 D.L.R. (4th) 77; [1991] 4 W.W.R. 175; 53 B.C.L.R. (2d) 228; 45 C.P.C. (2d) 245 (B.C.C.A.).

distinguished:

Ramia (Edward), Ltd. v. African Woods, Ltd., [1960] 1 All E.R. 627 (P.C.); *St. Ann's Fishing Club v. The King*, 1950 CanLII 28 (SCC), [1950] S.C.R. 211; [1950] 2 D.L.R. 225; *Berkheiser v. Berkheiser and Glaister*, 1957 CanLII 56 (SCC), [1957] S.C.R. 387; (1957), 7 D.L.R. (2d) 721; *Lonsdale (Earl of) v. Lowther*, [1900] 2 Ch. 687; *Reference re Saskatchewan Natural Resources*, [1931] S.C.R. 263; *Fonthill Lbr. Ltd. v. BK. Montreal*, [1959] O.R. 451; (1959), 19 D.L.R. (2d) 618; 38 C.B.R. 68 (C.A.); *Mainwaring v. Mainwaring* reflex, (1942), 57

B.C.R. 390; [1942] 2 D.L.R. 377; [1942] 1 W.W.R. 728 (C.A.); *Martin v. Perrie*, 1986 CanLII 73 (SCC), [1986] 1 S.C.R. 41; (1986), 24 D.L.R. (4th) 1; 36 C.C.L.T. 36; 64 N.R. 195; 12 O.A.C. 269; *Angus v. Sun Alliance Insurance Co.*, 1988 CanLII 5 (SCC), [1988] 2 S.C.R. 256; (1988), 65 O.R. (2d) 638; 52 D.L.R. (4th) 193; 34 C.C.L.T. 237; 47 C.C.L.T. 39; [1988] I.L.R. 1-2370; 9 M.V.R. (2d) 245; 87 N.R. 200; 30 O.A.C. 210.

considered:

Guerin et al. v. The Queen et al., 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120; 20 E.T.R. 6; 55 N.R. 161; 36 R.P.R. 1; *Kruger v. The Queen*, reflex, [1986] 1 F.C. 3; (1985), 17 D.L.R. (4th) 591; [1985] 3 C.N.L.R. 15; 32 L.C.R. 65; 58 N.R. 241 (C.A.); *Kruger et al. v. The Queen* reflex, (1981), 125 D.L.R. (3d) 513; [1982] 1 C.N.L.R. 50; 23 L.C.R. 108 (F.C.T.D.); *Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (SCC), [1988] 2 S.C.R. 654; (1988), 91 N.B.R. (2d) 43; 53 D.L.R. (4th) 487; 232 A.P.R. 43; [1989] 1 C.N.L.R. 47; 89 N.R. 325; 1 R.P.R. (2d) 105; *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 S.C.R. 322; [1989] 3 W.W.R. 117; (1989), 35 B.C.L.R. (2d) 1; 25 F.T.R. 161; 92 N.R. 241; *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85; (1990), 71 D.L.R. (4th) 193; [1990] 5 W.W.R. 97; 67 Man. R. (2d) 81; [1990] 3 C.N.L.R. 46; 110 N.R. 241; 3 T.C.T. 5219; *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385; [1990] 4 W.W.R. 410; 46 B.C.L.R. (2d) 1; 56 C.C.C. (3d) 263; [1990] 3 C.N.L.R. 160; 111 N.R. 241; *Lower Kootenay Indian Band v. Canada* reflex, (1991), 42 F.T.R. 241 (F.C.T.D.); *Gauthier v. The King* (1918), 56 S.C.R. 176; 40 D.L.R. 353; *R. v. Gliberry*, [1963] 1 O.R. 232; (1963), 36 D.L.R. (2d) 548; [1963] 1 C.C.C. 101; 38 C.R. 25 (C.A.).

referred to:

Canson Enterprises Ltd. v. Boughton & Co., 1991 CanLII 52 (SCC), [1991] 3 S.C.R. 534; (1991), 85 D.L.R. (4th) 129; [1992] 1 W.W.R. 245; 61 B.C.L.R. (2d) 1; 6 B.C.A.C. 1; 9 C.C.L.T. (2d) 1; 39 C.P.R. (3d) 449; 43 E.T.R. 201; 131 N.R. 321; 13 W.A.C. 1; *Hodgkinson v. Simms*, 1992 CanLII 1083 (BC CA), [1992] 4 W.W.R. 330; (1992), 65 B.C.L.R. (2d) 264; 6 C.P.C. (3d) 141 (B.C.C.A.); *Lewis v. Todd and McClure*, 1980 CanLII 20 (SCC), [1980] 2 S.C.R. 694; (1980), 115 D.L.R. (3d) 257; 14 C.C.L.T. 294; 34 N.R. 1; *Beaudoin"Daigneault v. Richard*, 1984 CanLII 15 (SCC), [1984] 1 S.C.R. 2; (1984), 37 R.F.L. (2d) 225; 51 N.R. 288; *Klimashewski v. Klimashewski Estate*, 1987 CanLII 13 (SCC), [1987] 2 S.C.R. 754; (1987), 50 Man. R. (2d) 161; 28 E.T.R. 163; 80 N.R. 396; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, 1987 CanLII 68 (SCC), [1987] 1 S.C.R. 1247; (1987), 39 D.L.R. (4th) 465; 27 C.C.L.T. 51; 17 C.P.C. (2d) 204; 76 N.R. 212; *Fletcher v. Manitoba Public Insurance Co.*, 1990 CanLII 59 (SCC), [1990] 3 S.C.R. 191; (1990), 75 O.R. (2d) 373; 74 D.L.R. (4th) 636; 71 Man. R. (2d) 81; 1 C.C.L.I. (2d) 1; 5 C.C.L.T. (2d) 1; [1990] I.L.R. 1-2672; 30 M.V.R. (2d) 261; 116 N.R. 1; 44 O.A.C. 81; *Sunrise Co. v. Lake Winnipeg (The)*, 1991 CanLII 107 (SCC), [1991] 1 S.C.R. 3; (1991), 77 D.L.R. (4th) 701; 117 N.R. 364; *Ontario (Attorney General) v. Bear Island Foundation*, 1991 CanLII 75 (SCC), [1991] 2 S.C.R. 570; (1991), 83 D.L.R. (4th) 381; [1991] 3 C.N.L.R. 79; 127 N.R. 147; 46 O.A.C. 396; 20 R.P.R. (2d) 50; *Lapointe v. Hôpital Le Gardeur*, 1992 CanLII 119 (SCC), [1992] 1 S.C.R. 351; (1992), 90 D.L.R. (4th) 27; 10 C.C.L.T. (2d) 101; 133 N.R. 116; *Melville (City of) v. Attorney General of Canada*, reflex, [1982] 2 F.C. 3; (1981), 129 D.L.R. (3d) 488 (T.D.); *Jasper Park Chamber of Commerce (The) v. Governor General in Council*, reflex, [1983] 2 F.C. 98; (1982), 141 D.L.R. (3d) 54; 44 N.R. 243 (C.A.); *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; [1985] 4 W.W.R. 385; 35 Man. R. (2d) 83; 59 N.R. 321; *Regional Municipality of Ottawa-Carleton v. Canada Employment and Immigration Commission* (1986), 86 CLLC 14,053; 69 N.R. 156 (F.C.A.); *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)*, A-294-92, Stone J.A., judgment dated 23/10/92, F.C.A., not yet reported; *McCain Foods Ltd. v. Canada (National Transportation Agency)*, 1992 CanLII 2416 (FCA), [1993] 1 F.C. 583 (C.A.); *Smith v. The Queen*, 1983 CanLII 134 (SCC), [1983] 1 S.C.R. 554; (1983), 147 D.L.R. (3d) 237; 47 N.R. 132; *Surrey (Corpn.) v. Peace Arch Enterprises Ltd. and Surfside Recreations Ltd.* reflex, (1970), 74 W.W.R. 380 (B.C.C.A.); *Fales et al. v. Canada Permanent Trust Co.*, 1976 CanLII 14 (SCC), [1977] 2 S.C.R. 302; (1976), 70 D.L.R. (3d) 257; [1976] 6 W.W.R. 10; 11 N.R. 487; *Attorney-General of Canada v. Higbie*, 1944 CanLII 29 (SCC), [1945] S.C.R. 385; [1945] 3 D.L.R.1; *The King v. Armstrong* (1908), 40 S.C.R. 229; 5

E.L.R. 182; *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 (P.C.); *The Queen v. Symonds* (1847), N.Z.P.C.C. 387 (S.C.); *St. Catherine's Milling and Lumber Company v. Reg.* (1888), 14 App. Cas. 46 (P.C.); *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 (P.C.); *St. Catharines Milling and Lumber Co. v. The Queen* 1887 CanLII 3 (SCC), (1887), 13 S.C.R. 577; *Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (SCC), [1988] 2 S.C.R. 654; (1988), 91 N.B.R. (2d) 43; 53 D.L.R. (4th) 487; 232 A.P.R. 43; [1989] 1 C.N.L.R. 47; 89 N.R. 325; 1 R.P.R. (2d) 105; *The Queen v. George*, 1966 CanLII 2 (SCC), [1966] S.C.R. 267; (1966), 55 D.L.R. (2d) 386; [1966] 3 C.C.C. 137; 47 C.R. 382; *St. Ann's Fishing Club v. The King*, 1950 CanLII 28 (SCC), [1950] S.C.R. 211; [1950] 2 D.L.R. 225; *Theodore v. Duncan*, [1919] A.C. 696 (P.C.); *Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.); *Regina v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta*, [1892] Q.B. 892 (C.A.); *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193 (H.L.); *Entick v. Carrington* (1765), 19 St. Tr. 1029 (K.B.); *Shaul, Helen In re*, [1961] Ex.C.R. 101; *Bain v. The Director, Veterans' Land Act et al.*, [1947] O.W.N. 917 (H.C.); *Pankka v. Butchart et al.*, [1956] O.R. 837; (1956), 4 D.L.R. (2d) 345 (C.A.).

authors cited

Blackstone, Sir William. *Commentaries on the Laws of England*, Book 2, New York: W. E. Dean, Printer & Publisher, 1846.

Coke, Sir Edward. *Institutes on the Laws of England*, Vol. 1, London: James & Luke G. Hansard & Sons, 1832.

Halsbury's Laws of England, Vol. 8, 4th ed., London: Butterworths, 1974, Para. 805.

Halsbury's Laws of England, Vol. 9, 4th ed., London: Butterworths, 1974, Paras. 931, 943.

Jowitt's Dictionary of English Law, 2nd ed., London: Sweet & Maxwell Ltd., 1977 "corporation".

Walker, David M. *The Oxford Companion to Law*, Oxford: Clarendon Press, 1980 "usufruct".

APPEAL and CROSS-APPEAL from a Trial Division decision (*sub nom. Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, reflex, [1988] 3 F.C. 20 (abridged); *sub nom. Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.* reflex, (1987), 14 F.T.R. 161) dismissing the appellants' action alleging that the Crown had breached its fiduciary obligations towards them with respect to the surrender of Indian Reserve No. 172 and the mineral rights therein. Appeal and cross-appeal dismissed.

counsel:

Thomas R. Berger, Leslie J. Pinder, Arthur Pape, Gary A. Nelson for appellants (plaintiffs).

John R. Haig, Q.C., Mitchell Taylor for respondent (defendant).

solicitors:

Mandell Pinder, Vancouver, for appellants (plaintiffs).

Deputy Attorney General of Canada for respondent (defendant).

The following are the reasons for judgment rendered in English by

Isaac C.J. (*dissenting*): I have had the opportunity to read, in draft, the reasons for judgment of my colleague, Mr. Justice Stone. While I might have reached a different conclusion on a number of issues covered by him, for the

reasons which follow, I find it necessary to consider only one issue in arriving at my conclusion with respect to the disposition of this appeal.

THE FACTS

The appellants are members of the Blueberry River and Doig River Indian Bands, though until 1977, they all belonged to one band (for that reason, I will occasionally refer to the appellants collectively as "the Band"). From 1962 to 1977, they were known as the Fort St. John Band and before that as the Beaver Band of Fort St. John. As the learned Trial Judge noted at page 28,[1]*ftnote[1] The decision of the Trial Judge is reported reflex, [1988] 3 F.C. 20 (T.D.) (abridged); *sub nom. Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.* reflex, (1987), 14 F.T.R. 161. the appellants are sometimes collectively referred to as "Dunne-za/Cree" after the two linguistic groupings which comprise the Band.

Traditionally, the Dunne-za/Cree were hunting and trapping folk. Together with other native peoples, they have lived in and around the territory in the Peace River country, in what is now northeastern British Columbia, for several centuries. In the late nineteenth century, however, when European settlers began moving into the Peace River country, the Crown and various Indian groups entered into Treaty 8, one of the series of so-called numbered treaties. The Band adhered to the Treaty on May 30, 1900.

Under the terms of Treaty 8, the Band ceded its land to the Crown in return for a promise by the Crown to set aside reserved lands whenever the state of European settlement might make it desirable for the Band. The written Treaty and accompanying oral assurances made by the Treaty Commissioners contain a number of covenants on the part of the Crown, but, for present purposes, the most relevant point is that the Treaty anticipated that until it was necessary formally to establish reservations, the Indians would continue to have free access to all of their traditional territory. The Treaty also noted that the Crown would not forcibly interfere with the Indians' traditional way of life.

In 1913, the Band chose a 28-square-mile block of land as a reserve. This was done at the behest of Crown officials who feared that the influx of white settlers into the area could mean the loss of most of the good land. It is also worthwhile to note that the land which formed I.R. 172 was chosen in part because of its potential value as agricultural land, despite the fact that the Dunne-za/Cree were a hunting and gathering people.[2]*ftnote[2] See, e.g. letter dated March 18, 1915, from D. F. Robertson, Surveyor, to the Assistant Deputy Secretary of Indian Affairs (Appeal Book, Appendix, Vol. 1, at p. 43). It is not clearly stated to be the case, but reading the report of the Treaty Commissioners, in which they spoke of the eventual change of the Indians from a nomadic lifestyle to an agricultural one, it would seem that the possibility that the Indians would indeed have to eventually change played a part in the Crown's thinking.[3]*ftnote[3] See, e.g. Appeal Book, Appendix, Vol. 1, at p. 17. One could also infer from the fact that this particular block of land was chosen (although the appellants did not make this argument themselves) that the Band and the Crown had discussions about the possible future needs of the Band beyond their traditional lifestyle.

Whatever the case, I.R. 172 was set aside for the Band by Order in Council dated April 11, 1916. The appellants say that the land comprising I.R. 172 was "vital" to the Band in that it formed a part of their seasonal circuit of travels. In their words, it was "a place where spiritual and cultural contacts could be rejuvenated, from which summer harvesting was conducted, and an important link between Indian and non-Indian society." Moreover, "[i]t was the only location where the Band as a whole gathered together."[4]*ftnote[4] See, e.g. the evidence of the appellant, Jerry Attachie (transcript of trial evidence, Vol. 6, at p. 812); the evidence of Ms. T. Cheekyass (transcript of trial evidence, Vol. 14, at pp. 1701-1705); and the expert report of H. Brody (Appeal Book, Appendix, Vol. 11, at pp. 1470-1473).

Very shortly after creation of the reserve, however, pressure began to be exerted upon the Crown to allow

encroachment on I.R. 172. Foreshadowing what was eventually to take place, the private Great War Veterans' Association of Canada and the governmental Soldier Settlement Board asked that a number of reserved areas be made available for men returning from the First World War.[5]*ftnote[5] See, e.g., correspondence dated 1917-1918, between the Great War Veterans' Association of Canada and the Assistant Deputy Minister for Indian Affairs (Appeal Book, Appendix, Vol. 1, at at pp. 46-49) and correspondence dated November-December, 1918, between the Hon. Arthur Meighen, Minister of the Interior, and the Assistant Deputy Minister for Indian Affairs (Appeal Book, Appendix, Vol. 1, at pp. 50-59). In the end, the Department of Indian Affairs informed the Minister of the Interior that I.R. 172 could not be made available for soldier settlement as it was needed for the Band.[6]*ftnote[6] See letter dated January 22, 1920, from the Assistant Deputy Minister of Indian Affairs to the Deputy Minister of the Interior (Appeal Book, Appendix, Vol. 1, at p. 64). The federal Crown also turned down a request by the Government of British Columbia in 1935 that I.R. 172 be exchanged for a larger tract of land further north.[7]*ftnote[7] See letter dated June 6, 1935, from M. Christianson, Inspector of Indian Agencies, to Dr. H. A. W. Brown, Indian Agent, Fort St. John (Appeal Book, Appendix, Vol. 2, at p. 199).

The appellants place emphasis on the fact that in each instance, the Crown turned down requests for the land without putting the matter to the Band itself. This is evidence, they say, of the Crown's self-admitted obligation to act in the Band's best interests and not to "tempt" them (my words, not the appellants') with spurious offers of which they could have little understanding. In this regard, it is worthwhile to note the findings of the Trial Judge with respect to the state of development of the Band's society (albeit at a later date). At page 43 he said:

There seems to be little doubt that, in the 1940s, the Dunne-za Cree did not possess the required skills to engage in any financial planning or budgeting or to generally manage their affairs from a financial standpoint. They had no true organized system of government or real law makers. They also lacked to a great extent the ability to plan or manage, with any degree of success, activities or undertakings other than fishing, hunting and trapping. It seems that many of their decisions even regarding these activities, could better be described as spontaneous or instinctive rather than deliberately planned.

As time passed, and as the area became more settled (and as the level of game accordingly began to drop), the appellants began to make less and less actual use of I.R. 172. The Crown made much of this in argument, but despite it, the prevailing attitude at the time of the Government officials responsible for Indian affairs continued to be that eventually, the land would become of use to the Band. It was for that reason, for example, that the Government provided for the construction of a road through the reserve. A memorandum to the Superintendent General of Indian Affairs, dated October 9, 1934 (Volume 2 to the Appendix to the Appeal Book, at page 179), for example, makes clear the Government's belief that I.R. 172 would some day be of use to the Band:

[I]t is considered that the construction of this road through the centre of this reserve by the Provincial Government will be of sufficient benefit to the Indians <u>when the reserve is being developed by them</u>, to justify this transfer [of enough land to build the road] to the Province without compensation. [Emphasis added.]

The appellants also insist that the land remained a part of their seasonal circuit until 1945.

In the meantime, some interest had been expressed in exploring the area for mineral deposits. As the evidence shows, in 1940, an application was made by one Alexander Anderson to explore for oil on I.R. 172.[8]*ftnote[8] A copy of the application is found at Appeal Book, Appendix, Vol. 2, at p. 248. Pursuant to this, the Government asked for, and received, a surrender of the mineral rights to the reserve so that they could be leased for the Band's benefit. Copies of the surrender documents are found at Volume 3 to the Appendix to the Appeal Book, at pages 264-279. It is important to emphasize that the surrender was for <u>lease only</u>. No sale of the land was permitted or contemplated by the 1940 surrender.

An exploration permit was in fact issued by the Director of Indian Affairs (DIA), and the money received

therefrom was credited to the Band.[9]*ftnote[9] See the transcript of trial evidence, Vol. 13, at p. 1634. It would also seem that pursuant to the permit, at some time or times during the Second World War, oil and gas exploration took place on and in the vicinity of I.R. 172.[10]*ftnote[10] See, e.g., various reports of Indian inspectors (Appeal Book, Appendix, Vol. 3, at pp. 316-352). This was in keeping with the policy of the Government to promote the exploration and development of oil and natural gas resources on Indian reserved lands. Dr. J. E. Chamberlain, a witness called by the appellants, and who was accepted by the Trial Judge as an expert in the field of government policies and administrative practices relating to Indian affairs in Canada,[11]*ftnote[11] See the transcript of trial evidence, Vol. 18, at p. 2481. described this policy in the following way:

During the late 1930s and through the 1940s, there was a growing commitment to the exploitation of subsurface minerals under reserves, as another way to develop the revenue potential of reserves. Specific regulations were promulgated for the exploitation of oil and gas under reserves, and to this end the Department of Indian Affairs established an expert based in Calgary to advise on and ensure the maximum development of reserve oil and gas potential on Indian lands.[12]*ftnote[12] Expert Report of Dr. J. E. Chamberlain, Appeal Book, Appendix, Vol. 13, at p. 1716.

Similarly, the Annual Report for 1939 of the Director of Indian Affairs noted that as regards the disposition of reserved lands, governmental policy

. . . leans toward leasing of land surplus to immediate needs rather than outright sale, and toward the conservation of Indian land assets against the future needs of a steadily increasing population.[13]*ftnote[13] Appeal Book, Appendix, Vol. 10, at p. 1312.

In his Annual Report for 1945"the very year of the surrender of the surface rights"the Director made a similar statement of policy against alienation of Indian title:

The Department has set its face solidly against alienation by sale of lands for which there is any likelihood of Indian need in future years. Lands surplus to immediate needs are administered under leasing arrangements and from such lands substantial revenues have accrued.[14]*ftnote[14] Appeal Book, Appendix, Vol. 10, at p. 1318.

Like my colleague Mr. Justice Stone, I would make a preliminary observation that this evidence of contemporary governmental policy towards the native peoples was not discussed by the Trial Judge in his reasons for judgment. In my view, however, for reasons which will become evident, the Crown's self-assumed policy of earning the maximum revenue from unused Indian lands while at the same time ensuring that Indian title was not extinguished is of considerable relevance.

In any event, as at the close of the First World War, the turn of the tide in favour of the Allies in the Second World War brought pressure upon the authorities to make Indian reserved lands available for settlement by returning servicemen. At this time, however, the federal minister responsible for the Department of Indian Affairs, i.e. the Minister of Mines and Resources, was also responsible for acquiring land for returning veterans. This state of affairs continued until October 1944, when the *The Veterans' Land Act, 1942* was amended to transfer this latter function to the newly-created Minister of Veterans Affairs.[15]*ftnote[15] S. 8 of *The Department of Veterans Affairs Act*, S.C. 1944-45, c. 19, provided for a general substitution of the newly-created Minister of Veterans Affairs in a number of statutes, including *The Veterans' Land Act, 1942* [S.C. 1942-43, c. 33]. In November 1945, *The Veterans' Land Act, 1942* was specifically amended to the same effect by S.C. 1945, c. 34, s. 1.

It was in August of 1944 that the Deputy Minister of Indian Affairs (whose Department, it should be noted, was still responsible for *The Veterans' Land Act, 1942*) first intimated that I.R. 172 might be made available to veterans if it could be disposed of in its totality and for a satisfactory price. From this point, a train of events was set in motion which culminated in the surrender of I.R. 172 in September 1945.

The details of the surrender are fully set out in the reasons of my colleague, Mr. Justice Stone, but to summarize briefly, after the 1945 surrender, negotiations took place between the Director of Indian Affairs and the Director, Veterans' Land Act (DVLA). I would reiterate that at the time the negotiations began, both parties were under the jurisdiction of the same Minister of the Crown.

I.R. 172 was appraised at $93,000 and the Director of Indian Affairs initially took the position that the land should not be sold for less than $100,000. DVLA took the position, however, that it would only offer $70,000, which was ultimately accepted by Indian Affairs.[16]*ftnote[16] See e.g., letter dated November 29, 1946 from DVLA to DIA (Appeal Book, Appendix, Vol. 5, at p. 638) and reply dated December 7, 1946 (Appeal Book, Appendix, Vol. 5, at p. 643). In March 1948, the land comprising I.R. 172 was transferred to the Director, Veterans' Land Act by letters patent.

During this time, the material condition of the Band worsened considerably. A 1947 report by the Regional Superintendent of Indian Health Services spoke of their "complete extinction" seeming possible and the fact that the Band had "a special claim on the sympathy of the Department".[17]*ftnote[17] Appeal Book, Appendix, Vol. 6, at p. 671. Yet, new reserved lands were not transferred to them until 1950, i.e. five years after their surrender of I.R. 172. Throughout this time, most of the Band members eked out what was at best a squalid existence as squatters on provincial lands. And when new reserve lands were secured for the Band, they were located in areas already undergoing white settlement.

After the transfer from DIA to DVLA in 1948, the land comprising I.R. 172 was subdivided and further transferred to veterans under agreements for sale, although four plots of land which were unsuitable for farming were retained. The execution of the agreements for sale took place between September 10, 1948 and April 3, 1956. By virtue of section 10 of *The Veterans' Land Act, 1942*, the terms of which were incorporated into the agreements for sale, the veterans occupied their parcels of land as tenants at will until the land was legally conveyed upon payment of the purchase price. Accordingly, deeds were given to the veterans on various dates between April 13, 1956 and April 4, 1977. In addition, the four lots unpurchased by veterans were sold to oil companies on May 30, 1952.[18]*ftnote[18] See Appeal Book, Appendix, Vol. 18, at pp. 2360-2361.

Despite the fact that the Director of Indian Affairs had purportedly stepped out of the picture upon transfer of control of I.R. 172 to DVLA in 1948, in 1949, a natural gas company wrote to DIA seeking an exploration permit for I.R. 172.[19]*ftnote[19] See letter dated June 28, 1949, from the Peace River Natural Gas Company to the Director of Indian Affairs (Appeal Book, Appendix, Vol. 6, at p. 736). It seems that natural gas had been discovered 40 miles southeast of the reserve. DIA immediately sent the local Indian Agent instructions to obtain a surrender of mineral rights.[20]*ftnote[20] See letter dated August 3, 1949, from D. J. Allan, Superintendent Reserves and Trusts, to J. E. Galibois, Indian Agent, Fort St. John (Appeal Book, Appendix, Vol. 6, at p. 741). Upon being informed (or reminded) that I.R. 172 had been "sold" to DVLA, he informed the oil company accordingly. As similar requests were made of DIA in the early 1950s, each inquiry was referred to DVLA, notwithstanding repeated doubts about the disposal of the mineral rights with the 1945 surrender.[21]*ftnote[21] In 1961, for example, a solicitor for the Department of Veterans Affairs wrote that it had "always been a mystery" to him how DVLA had acquired the mineral rights to I.R. 172. The official reply was that it was because when I.R. 172 was "sold" to DVLA the mineral rights had not been specifically reserved. This, it was felt, might have been a matter of "inadvertence". See Appeal Book, Appendix, Vol. 8, at pp. 1042-1043.

In the end result, most of the veterans in the area agreed to an oil and gas lease. On the so-called surplus lots which were not suitable for farming and which had not been bought by veterans, however, DVLA sold the lands and their mineral rights at public auction, the proceeds for which were paid to the federal Consolidated Revenue Fund. The appellants say that this is an important fact to bear in mind since it reveals the true identity of the DVLA as an agent of the Crown.

It is common ground that interest by the Band in their possible continuing legal rights *vis à vis* I.R. 172 was first expressed in the 1970s. The appellants date it from 1977, when they were first advised to obtain legal counsel by their government District Manager, while the Crown says that it should be taken to date from 1970, when the Band resolved to provide copies of all the documentation relating to the purported sale of I.R. 172 to the Union of British Columbia Indian Chiefs. In any event, the appellants finally commenced action in the Trial Division of this Court in September 1978. The action came on for trial in January 1987 and was dismissed by judgment pronounced on November 4, 1987.

THE NATURE OF INDIAN TITLE TO LANDS IN CANADIAN LAW

In his reasons for judgment, the Trial Judge placed great emphasis on the assumption that Indians' interests in lands is "not a legal property interest" but merely personal in nature (at page 44). With respect, I think that this conclusion was based on a misapprehension of the case law. In light of the fact that this assumption formed the foundation of his ultimate decision, I think it useful before considering the substantive grounds for my conclusion to review some of the general principles which I consider to be applicable to cases of this type. In addition to illustrating the way that the courts have treated these types of cases, I think that this will help to place the events"particularly the impugned actions of the Crown"in context.

The starting point in the consideration of any case like this is a recognition that native title to land is a matter *sui generis*. Current legal doctrine may have evolved through consideration by common law judges, but the rules applied by the courts to disputes involving native title to land are rather different from the ordinary common law of real property. In my view, this is of critical importance when considering the nature of the relationship of native peoples to their land, and the concomitant obligations of the Crown to native peoples. Viscount Haldane emphasized this point in *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 (P.C.), when he said at pages 402-403:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with.

In my view, the true essence of Indian title in Canada can best be described as a bastardization of the common law of real property, or the grafting of non-English concepts upon an English base. When the British Crown asserted dominion over British North America, it did so as an expression of the King's paramount interest in fee as against all other European powers. In this sense, Imperial sovereignty in North America was based on the same foundation as the King's sovereignty in feudal England. To borrow the words of Blackstone, political exigency"specifically the need to assert lawful possession against foreign powers"made it a "necessary principle (though in reality a mere fiction)" that the King was considered at law to be "the universal lord and original proprietor of all the lands in his kingdom", and that no one could have any interest in it "but what has mediately or immediately been derived as a gift from him" (*Commentaries on the Laws of England* , Book 2, at page 51).[22]*ftnote[22] The idea is much older. Coke wrote: "[A]ll the lands within this realme were originally derived from the crowne, and therefore the King is sovereigne lord, or lord paramount, either mediate or immediate, of all and every parcell of land within the realme." (*Institutes on the Laws of England*, Vol. 1, 65.a).

Upon this feudal conception of eminent domain, however, was grafted a set of generic rules and doctrines, the growth of which was expressed succinctly by Chapman J. in *The Queen v. Symonds* (1847), N.Z.P.C.C. 387 (S.C.), when he said at page 388:

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and

other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse.

The leading modern Canadian case which discusses the principles of law applicable to this intercourse is *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335. That case involved a surrender for lease by an Indian band to the Crown of lands which were wanted for use as a golf course, and as the reasons of both the Trial Judge and Mr. Justice Stone show, the decision is of some significance in discussing both the fiduciary obligations of the Crown *vis à vis* the appellants and the issue of limitations. In addition, however, the case is important for what it says about the nature of Aboriginal title generally.

In an earlier case *St. Catherine's [sic] Milling and Lumber Company v. Reg.* (1888), 14 App. Cas. 46, at page 58, the Privy Council spoke of the Crown having "a present proprietary estate in the land, upon which the Indian title was a mere burden."[23]*ftnote[23] Strictly speaking, the case turned on an interpretation of *The Royal Proclamation of 1763* (U.K.) [R.S.C., 1985, Appendix II, No. 1], which does not apply to natives in what is now Western Canada. Nonetheless, the general description of native title remains relevant. Lord Watson, writing for the Board, and possibly showing his civilian roots[24]*ftnote[24] Lord Watson was trained at the Scottish Bar. by borrowing a term from Roman law, described native title as a "personal and usufructuary right, dependent upon the good will of the Sovereign" (at page 54).[25]*ftnote[25] In Roman law, a usufruct is the right of using and enjoying the property of another without the right to change the character of the property. See *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), at p. 1268. Similarly, in *Amodu Tijani v. Southern Nigeria (Secretary), supra*, at page 403, Viscount Haldane described aboriginal title as "a mere qualification of or burden on the radical or final title of the Sovereign".

In *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 (the so-called *Star Chrome* case), however, the Privy Council clarified these statements. At page 408, and in answer to the Trial Judge's suggestion that the appellants here merely enjoyed a personal interest in their lands, Duff J., writing for the Board, said that native title to land "is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown". (Emphasis added.)

It was in *Guerin* that the Supreme Court refined the definition of native title to provide it with a meaning more readily applicable to modern situations.[26]*ftnote[26] I hasten to add, though, that even under the old cases, the native interest was not as tentative or fragile as words like "personal", "usufructuary" and "mere burden" might make it appear. In the Supreme Court of Canada decision in *St. Catherines Milling (sub nom. St. Catharines Milling and Lumber Co.) v. The Queen* 1887 CanLII 3 (SCC), (1887), 13 S.C.R. 577, at p. 608, Strong J. (as he then was) described the essence of the interest as follows:

This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. In delivering the majority judgment, at page 382, Dickson J. (as he then was) reconciled the personal *versus* proprietary distinction. As will be seen, in doing so, he echoed the warning given by Viscount Haldane in *Amodu Tijani*:

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact than in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate. [Emphasis added.]

He then described the nature of the Indians' legally recognizable interest in land in the following way [at page 382]:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. 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. [Emphasis added.]

In subsequent cases, the Supreme Court of Canada has reiterated the unique nature of native title. In *Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (SCC), [1988] 2 S.C.R. 654, for example, the Court reviewed the cases and said at page 678:

The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy although, as Dickson J. pointed out in *Guerin*, it is difficult to describe what more in traditional property law terminology. [Emphasis added.]

See also *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 S.C.R. 322; *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075; and *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85.

It can accordingly be seen that the nature of the Indians' interest in land is intertwined with their peculiar relationship with the Crown. As Sovereign Lady, the Queen has ultimate title to all land over which she exercises legal dominion. Over the centuries, the restrictions on most landholders have been eased considerably, such that the feudal notions of rights and obligations exist in legal fiction only. For the native peoples, however, Her Majesty remains in a quasi-feudal position. The natives are free to use their land as they wish, but when they wish to dispose of it, the Crown has obliged itself to ensure that their best interests are safeguarded.

To put it another way, when the Privy Council spoke of the Indians' interest being a "burden" on the Crown's title, it might have been more accurate to describe it as also being a burden on the person of the Sovereign to make sure that the Indians were not unconscionably divested of their right to full and unrestricted enjoyment of their lands. It was in this spirit that in *The Queen v. George*, 1966 CanLII 2 (SCC), [1966] S.C.R. 267, at page 279, Cartwright J. (as he then was) said that the *Indian Act* [R.S.C. 1952, c. 149] and treaties made with Canada's Aboriginal peoples should be construed

. . . in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.

To summarize, then, the authorities show that in approaching native land cases, one must be mindful of the fact that in interposing itself between the Indians and the non-native public, the Crown is acting in recognition of the fact that the Aboriginal peoples had a form of legally recognizable title in the lands which they occupied prior to the coming of the Europeans, and moreover, that the Crown has obliged itself as a matter of honour to safeguard the interests of the native inhabitants. That is the context in which I think that the propriety of the governmental action must be examined in the circumstances of this case.

THE 1940 SURRENDER OF THE MINERAL RIGHTS TO I.R. 172

In my opinion, the answer to the appellants' claim lies in the surrender for lease of the petroleum, natural gas and mining rights to I.R. 172 in 1940. The Trial Judge held that the 1940 surrender was, in effect, overtaken by the 1945 surrender. In my view, however (and without expressing any decisive opinion on the legal validity of the 1945 surrender, a matter about which I entertain considerable doubt), the effect of the surrender of mineral rights in these particular circumstances was to remove them from further consideration, so to speak, unless they were specifically addressed.

In reaching his conclusion that the mineral rights were included in the 1945 surrender, the Trial Judge said at pages 53-54:

It is of some importance to remember that the title of the reserve lands remained in the Crown at all times. What might be termed the granting clause in the 1940 surrender effectively released to the King whatever usufructuary interests the plaintiffs had in "the petroleum and natural gas and the mining rights in connection therewith" pertaining to I.R. 172. The 1945 surrender, on the other hand, refers to the reserve itself and not to any particular limited right in the reserve and purports to release to His Majesty for ever the entire reserve. This, of course, can only mean whatever usufructuary interest or rights the Indians might have in the entire reserve. There is no restriction in the granting clause; the habendum clause mentions that it is "in trust to sell or lease . . . and moneys received shall be placed to our credit in the usual way". When there is no restriction or reservation expressed in the description of the property granted or ceded all of the property mentioned, whether it be real or personal and all of the interest in that property whether it be legal, equitable or usufructuary, is presumed to be the subject-matter of the grant. This is not only a rule of common law but one of common sense. [Emphasis added.]

He continued [at page 54]:

Assuming for the moment that full, free and informed consent was given by the plaintiffs to the 1945 surrender [which he later found to be the case], one would normally conclude on the mere reading of those two documents and failing evidence to the contrary, that it was intended by both parties on executing the 1945 surrender, that all of the property rights of the plaintiffs, including any property or other rights in minerals which they might possibly have were being surrendered for the purposes mentioned in that document, that is, for sale or lease by the Crown for the benefit of the Indians.

In argument before us, counsel for the Crown elaborated on this. Adverting to the fact that legal title to all reserved lands is vested in the Crown, counsel argued that in essence, a surrender is the simple removal of the legislative restriction upon the Crown from disposing of a part of a reserve. In 1940, he says, the Indians partially lifted this restriction so as to allow the Crown to deal with mineral rights on their behalf. The effect of the 1945 surrender, in turn, was to lift the restriction on alienability completely. Viewed in this light, so the argument ran, it becomes obvious that the appellants cannot claim that their title had somehow been "severed" by the earlier surrender.

With respect, I think that whether one characterizes it as a form of merger of title as the Crown did, or as a question of intent of the parties as did the Trial Judge, the conclusion that the 1940 surrender was subsumed by the 1945 surrender was erroneous in several respects.

First, I am of the view that in the passage just quoted, and in particular in the portion which I have emphasized, the Trial Judge tilted the balance of presumption in the wrong direction. He said that without an express restriction in the surrender, the Indians' entire interest in I.R. 172 "is presumed to be the subject-matter of the grant" and that "failing evidence to the contrary", "it was intended by both parties" that all native interests would pass under the terms of the 1945 surrender (at page 54). Even if this is so in the case of two parties dealing at arms length under the general law of real property, it was an error to fail to take notice of the fact that the native interests in their land, and the disposability of those interests, are matters *sui generis*.

In my opinion, under the arrangements agreed upon by the native peoples and the Crown in the various treaties, and as embodied in the *Royal Proclamation of 1763* and the *Indian Act*, it is impossible by definition for Indians to make transactions of the sort contemplated by the Trial Judge. Indeed, as Dickson J. said in *Guerin*, the very intent was "to facilitate the Crown's ability to represent the Indians in dealing with third parties" (*supra*, at page 382) and to "interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited" (at page 383). It is therefore wrong, in my view, to apply presumptions, developed at common law to protect the interests of innocent purchasers dealing at arms length in real property transactions, to a transaction in which a disadvantaged party is surrendering for a specified purpose a legally unique interest in land to another who has pledged to act only in the disadvantaged party's best interests and in accordance with the purpose for which the land was surrendered.

With respect, I think that by treating the appellants as ordinary transferors of a common law estate, the Trial Judge fell into the sort of error against which Viscount Haldane and Dickson J. had cautioned. His approach implicitly reverts to a characterization of the native interest in terms of the common law of real property. As Dickson J. stated in *Guerin*, and as Viscount Haldane admonished in *Amodu Tijani*, native title is *sui generis*, and it must be regarded on its own terms. Applying this caution to this case, I do not think that determining the effect of the 1940 surrender on the subsequent 1945 disposition is as simple as saying that since the Crown owned everything subject only to certain personal rights in the Indians, once the personal rights were waived the Crown was free to deal with the land as it pleased. Yet, this is the unstated corollary to the conclusion of the Trial Judge.

In a related way, the Trial Judge erred in not considering the fact that prior to the 1945 surrender, the Crown was in a fiduciary relationship to the Indians with respect to the mineral rights to I.R. 172. Quite apart from whatever fiduciary obligations may have been attendant upon the Crown during the period that it was seeking to obtain the surrender in 1945, there is no question that after 1940, the Crown was a fiduciary to the Indians with respect to the mineral rights. To borrow the language used by Dickson J. in *Guerin* (*supra*, at page 378), after the Indians surrendered the mineral rights to I.R. 172 for lease, the Crown was under an obligation to deal with those rights for the Indians' benefit and in accordance with the terms of the surrender.

This being so, if the Crown intended that the 1945 surrender was both to divest the Indians of their entire interest in the reserve and to relieve itself of the willingly assumed obligation to administer the mineral rights to the reserve in the Indians' best interests, it would have been under a positive duty to inform the Indians that this was the case. In *Guerin*, Dickson J. said as much. In discussing the duty on the Crown when it became apparent that it would not be able to obtain as generous conditions for the lease of the surrendered lands as was suggested to the Indians, he said at pages 388-389:

[T]he Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal. [Emphasis added.]

This reasoning is applicable here with equal force. Whatever may be the case in a conveyance of common law title to real property at arms length, in the circumstances of this case, after the 1940 surrender of the mineral rights for lease, the Crown was under an obligation to advise the Indians that it intended to sell, rather than lease, those rights before it took the 1945 surrender of surface rights. Put another way, because the Crown was under a fiduciary obligation, in the absence of full disclosure, it must be presumed not to have intended to have included

the mineral rights in the 1945 surrender. There is no evidence that the Crown did so, and in my view, it is inappropriate in the context of a fiduciary relationship"particularly a relationship between the Crown and a group of people of the Band's level of legal unsophistication"to interpret silence as meaning either that the party in a position of vulnerability was acceding to the permanent divestiture of its interest, or that the fiduciary was intending such a divestiture.

I would also say that in my view, the Trial Judge's conclusions are not supported by the evidence that was before him. As has been mentioned, the Trial Judge made his findings on a plain reading of the *habendum* clauses of the 1940 and 1945 surrender documents. "[F]ailing evidence to the contrary", he said [at page 54], the language used in the surrender documents (which were in the standard form used in common law deeds, it is worthwhile to note) led to the conclusion that both parties intended that the 1945 surrender encompass all of the native rights in I.R. 172. Yet he did so in the face of a government policy which promoted the exploration and development of oil and natural gas resources on reserved lands.

Furthermore, he found that no mention of mineral rights was made at the surrender meeting (at page 201 F.T.R.). Also not to be forgotten is the context in which the surrender "negotiations" took place, namely a desire to provide farming land for returned veterans. My colleague Mr. Justice Stone catalogues some of the pressures leading up to the 1945 surrender at pages 98-103, and they all clearly show that the Crown's desire was to provide agricultural land to returning servicemen. Finally, but not least of all, as I have noted earlier, after the transfer of control of I.R. 172 from the Director of Indian Affairs to the Director, the Veterans' Land Act in 1948, both DIA and DVLA were unsure about the status of the oil and gas rights.

On this analysis, I am led to the conclusion that the evidence was not neutral, as the Trial Judge suggested. On the contrary, it is my view that when taken in context, the evidence establishes that the Crown had not done what was necessary, given its position as a fiduciary, to prove that the parties intended that the 1945 surrender would overtake the previous surrender of the mineral rights for lease. This being the case, I am of the view that even after the 1945 surrender (again, assuming without more that it was valid), the Crown still held the mineral rights to I.R. 172 under an obligation to lease them under the most advantageous terms possible for the benefit of the appellants.

I am supported in this conclusion by the terms of the *Indian Act*.[*]*ftnote[*] R.S.C. 1927, c. 98. The appellants argue that on surrender the mineral rights became "Indian Lands" as defined by the Act, which they say are not capable of further surrender. The Trial Judge rejected this argument, however, holding that "Indian Lands" could only include surface rights, and not mineral rights alone.

Section 54 of the *Indian Act* in force at the relevant time[27]*ftnote[27] R.S.C. 1927, c. 98. provided that all "Indian lands which are reserves or portions of reserves surrendered" were to be dealt with by the Crown in accordance with the terms of surrender. In a confirmatory provision, paragraph 2(*e*) defined "Indian lands" as "any reserve or portion of a reserve which has been surrendered to the Crown." "Reserve", in turn, was defined in paragraph 2(*j*) as meaning

2. . . .

(*j*) . . . any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein. [Emphasis added.]

It should be noted at the outset that this is plainly an inclusive definition, which on its face is extended to encompass within the meaning of "reserve" things beyond mere surface rights.

In *St. Ann's Fishing Club v. The King*, 1950 CanLII 28 (SCC), [1950] S.C.R. 211, Kerwin J. (as he then was) held that in order for reserved lands which had been surrendered for a term of years to be re-surrendered, they first had to be made part of the reserve again (at pages 212-213). Similarly, Rand J., delivering a concurring opinion, suggested that *St. Catharine's Milling* could be taken to stand for the proposition that there could be a partial surrender of the native "personal and usufructuary rights" in property. In his view, this would permit a surrender of a reserve for a limited period (at page 219).

The question in this case, therefore, is whether the mineral rights, being clearly included in the definition of "reserve", can be a "portion of a reserve" so as to be convertible to Indian lands. If so, then, as the appellants urge, the mineral rights to I.R. 172 could not be surrendered in 1945 as they no longer formed part of the property that the Dunne-za/Cree were capable of surrendering without more.

In my view, the appellants' position is supported on a plain reading of the statute. Furthermore, on the basis of the reasoning in *St. Ann's Fishing Club* (particularly that of Rand J.), it should follow that there can be a valid partial surrender of something as readily ascertainable as mineral rights.

One would hardly deny, for instance, that a band of Indians could surrender a river or stream on a reserve and that such a river or stream would easily fall within our notion of what could constitute Indian lands. One assumes that they would also be able to surrender merely the fishing rights to the stream.[28]*ftnote[28] In *St. Catharine's Milling*, the Indians were found to have retained fishing rights in an otherwise complete surrender. See the judgment of Rand J. in *St. Ann's Fishing Club, supra*, at p. 219. If this is so, why could they not surrender the underground equivalent"the streams, or "seams" as geologists describe them, of minerals? Certainly during the 1940s, the Crown seemed to think that the mineral rights were capable of being leased without any connection with the surface land. And as my colleague Mr. Justice Stone, points out, Mr. Joe Leask, a Crown witness, was of the view that it was necessary to "cancel" a prior surrender by order in council in order to execute another surrender which conflicted with its terms.[29]*ftnote[29] Transcript of trial evidence, Vol. 21, at pp. 3037-3041. There is no evidence in this case that the 1940 surrender was ever "cancelled".

Taking all of this into account, if one applies a remedial interpretation to the *Indian Act*, as the *Interpretation Act* insists be done,[30]*ftnote[30] S. 15 of the *Interpretation Act*, R.S.C. 1927, c. 1, provided:

Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing which Parliament deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit. [Emphasis added.] section 54 is in my view quite properly seen as encompassing the whole sphere of minerals, woodlands, fish and game, and anything else that would help the Crown use the land in the best interests of the Indians. Taking the words in their literal meaning, if by definition a reserve includes minerals, then minerals must certainly be a "portion of" the reserve.

For these reasons, I am of the opinion that in 1945, the mineral rights to I.R. 172 were not included in the surrender. This does not mean, as the Trial Judge has suggested [at page 57], that the mineral rights "would be forever incapable of sale". Quite clearly, such an interpretation would be contrary to the intent of the *Indian Act* that native peoples could use their lands to maximum benefit. But it does mean that once the mineral rights had been severed from the reserve, as the Crown considered to be in the best interests of the Band to do, they could not be re-surrendered without specific consent thereto from the Band and without the prior revocation of the 1940 surrender of mineral rights for lease, neither of which occurred here. As I have noted, that such a procedure was not viewed as absurd by the Crown is made plain by the evidence of Mr. Leask, the Crown's own witness.

THE TRANSFER OF SURFACE RIGHTS TO I.R. 172 FROM THE DIRECTOR OF INDIAN AFFAIRS TO THE DIRECTOR, THE VETERANS' LAND ACT PENDING DISPOSAL"A TRANSFER OF SURFACE

RIGHTS ONLY

Both the Trial Judge and my colleague, Mr. Justice Stone, proceed on the basis that the letters patent which transferred I.R. 172 to the Director, the Veterans' Land Act effected a sale from the Crown to a third party, independent of the Crown. Because of this, they conclude that at the time of transfer, the Crown's legal interest in the mineral rights was brought to an end. I am of a different opinion, however. I am of the view that for the very same reason that the mineral rights were not subsumed within the terms of the 1945 surrender, they did not pass to DVLA in the 1948 transfer.

At the risk of repetition, the Crown was a fiduciary, and even if it was only through inadvertence that the mineral rights were not specifically reserved, as the Department of Veterans' Affairs opined (see *supra*, note 20), if the self-imposed obligation to lease the mineral rights for the Indians' benefit had not been lifted, it could not have been avoided by the simple issue of letters patent to another creature of the Crown.

I would also add that in my view, notwithstanding the documentation used, the transfer from DIA to DVLA was merely that"an administrative transfer between Crown agencies pending sale. Accordingly, even if the letters patent can be interpreted as including the mineral rights as well as the surface rights to I.R. 172, the obligation that I find to have been owed by the Crown in respect of the mineral rights as a result of the 1940 surrender continued unabated after 1948.

I find this to be the case because I believe that an examination of *The Veterans' Land Act, 1942*, and the constitutional framework in which it was meant to operate, leads to the conclusion that DVLA was a Crown actor and that as such, he could inherit whatever encumbrances attached to land he acquired. In other words, that he could acquire the burden on the land along with the benefits.

The starting point for any discussion of the legal responsibility of governmental actors is (or, at least was, until 1982) the constitutional premise that the Sovereign is the source and fountain of justice and that all jurisdiction is derived from her.[31]*ftnote[31] *Bacon's Abridgement*, Prerogative. See also *Halsbury's Laws of England* (4th ed.), Vol. 9, "Constitutional Law", para. 943. In so far as exclusive heads of jurisdiction are concerned, the Crown is one and indivisible[32]*ftnote[32] *Theodore v. Duncan*, [1919] A.C. 696 (P.C.), at p. 706, *per* Viscount Haldane. See also *Maritime Bank of Canada (Liquidators of) v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.) and *Regina v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta*, [1982] Q.B. 892 (C.A.). and by virtue of the royal prerogative, the Sovereign is the supreme executive authority in the state. All executive acts are done in her name or are done by Ministers of the Crown acting under statutory powers conferred upon them. Moreover, there is no act of the executive for which some officer or Minister of the Crown is not responsible.[33]*ftnote[33] See *Halsbury's Laws of England* (4th ed.) Vol. 9, "Constitutional Law", para. 931.

Accordingly, at common law, if land is acquired by the Crown subject to a native encumbrance, it does not matter which governmental officer later becomes responsible for its administration"the burden is an obligation owed by the Sovereign and it will not be lifted until extinguished. Extinguishment can only take place by mutual agreement between the Crown and the Indians, or through an Act of Parliament, although in the latter case, express words are necessary before the courts will construe a private right as having been taken away.[34] *ftnote[34] In *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193 (H.L.), Lord Blackburn said at p. 208:

It is clear that the Burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears.

As I have concluded that, in the circumstances of this case, extinguishment of the Crown's fiduciary duty to lease the mineral rights on behalf of the Indians did not occur as a result of the 1945 surrender, i.e. by agreement, the

question now to be answered is whether anything in *The Veterans' Land Act, 1942* can be said to show, either expressly or by necessary implication, that Parliament intended that the vesting of control of Indian reserved lands in the Director, the Veterans' Land Act was sufficient to extinguish any native rights in the lands. For if no such intention can be shown, one must conclude that in so far as the Crown's obligation under the 1940 surrender of the mineral rights to I.R. 172 was concerned, DIA and DVLA were one and that the "negotiations", therefore, between DIA and DVLA were a case of self-dealing in its most elementary form (an issue upon which the Trial Judge did not find it necessary to express an opinion).

Most of the argument over the status of the DVLA in this case was restricted to an isolated examination of section 5 of *The Veterans' Land Act, 1942*.[35]*ftnote[35] A word about the legislative history of the *Veterans' Land Act* might be in order. The V.L.A. was originally enacted in 1942 (S.C. 1942-43, c. 33). There are two subsequent amendments which are of particular interest in this case, although both occurred after the surrender and therefore do not have substantive application. S.C. 1950, c. 51, s. 6 added a provision which in the 1952 revision of the Public General Statutes [R.S.C. 1952, c. 280] was numbered as subsection 5(2). It provided:

5. . . .

(2) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Director on behalf of Her Majesty, whether in his name or in the name of Her Majesty, may be brought or taken by or against the Director in the name of the Director in any court that would have jurisdiction if the Director were not an agent of Her Majesty.

Similarly, S.C. 1980-81-82-83, c. 78, s. 1, added a new s. 5(8):

5. . . .

(8) Any land vested in the Director to which a court order or judgment referred to in section 37 applies [which says that mechanics' liens and division of family assets laws do not extend to lands in respect of which the title remains vested in the Director] is hereby declared, for the purpose of the application of that section, to be held by the Director as a corporation sole and not as an agent of Her Majesty in right of Canada. I agree that in the end, the answer to this issue will turn on the meaning given to section 5 (particularly subsection 5(1)), but in getting to this point"in other words, in determining whether Parliament intended to extinguish the Crown's solemn assurance, as Cartwright J. described it in *The Queen v. George* , *supra*, to the Indians"I think that it is imperative to consider the Act as a whole.

The preamble, for instance, is significant in that it made evident the intention of Parliament to create an active role for the Government in land distribution to returning servicemen. It said, for example, that it was "in the public interest" to "assist in the acquiring of ownership of farm homes by qualified veterans" because the great majority of them had "limited financial assets". More importantly, however, it spoke in terms of direct governmental involvement: "[I]t is the purpose of the Dominion Government to provide a measure of financial assistance to veterans on their performance of prescribed settlement conditions. . . . "

Subsection 3(1) provided that the Governor in Council could appoint a Director of the Act who was directly responsible to the Minister of Mines and Resources (after October 1944, to the Minister of Veterans Affairs) and who was to "have the rank and standing of a Deputy Head". Subsection 3(2), in turn, provided that the Director's salary was to be fixed by order in council.

Section 7 described the scope of the Director's authority to acquire property. He could either (a) purchase it by agreement, or (b) "in any other manner acquire by consent or agreement from His Majesty in the right of Canada or from any province or municipal authority, or from any person, firm or corporation." Section 9 gave the Director the authority to "contract with any veteran" for the sale of land. The purchase price could be paid over a term of

years, but until it was paid in full, title to the land remained in the Director (section 11) and the veteran was a tenant at will (section 10).

The definitions of "land" and "property" in the Act are also of some interest. Section 2 provided:

2. . . .

(*b*) "land" or "lands" includes granted or ungranted Dominion, provincial or private lands, and real or immovable property, messuages, lands, tenements and hereditaments of any tenure, and real rights, easements and servitudes, streams, watercourses, waters, roads and ways, and all rights or interests in, or over, or arising out of, and all charges upon, land or lands as herein defined;

(*c*) "property" includes land, as herein defined, and goods, chattels, real and personal, and personal or movable property, and all rights or interests in, or over, or arising out of, and all charges upon, property as herein defined. [Emphasis added.]

As noted, section 7 spoke of the acquisition of "property" by the Director. In light of the definitions found in paragraphs 2(*b*) and (*c*) (i.e. "property" including rights, interests and charges on land), this would have included the native rights. *Prima facie*, therefore, the Director as a transferee of lands was in no different a position than any other person. In other words, there is no reason for holding that when he took title to a piece of property, he did not do so subject to any encumbrances which might attach to the land if it were purchased by a private citizen.

As the Trial Judge pointed out, the answer to the question of whether the DVLA was a Crown actor for the purposes of "stepping into the shoes" of the Director of Indian Affairs *vis-à-vis* I.R. 172 lies in subsection 5(1). It provides:

5. (1) For the purposes of acquiring, holding, conveying and transferring and of agreeing to convey, acquire or transfer any of the property which he is by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only, the Director shall be a corporation sole and he and his successors shall have perpetual succession and as such the agent of His Majesty in the right of Canada. [Emphasis added.]

In light of the constitutional principles already mentioned, the question is whether this provision can be said to have sufficiently expressed or necessarily implied an intention by Parliament to set DVLA separate and apart from the Crown in so far as the acquisition of title to land is concerned. I think that this point"a presumption that in enacting *The Veterans' Land Act, 1942* , Parliament did not intend to divest the Indians of their rights"is important, for it seems to me that the Trial Judge proceeded from an assumption of what one might call "interpretive neutrality".

For ease of analysis, it might be useful to cut away the superfluous language. Cut down to its basics (and referring only to the power in issue in this case), subsection 5(1) would have read as follows: "For the purpose of acquiring land, but for such purpose only, the Director is a corporation sole and as such the agent of the Crown." When read in this way, can any intention by Parliament to divest the Indians of their interests be divined? For several reasons, I would hold that the answer must be "no".

First, it seems apparent that contrary to the assertion of the Trial Judge, what subsection 5(1) does in fact, is confirm that DVLA was acting on behalf of the Crown when he acquired land. He may have been a corporation sole, but on a plain reading of the provision, I cannot see how anyone could contend that he was not acting as the agent of the Crown in the face of the statutory language.

Secondly, I think that it is significant that the subsection describes the status of the Director for the purposes of acquiring land, but does so "for such purposes only". This, of course, presumes that for all other purposes, the DVLA had some other status. In light of section 3, which conferred upon him the rank of Deputy Head, this could

only have been the status of Crown servant. *The Veterans' Land Act, 1942* may have served to create a Director with some degree of day-to-day functional independence from the apparatus of government, but this provision in my view affirms the overall legislative scheme of ensuring that the Director would remain under the active control of the Government.

Thirdly, and perhaps most importantly of all, one must bear in mind the definition of "corporation sole". It is no longer an expression in common use in Canada, but in law it has a distinct meaning, far different from that of the "ordinary" corporate entity. *Jowitt's Dictionary of English Law* (2nd ed.) provides the following definition:

Corporation . . .

A corporation sole consists of only one member at a time, the corporate character being kept up by a succession of solitary members. Corporations sole are always holders of a public office, the principal examples being the sovereign and ecclesiastical persons, such as bishops, parsons, *etc*.; the Solicitor for the Affairs of Her Majesty's Treasury is a corporation sole of statutory creation.[36]*ftnote[36] The *Treasury Solicitor Act, 1876* (U.K.), 39 & 40 Vict., c. 18, s. 1, for example, provided:

1. The person for the time being holding the office of Solicitor for the affairs of Her Majesty's Treasury (in this Act referred to as the Treasury Solicitor) shall be a corporation sole by the name of the Solicitor for the Affairs of Her Majesty's Treasury, and by that name shall have perpetual succession, with a capacity to acquire and hold in that name lands, Government securities, shares in any public com- pany . . . to sue and be sued, to execute deeds, using an official seal . . . and to do all other acts necessary or expedient to be done in the execution of the duties of his office. A Secretary of State may be constituted a

corporation sole.[37]*ftnote[37] S. 1A of the *Ministers of the Crown (Transfer of Functions) Act, 1946* (U.K.), 9 & 10 Geo. VI, c. 31, as enacted by the *Ministers of the Crown Act, 1974* (U.K.), 1974, c. 21, Sch. 2, s. 1 provides:

1A."(1) His Majesty may in connection with any change in the departments of the office of Secretary of State . . . make such incidental, consequential and supplemental provisions as may be necessary or expedient in connection with the change, including provisions"

(*a*) for making a Secretary of State a corporation sole. The principal incident of such a corporation is that the property which the member holds by virtue of his office (but not his private property) passes on his death not to his personal representatives but to his successor in office, as if he and the successor were the same person. [Emphasis added.]

By definition, therefore, the use of the expression in *The Veterans' Land Act, 1942* suggests that in this case, Parliament intended that DVLA was acting on behalf of the Crown when he acquired I.R. 172.

Finally, it is my view that the remaining provisions of section 5, while alone not necessarily being conclusive, add confirmation of Parliament's intent that the Director be a governmental actor. Subsection (2), for example,[38]*ftnote[38] Though the provisions of s. 5 were renumbered (see note 35 above), I am referring to the subsection numbers as they existed at the time of the transfer in 1948. provided that a deed from the Director could constitute as good a title as an original Crown grant. Subsection (3) confirmed that like Her Majesty personally, the Director was not by virtue of his constitution as a corporation sole made subject to any corporations legislation. Subsection (4) gave him a seal of office which featured the Arms of Canada. And, not least of all, subsection (6) deemed it necessary to state that for the purposes of taxation and for such purposes only, the Director was not an agent of the Crown. Surely, this presumes that for all other purposes, the Director was an agent of the Crown. If Parliament had intended the interpretation adopted by the Trial Judge, subsection (6) (not to mention the 1950 and 1980 amendments) would have been completely unnecessary.

In light of all of this, I cannot accept that *The Veterans' Land Act, 1942* evidences an intention by Parliament to extinguish the native interest in land upon its transfer from one creature of the Crown, i.e. the Director of Indian Affairs, to another, i.e. the Director, the Veterans' Land Act. This being the case, it is my view that the basic principles of constitutional law, namely that all executive acts are done in the Sovereign's name, that the Crown is one and indivisible, and that there is no governmental act for which one of Her Majesty's Ministers cannot be held responsible, can only lead to the conclusion that when the DVLA purported to acquire title to the land comprising I.R. 172, he did so as a representative of the Crown.

In argument, counsel for the Crown made much of the fact that the transfer between DIA and DVLA took place by letters patent, rather than through order in council. This, he said, provided evidence that the transaction was a sale, as opposed to an internal governmental transfer. In my view this has little or no relevance to the issues in this appeal. According to the constitutional principle of legality, the existence of a power or duty is a matter of law, not of fact, and must be determined by reference to some legal authority.[39]*ftnote[39] *Entick v. Carrington* (also known as *The Case of Seizure of Papers*) (1765), 19 St. Tr. 1029 (K.B.), at p. 1068; 95 E.R. 807. See also *Halsbury's Laws of England* (4th ed.), Vol. 8, "Constitutional Law", para. 805. The Crown cannot use its own documentation as a way to "bootstrap" its mistake into something that it is not.

I would add that the authorities support the conclusion that for the purposes of holding and acquiring land, DVLA was a representative of the Crown. In *Shaul, Helen In re*, [1961] Ex.C.R. 101, for example, Thurlow J. (as he then was) was interpreting section 5 of *The Veterans' Land Act, 1942*. He said at page 108:

By various sections of the *Veterans' Land Act*, the Director is empowered to acquire real and personal property and to contract with a veteran for the sale to him of such property . . . . Obviously, the exercise of these powers would in the ordinary course raise contractual obligations between the Crown, represented by the Director, on the one hand and vendors of land or veterans on the other . . . . [Emphasis added.]

Because of the special wording of the new subsection 5(2),[40]*ftnote[40] See above note 35. Thurlow J. found that a judgment creditor could attach against proceeds from the sale of land held by the Director, but as this passage indicates, he was in no doubt about the nexus between the Crown and a purchaser or vendor created by subsection 5(1) of *The Veterans' Land Act, 1942*.

Similarly, in *Bain v. The Director, Veterans' Land Act et al.*, [1947] O.W.N. 917 (H.C.), Assistant Master Marriott struck out a mechanics' lien filed against land, the title of which was vested in the DVLA. After quoting subsection 5(1), he said at page 918:

The last part of this section specifically provides that the Director is the agent of the Crown, and although this may not in some cases be conclusive . . . yet when it is coupled with the fact that the Director's operations are carried on directly under the superintendence of the Minister of Veterans' Affairs, (s. 3(2)), I think it is plain that the Director is entitled to the rights and privileges of the Crown in the right of the Dominion of Canada.

. . .

For the above reasons I conclude that the Director is an emanation, or more properly the agent, of the Dominion Crown and that the Dominion of Canada has a proprietary interest in the lands and premises in question in this action.

This same reasoning was cited with approval by the Ontario Court of Appeal in *Pankka v. Butchart et al.*, [1956] O.R. 837. The Court confirmed that a veteran who had not yet paid the purchase price remained a tenant at will with no legal interest in the property. Since the owner of the land was the DVLA, a mechanics' lien action against the property could not stand. What is particularly interesting about this latter case, however, is that the Director intervened in the appeal to argue that he was the agent of the Crown and that the *Mechanics' Lien Act* [R.S.O.

1950, c. 227] did not apply to him. It seems rather curious that here, the Crown is arguing the opposite!

Accordingly, I am of the opinion that it is an error to consider that after 1948, there were two separate juridical parties involved, *viz* the Director of Indian Affairs and the Director, the Veterans' Land Act. In my view, the correct interpretation is that there was one"the Crown"and that because the mineral rights had been surrendered in 1940 and thereby severed from the surface rights to the reserved lands, the Crown still held them in trust for lease, even after the transfer of active control of the surface rights from DIA to DVLA.

THE SALE OF THE LAND TO VETERANS

The situation changes, however, upon sale of the lands to the veterans. This is because of subsection 5(2) of *The Veterans' Land Act, 1942* (original numbering) which provided that all conveyances from DVLA constituted new titles to the land conveyed. By virtue of sections 10 and 11 of the Act, DVLA retained title until the purchase price was paid in full, but from that date, the veterans enjoyed fee simple absolute over their property. As I have noted, the deeds transferring title to the lots into which I.R. 172 was divided were made between May 30, 1952 and April 4, 1977.

There is no evidence of any knowledge on the part of the veterans of any possible claim that could be made by the appellants to the mineral rights to their lots. This being the case, even apart from the provisions of subsection 5(2) of *The Veterans' Land Act, 1942*, which statutorily gave them new title, I would conclude that they were *bona fide* purchasers for value without notice and that it would be unjust to grant any remedy against them.

As against the Crown, however, I conclude that on either alternative, i.e. that the mineral rights were not included in the 1945 surrender and hence were excluded from the transfer of control of I.R. 172 from DIA to DVLA, or that if they were included in the transfer, DVLA was a representative of the Crown such that the Crown's obligation to the Indians *vis-à-vis* the mineral rights was not extinguished, the Crown was in breach of its fiduciary obligation towards the appellants as of the date of conveyance of fee simple absolute in the lands to the veterans. Accordingly, I would conclude the Crown liable to the appellants for damages flowing from this breach.

LIMITATIONS

I turn now to the question of limitations.

Assuming that the 1975 British Columbia *Limitation Act*[41]*ftnote[41] R.S.B.C. 1979, c. 236 [which did not substantially amend the relevant provisions of the 1975 *Limitations Act*.]. applies to this action, I agree with my colleague Mr. Justice Stone that the appellants' claim does not fall squarely within the bounds of any of the enumerated limitation periods and would therefore seem to be covered by subsection 3(4), which provides:

3. . . .

(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

Having said this, though, I am of the view that the time in which the appellants were required to commence action was in the circumstances postponed by subsection 6(3) of the Act, which provides:

6. . . .

(3) The running of time with respect to the limitation periods fixed by this Act for an action

. . .

(d) based on fraud or deceit;

. . .

is postponed and time does not commence to run against a plaintiff until . . . those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

Subsection 6(4) expands upon this by defining "appropriate advice" and "facts", but it seems clear to me that in the circumstances of this case, the appellants fall within the protection offered by this provision.

There is in my view no doubt that until at least the mid-1970s, the appellants were simply unable to exercise the same degree of diligence with respect to their legal rights as might be expected of an ordinary member of society. As the evidence clearly shows, even as late as 1978, the appellants were still in a particularly vulnerable position *vis-à-vis* the Crown. At page 43, the Trial Judge noted that the appellants' district manager (who, it should be remembered, was a Crown servant) gave evidence to this effect:

The witness Johnson-Watson testified that, even during the years 1975 and 1978 when he was district manager for the Fort Saint John district office, he found that the Dunne-za Cree were greatly limited in the ability to manage the financial aspect of their affairs, that they were not successful farmers and that they still relied to a large extent on advice and guidance from the Department's staff. Most of the other bands were considerably more advanced in these areas.

There is equally no doubt in my mind that the circumstances surrounding this case amount to fraud in the equitable sense. I say this on the basis of the judgment of Dickson J. in *Guerin* in which he said at page 390:

It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. [Emphasis added.]

I would add that even though it dealt with Ontario legislation, the recent decision of the Supreme Court of Canada in *M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6, in which it discussed the applicability of statutes of limitations to sexual abuse cases, would seem to be of some relevance here. The discussion of La Forest J. of the importance of taking a broad, contextual view of these matters, and of considering the real legislative intent behind statutes of limitations in deciding whether someone ought to be precluded from bringing action to enforce his rights by passage of time, are applicable by analogy to the circumstances of the appellants.

Like victims of childhood sexual abuse, the appellants were simply unable to appreciate the fact that when the Crown "suggested" that they surrender their native rights to lands, they might be giving up something of legal

value. Moreover, I think that one can draw an analogy between the coercion involved in the concealment of sexual abuse cases and the Crown's failure here to raise the issue of mineral rights when it was discussing the merits of the 1945 surrender. In both cases, the superior party to a fiduciary relationship is playing on the dependence and trust of the disadvantaged party. Finally, it seems to me that much the same thing could be said about the real ability of most of the appellants to take legal action to enforce their rights prior to the 1970s as the Supreme Court said about the social "taboo" against actions of the sort in issue in *M.(K.)*.

Having regard to all of the circumstances, including the fact that as was noted by the Trial Judge, the appellants relied extensively upon advice from the Crown as late as 1978, I conclude that the point from which the limitation period began to run was some time in 1975, when the Band was advised to seek legal counsel by their district manager. In my opinion, therefore, the action was within the limits prescribed by subsection 3(4) of the *Limitation Act*.

In addition to the basic limitation period, though, British Columbia has adopted what has become known as an "ultimate" limitation period. Section 8 of the *Limitation Act* (which was applied by the Trial Judge in this case) provides that notwithstanding any postponement of time, no action "shall be brought after the expiration of 30 years from the date on which the right to do so arose". But since in this case, the first alienation of legal title to the lands did not take place until 1952, the action was commenced well within the ultimate limitation period.

THE CROSS-APPEAL

As my colleague, Mr. Justice Stone, noted, the Crown has cross-appealed the Trial Judge's finding that the Crown breached its fiduciary obligation to the appellants by agreeing to accept payment of $70,000 in exchange for I.R. 172 without exploring the possibility of obtaining a better price. On this issue, I am in agreement with the reasons and disposition proposed by my colleague.

DISPOSITION OF THE APPEAL

For all of the foregoing reasons, I would allow the appeal and dismiss the cross-appeal, with costs both here and below, and in accordance with the order of the Trial Judge, remit the action to the Trial Division for assessment of damages in a manner consistent with these reasons.

* * *

The following are the reasons for judgment rendered in English by

Marceau J.A. (concurring in the result): I have had the advantage of reading, in draft, the reasons for judgment prepared by Mr. Justice Stone. I agree with my brother's suggestion as to the final disposition of the appeal as well as with his interim conclusions on the major issues involved. However, my reasoning does not always accord with his, and considering the importance of the case, I wish to express some personal views.

1. Let me first mention the difficulties I have with the approach adopted by the Trial Judge in dealing with the basic allegation of the appellants, namely that the Crown had breached its fiduciary obligation towards them before and during, as well as after the 1945 surrender. The Trial Judge, after a long analysis of the jurisprudence of the Supreme Court starting with *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, refused to accept that the Crown could be under a fiduciary duty towards the Indians previous to surrender of reserve lands. He drew from the reasons of Dickson J. (as he then was) in *Guerin* that "there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender."[42]*ftnote[42] reflex, [1988] 3 F.C. 20 (T.D.), at p. 46. I disagree with that initial proposition.

I do not read Dickson J's remarks in *Guerin* as rejecting the view that a fiduciary relationship between the Crown

and an Indian band could exist previous to surrender of their reserve land; only that the surrender gave rise [at page 382] "to a distinctive fiduciary obligation" (emphasis added). In *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, writing with La Forest J., the Chief Justice had this to say, at page 1108:

In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

In *M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6, the most recent judgment of the Supreme Court dealing with fiduciary relationships, La Forest J. had particularly enlightening comments on the subject. At pages 64-66, he wrote as follows:

In *Lac Minerals v. International Corona Resources Ltd., supra* [1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574], I suggested a further refinement of the process by which fiduciary relationships could be uncovered. In particular, I identified three senses of the term "fiduciary" in an effort to clarify its import in given situations. The first sense of the term was as used by Wilson J. in *Frame v. Smith* [1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99], which I characterized as follows, at pp. 646-7:

There the issue was whether a certain class of relationship, custodial and non-custodial parents, was a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. . . .

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.

It is this first usage of the term "fiduciary" which arises in the present case. The inherent purpose of the family relationship imposes certain obligations on a parent to act in his child's best interest, and a presumption of fiduciary obligation arises.

In *Lac Minerals* I stressed the point, which also emerges from *Frame v. Smith*, that the substance of the fiduciary obligation in any given case is not derived from some immutable list of duties attached to a category of relationships. In other words, the duty is not determined by analogy with the "established" heads of fiduciary duty. Rather, the nature of the obligation will vary depending on the factual context of the relationship in which it arises.

These teachings, as I understand them, preclude dispute of the appellants' contention that, even prior to surrender of their reserve land, there was already between them and the Crown, with respect to any Crown act that could affect their well-being, a fiduciary relationship which placed upon the Crown a fiduciary duty, the fulfilment of which must be judged in accordance with a fiduciary's strict standard of conduct, and sanctioned without regard to any foreseeability principle.

My approach is therefore different from that of the Trial Judge, but it does not lead me to different conclusions.

Indeed, that difference of approach, I believe, amounts more to a question of form, a question of characterization and presentation, than a question of substance. I will explain myself.

Once acknowledged that a fiduciary duty is imposed upon the Crown before surrender, it is, of course, necessary to determine the content of that duty, a determination which is dependant on the matters to which the duty relates and the context in which it is to be performed. It is easy to realize that the duty of the Crown towards a band, in respect of reserve land set aside for the use and benefit of that band, cannot create the same obligations before, at the time of, or after surrender. While after surrender the obligations parallel those of a trustee, before and at the moment of surrender they are necessarily quite different and closer to those of a guardian and special adviser. To say that, however, is obviously not sufficient: a definition of the duty in more concrete terms is necessary in order to verify whether in fact, at a certain time and in certain circumstances, the duty has been breached.

If we now return to the Trial Judge, we can see that, in spite of his refusal to affirm the existence of a fiduciary duty on the part of the Crown before surrender, his reasoning led him to the same necessity of defining the content of the obligations imposed upon the Crown at the time of surrender. This happened because the Trial Judge placed upon the Crown, at that moment, a special duty whose content, once put in concrete terms, turned out to create, in his appreciation, an obligation quite close to those of a guardian and special adviser. He describes the duty of the Crown in contemplation of a surrender as follows (at page 47 of the report):

I must hasten to state however, that, wherever advice is sought or whenever it is profered, regardless of whether or not it is sought or whether action is taken, there exists a duty on the Crown to take reasonable care in offering the advice to or in taking any action on behalf of the Indians. Whether or not reasonable care and prudence has been exercised will of course depend on all of the circumstances of the case at that time and, among those circumstances, one must of course include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the Indians of which the Crown might reasonably be expected to be aware. Since this situation exists in the case at bar, the duty on the Crown is an onerous one, a breach of which will bring into play the appropriate legal and equitable remedies.

I do not think that the duty of the Crown before surrender, even properly considered as the legal consequence of a fiduciary relationship, could be described in better or harsher terms.

Thus, in the end, since I am in accord with Mr. Justice Stone that there is no reason to challenge the appreciation that the Trial Judge made of the evidence and the findings that he came to with respect to the facts, I would need very specific and cogent argument to reject his conclusion that the appellants had failed to establish a breach by the Crown of its legal duty towards them before surrender.

I am not disturbed by the fact that, at the moment of the 1945 surrender, the transfer of the land to the Director, the Veterans' Land Act (Director, VLA) was already contemplated. The appellants' suggestion was obviously that the Crown had its own interest in mind, thereby breaching the most fundamental obligation of a fiduciary, that of avoiding any self-interested dealings while acting in a fiduciary capacity. The suggestion, in my view, is unwarranted. It would be wrong, I think, to treat the Crown like a private individual in this respect. The fact that the surrendered land could help satisfy the needs of veterans does not imply that the Crown was dealing in its own interest. Very exceptional circumstances would be required to place the Crown in a real conflict of interest, since the essence of the Crown is to serve the public and satisfy various public interests, not to acquire for itself. There is nothing in the evidence to suggest that the surrender could not be advantageous to the Band and to some veterans simultaneously, or that the interest of the latter prevailed, in the minds of the officers of the Crown, over that of the Band at the time of the surrender.

Nor am I prepared to accept the submissions of the appellants that the Crown must be seen as having breached its fiduciary duty by the sole fact that all of the statutory requirements for surrendering reserve lands set forth in section 51 of the *Indian Act* had not been complied with. It is true that the requirement of subsection 51(3), i.e.

that the surrender assented to by the band at a special meeting held for that purpose be certified on oath by the officer authorized by the superintendent general to attend the meeting and "by some of the chiefs and principal men present thereat", had not been strictly observed, but I do not attach to the irregularity the effect suggested by the appellants. I admit that the position adopted by the Trial Judge that the requirement of subsection 51(3) was sufficiently complied with and that, in any event, the provision was directory and not mandatory is not totally satisfactory since, even if only directory, a failure to respect the requirement could be seen as a breach of some obligation of prudence or care. My position is different.

The appellants' submission is not that the surrender would be null and void; they are no longer seeking a declaration to that effect. They submit that the defect in the certificate, in itself, regardless of the reason behind it and the facts that actually occurred, shows breach of a fiduciary obligation giving rise in their favour to a right to be compensated in damages, the damages to be calculated as if no surrender had occurred. It is a submission that does not appear to me to be legally defensible. In my judgment, it is not possible to arrive at the conclusion that there was a breach of an obligation imposed by the fiduciary relationship from the sole existence of the irregularity without considering the circumstances leading to the irregularity. And, above all, the compensation to which such breach would give rise would have to go to a victim thereof and relate solely to a loss that, even if not foreseen, had been directly caused by the breach.

2. The appellants allege that after the surrender, the Crown, in its dealing with the surrendered land, breached its fiduciary obligation towards the Band at three different occasions and in three different manners. First, the appellants argue that the Minister of Mines and Resources (the Minister) and his officers in the Department of Indian Affairs (DIA) should have considered the possibility of leasing the land prior to resorting to an outright sale. Second, the appellants contend that, at the time of sale to the Director, VLA, not only should DIA have demanded a higher price commensurate with the value of the land (as found by the Trial Judge), but it should have retained the mineral rights. Finally, the appellants maintain that the Director, VLA himself should have withheld the mineral rights when he contracted with the veterans.

My comments on the first two allegations shall be brief since they involve mostly questions of fact and again I see no reason to interfere with the findings of fact of the Trial Judge.

In support of the first allegation, the appellants argue that the surrender being for "sale or lease", not for sale only, the Band's direct interest in the land was not completely extinguished obligating DIA to consider whether it would not have been to the Band's advantage to delay an outright sale, and preserve for some time that remaining interest. My answer is twofold. On the one hand, it does not appear to me that a surrender "for sale or lease" is one that leaves intact some of the Band's interest in the land; the extent of the renunciation implied by a surrender is determined by the more comprehensive of the possibilities contemplated. The delineation of possibilities merely serves to give the Crown more latitude. On the other hand, there is nothing in the evidence to suggest that, at the time of the transfer, a lease might have been preferable to sale; to the contrary, the evidence indicated that money was needed without delay to purchase replacement reserves.

To ground the second allegation, the appellants contend that, even if a reasonable person would have assigned no value to the mineral rights at the time of the transfer to the Director, VLA, it remained incumbent upon the Minister and the officials of DIA to retain those rights, given that this was the practice of the Western landowners and the Crown itself during the period. If such a practice had been established, the allegation would be serious, but the evidence, as I read it, is not to that effect. In respect of the private landowners, the appellants cite the testimony of one Axford, an expert geology witness for the Crown: the witness, however, merely submitted in cross-examination (transcript, vol. 29, pages 3760-3761) that sometimes property holders retained the mineral rights. As to the practice followed by the Crown, Mr. Leask, an official of DIA, testified that mineral rights would only have been retained when there was an awareness that they might have some value, and here there had been prospecting in 1940 which had produced no result. The Trial Judge was correct, in my opinion, in judging the conduct of the officials in relation to the context that existed at the time of the sale, and in disregarding the fact

that many years later the prospecting of 1940 proved to be erroneous when oil was found underneath the land.

The third allegation raises, at the outset, a difficult question of law. It is based on the assumption that the fiduciary obligation towards the Band in relation to the surrendered land remained intact after the transfer and passed to the Director, VLA when he took hold of the land. This is so, according to the appellants, because the transfer in no way ends the legal title of the Crown, the Director, himself, being an agent of the Crown.

The Trial Judge dismissed the allegation on the basis that, under *The Veterans' Land Act, 1942*, the Director is a corporation sole[43]*ftnote[43] More particularly, s. 5(1) reads:

5. (1) For the purposes of acquiring, holding, conveying and transferring and of agreeing to convey, acquire or transfer any of the property which he is by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only, the Director shall be a corporation sole and he and his successors shall have perpetual succession, and as such the agent of His Majesty in the right of Canada. and it was in this capacity that he took the land and held it for the sole purposes set forth in the Act. I would go further.

It does not appear to me that the fiduciary obligation that exists with respect to surrendered land is a direct consequence of the Crown's ownership. The Crown is the owner of the land before as well as after surrender. The fiduciary obligation is a result of the fact that the Indians have accepted to have their special and exclusive interest in the land "transformed", so to speak, into a sum or sums of money, the proceeds of a sale or lease. The fiduciary obligation exists with respect to the land until the "transformation" is complete; afterwards, it attaches to the proceeds. In my view, such "transformation" occurs as soon as full payment for the land is obtained; it is irrelevant whether this payment results from a disposition to a third party, or a transfer to a separate and distinct government entity. Only the Minister of Mines and Resources (now the Minister of Indian and Northern Affairs) is charged with the duty to see that the obligation of the Crown towards the Indians is fulfilled, and only he is entitled to hold surrendered land, or the proceeds from its disposition, for the use and benefit of the Indians. It would be ridiculous and inconsistent to hold that, in the case of a transfer for value to another government department, the Indians' interest would attach to both the land and the proceeds.

I therefore agree with the Trial Judge and my colleague that the Director, VLA could not have breached a fiduciary obligation towards the Indians for the simple reason that he was not under any such obligation.

3. I come now to the final issue, the issue of limitations. This issue remains pertinent due to the finding by the Trial Judge, a conclusion with which we refuse to interfere, that the Crown had breached its fiduciary obligation when it transferred the land to the Director, VLA, in 1948, for a price which was inferior to the market value of the land.

There is no question that the limitations laws applicable are those of the province of British Columbia, since the cause of action is about land in British Columbia transferred to the Director, VLA by letters patent dated March 30, 1948 registered in the British Columbia Land Office. Section 39 of the *Federal Court Act*, R.S.C., 1985, c. F-7 (which was, at the time of the Trial Division judgment, subsection 38(1), R.S.C. 1970 (2nd Supp.), c. 10) does not allow any doubt in that respect. It reads:

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province.

(2) A proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

The dispute centres on which B.C. *Limitation Act* is applicable. In British Columbia, a first statute of limitations

dating back to 1911 [*Statute of Limitations*, R.S.B.C. 1911, c. 145] was renewed, with minor changes, in 1924 [*Statute of Limitations*, R.S.B.C. 1924, c. 145], 1936 [*Statute of Limitations*, R.S.B.C. 1936, c. 159] and 1948 [*Statute of Limitations*, R.S.B.C. 1948, c. 191] and was replaced by a totally new Act in 1975 [*Limitations Act*, S.B.C. 1975, c. 37]. While the provisions relevant to our case are identical in the 1924 and the 1948 statutes, they are completely revised by the 1975 Act.[44]*ftnote[44] In fact, the legislature modified the 1975 Act again in 1979 [*Limitation Act*, R.S.B.C. 1979, c. 236], but since, at that time, the action herein was commenced, it should not concern us. It is of prime importance, therefore, to determine which of these Acts governs.

The appellants submit that only the 1948 statute can be applicable since that was the Act in effect when the *Federal Court Act* was enacted; the respondent replies that section 39 must be read as incorporating not only the provincial laws that were in effect in the provinces in 1971, but the provincial laws as they exist from time to time, with the result that the 1975 statute must also be incorporated.

My brother Stone, in his reasons, deals at length with this initial issue reviewing the case law and, more particularly, two decisions of the Exchequer Court of Canada which considered the precursor of subsection 38(1) in the *Exchequer Court Act* [R.S.C. 1927, c. 34] (*Zakrzewski, Peter v. The King*, [1944] Ex.C.R. 163 and *Parmenter, Leonard A. v. The Queen*, [1956-1960] Ex.C.R. 66). In light of these cases, Mr. Justice Stone agrees with the Trial Judge that Parliament did not intend to freeze the operation of section 39 to provincial laws "in force" as of the date the *Federal Court Act* took effect.

Not only do I agree with that position, but it seems to me that any other would have the effect of defeating the sole purpose of the provision, namely to make applicable to proceedings brought in the Federal Court the same limitations legislation that would be applicable if the proceedings were brought in the provincial court, an obvious requirement for all cases of concurrent jurisdiction, now including, pursuant to the new section 17 [as am. by S.C. 1990, c. 8, s. 3], "all cases where relief is claimed against the Crown." So, I have no doubt that the British Columbia *Limitations Act* of 1975 is incorporated by reference.

Is this conclusion decisive in respect of whether the action is statute-barred? I think so.

First, the 1975 Act contains a provision which gives the new legislation a clear retroactive effect, thereby establishing that the action is no longer governed by the Act in place when the facts giving rise to the cause of action occurred. Section 14, reads, in part, as follows:

14. (1) Nothing in this Act revives any cause of action that is statute-barred at the time this Act comes into force.

(2) Subject to subsections (1) and (3), this Act applies to actions that arose before this Act comes into force.

(3) If, with respect to a cause of action that arose before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before 2 years from the date this Act comes into force, the limitation period governing that cause of action shall be the shorter of

(a) 2 years from the date this Act comes into force, or

(b) the limitation period that formerly governed the cause of action.

The B.C. Court of Appeal addressed the issue of retroactive application of the 1975 Act in the case of *Bera v. Marr* 1986 CanLII 173 (BC CA), (1986), 27 D.L.R. (4th) 161, where the facts underpinning the action arose in 1974, and found that section 14 was clear enough to override the standard presumption against interpreting a statute in a manner that would affect pre-existing rights.

Second, the Act also includes a provision establishing an ultimate limitation period of 30 years which applies to any cause of action and cannot be extended for any reason, with the result that the appellants' allegations of

disability and equitable fraud and their appeal to the discoverability doctrine (allegations which were repudiated by the Trial Judge on the facts) are irrelevant. This provision is section 8 which must be read in conjunction with sections 6 and 7. Mr. Justice Stone, in his reasons, reproduces the three lengthy sections and refers to the judgment of the B.C. Court of Appeal in *Wittman (Guardian Ad Litem) v. Emmott* 1991 CanLII 1119 (BC CA), (1991), 77 D.L.R. (4th) 77, which is the authority as to their interpretation.

I, therefore, agree with my colleague that, even though the appellants have been able to demonstrate some liability on the part of the respondent, their action is time barred and can only be dismissed.

* * *

The following are the reasons for judgment rendered in English by

Stone J.A.: This appeal and cross-appeal are from a judgment of the Trial Division, pronounced November 4, 1987.[45]*ftnote[45] An abridged version of the reasons for judgment is reported as *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, reflex, [1988] 3 F.C. 20, while the complete text is reported as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al*. reflex, (1988), 14 F.T.R. 161. The issues herein arise out of the surrender of Indian Reserve 172 (I.R. 172) to the federal Crown on September 22, 1945, pursuant to the *Indian Act*, R.S.C. 1927, c. 98 and the sale and conveyance of this reserve on March 30, 1948 by the federal Crown to the Director, the Veterans' Land Act (Director of VLA) appointed under *The Veterans' Land Act, 1942*, S.C. 1942-43, c. 33.

The action, which was commenced by statement of claim filed in the Trial Division on September 19, 1978, was dismissed with costs.

The main issues in this appeal are whether: (1) the Crown was under a fiduciary obligation towards the appellants previous to the surrender of I.R. 172; (2) the mineral rights in the reserve were included in the 1945 surrender; (3) the Crown was in breach of post-surrender fiduciary obligations with respect to the sale of I.R. 172 and the release of the mineral rights therein; and (4) the claim for breach of these obligations was statute-barred. The learned Trial Judge decided against the appellants on all of these issues with the exception that the respondent had breached a post-surrender fiduciary obligation in respect of the amount received by the Crown upon the sale of the surrendered lands to the Director of VLA. The finding that the Crown was under a duty to seek a better price is the subject of the cross-appeal.

FACTS

I shall first review the pertinent facts as found by the Trial Judge and make a few references to the evidence contained in the trial record.

The appellants, Joseph Apsassin, as Chief of the Blueberry River Indian Band and Jerry Attachie, as Chief of the Doig River Indian Band, acting on their own behalf and on behalf of all members of their respective bands as well as present descendants of the Beaver Band of Indians, instituted this action in the Trial Division. The members of these bands were originally all members of one band, known as the Beaver Band of Fort St. John (the "Band") in the province of British Columbia. From 1962 to 1977 this Band was called the Fort St. John Band. In 1977, the Band divided into the Blueberry River Indian Band and the Doig River Indian Band. The majority of the people of these bands are known as the Dunne-za or Beavers who speak the Beaver language, and the rest are ethnically Cree who speak the Cree language. They are collectively referred to as the "Dunne-za/Cree".

Ancestors of these two bands have resided and occupied their traditional territory in the Peace River country north of Fort St. John from very early times. In the late 1890s the federal Crown embarked on a treaty-making process when settlers and miners moved into the Peace River district. A Treaty Commission was established. It met with

the Band and on May 30, 1900, the Band entered into a treaty with the Crown known as Treaty 8. By this treaty, the Band ceded the traditional territory to Her Majesty and the Crown in turn promised that as white settlement made it necessary to do so, it would establish reserve lands for the Band to the extent of one square mile per family of five.

In 1913 the Band selected a reserve of 28 square miles, or a total of 18,168 acres, from federal Crown lands in what is known as the Peace River Block. By order in council P.C. 819 dated April 11, 1916,[46]*ftnote[46] Exhibit 12, Appeal Book, Appendix 1, Vol. 1, at pp. 44[ib]-45. these lands were set aside as I.R. 172. This reserve was situated approximately 6 miles north of what is now the municipality of St. John, 10 miles north of the Peace River and approximately 30 miles west of the Alberta border. The following is a 1944 description of I.R. 172:

DESCRIPTION OF THE RESERVE. It consists of 28 square miles of rolling land situate six miles north of the Village of Fort St. John. A good two-thirds of it is suitable for agriculture and contains some of the very best farm land in the District. Probably half of this two-thirds is open prairie; the remainder sparsely wooded with patchy poplar. The Western half is bisected by the Montney Creek which runs roughly north and south. The banks of this creek are too steep for ploughing but furnish good grazing. These banks are the only part of the Reserve that is non-arable; and I have estimated them as one-third of the total reserve acreage, which, if anything, is too high. The grazing is of good quality and will "finish" cattle for market. Water is relatively scarce, except in early summer when a few sloughs are filled. The Montney Creek on the Western portion, and Whiskey Creek (smaller) in the extreme north-easterly portion being the only steady flows of water. ACCESSIBILITY is by motor road from Fort St. John (B.C. Government Road) which practically bisects the Reserve from North to South. On the west the Reserve is bounded by a good road connecting Fort St. John with northern villages. The East side is also bounded by a fair road connecting Fort St. John with north-eastern villages. The nearest approach of the ALASKA HIGHWAY to the Reserve is at Fort St. John, a distance of six miles to the south.[47]*ftnote[47] Exhibit 254, Appeal Book, Appendix 1, Vol. 4, at pp. 409[ib]-410.

The Dunne-za/Cree had engaged exclusively in hunting, fishing and the gathering of berries for many centuries. Prior to 1940 they had added trapping as an integral part of their livelihood, and it became the chief means of securing credit, goods and other needs and amenities from the white man. Although these people were essentially nomadic, they habitually met as a group as the Trial Judge found at page 42, "for a few weeks in a summer gathering place where they would rest, visit, exchange information, play games, engage in various activities and generally enjoy and benefit from various social exchanges." As late as the 1940s the Dunne-za/Cree had no truly organized system of government or real law makers. Not being allowed to elect their Chief and Council under the *Indian Act*, they had appointed a Chief and a Headman or Sub-Chief. These positions were held by Chief Succona and Joseph Apsassin during the relevant period. Up until 1954 both the Chief and the Headman or Sub-Chief, although appointed for life, could be removed and replaced if deemed to be no longer wise or good.

The Dunne-za/Cree had limited contact with white society. The Trial Judge describes the extent of this contact and the ability of the Indians to manage their affairs from a financial standpoint, at page 43:

In the 1940s the Dunne-za Cree mixed very little with white society although white settlers were gradually moving north and their contacts with white trappers and with some of the farmers settling in the general area were becoming somewhat more frequent. They maintained contact with the Department of Indian Affairs through the Indian Agent whose office was situated in Fort Saint John. The Indian Agent would, throughout the year, visit the indians from time to time and would also see them when they came to Fort Saint John to trade their furs and would also meet with them at treaty time wherever treaty money was to be paid.

There seems to be little doubt that, in the 1940s, the Dunne-za Cree did not possess the required skills to engage in any financial planning or budgeting or to generally manage their affairs from a financial standpoint. They had no true organized system of government or real law makers. They also lacked to a great extent the ability to plan or manage, with any degree of success, activities or undertakings other than fishing, hunting and trapping. It seems

that many of their decisions even regarding these activities, could better be described as spontaneous or instinctive rather than deliberately planned. The witness Johnson-Watson testified that, even during the years 1975 and 1978 when he was district manager for the Fort Saint John district office, he found that the Dunne-za Cree were greatly limited in the ability to manage the financial aspects of their affairs, that they were not successful farmers and that they still relied to a large extent on advice and guidance from the Department's staff. Most of the other bands were considerably more advanced in these areas. The society was individualistic, having to rely on one another and the members were not inclined to be competitive.[48]*ftnote[48] Reasons for judgment, Appeal Book, Vol. 2, at pp. 104-105.

Until the 1950s none of the Band members attended school and very few spoke English. A 1963 survey classified all adult members of the Band over 30 years of age as "illiterate" and indicated that very few members under that age had more than a Grade 2 education.[49]*ftnote[49] Exhibit 852, Appeal Book, Appendix 1, Vol. 9, at p. 1047.

Three major events affecting I.R. 172 and the Band occurred during the 1940s. On July 9, 1940, the Band surrendered the petroleum, natural gas and mining rights under I.R. 172 ("the 1940 surrender") to the Crown. The instrument of surrender was signed with an "X" by Chief Succona, Joseph Apsassin and three councillors on behalf of the Band. By the terms of the 1940 surrender the Band did

. . . release and quit claim unto our Sovereign Lord the King, his Heirs and Successors, the Petroleum and Natural Gas and the mining rights in connection . . . [50]*ftnote[50] Exhibit 177, Appeal Book, Appendix 1, Vol. 3, at p. 265.

with the reserve lands. The *habendum* and conditions of this surrender instrument read:

TO HAVE AND TO HOLD the same unto His said Majesty the King, his Heirs and Successors, in trust to lease the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the leasing of the petroleum and natural gas mining rights thereon shall be placed to our credit and the interest thereon paid to us in the usual way. [Emphasis added.]

This surrender was accepted by the Governor in Council, November 19, 1941 by order in council P.C. 8939.

At a Band meeting of September 22, 1945,[51]*ftnote[51] The Trial Judge throughout his reasons refers to this meeting as having been held on September 22, 1945 whereas J. L. Grew (who presided over the meeting) in his report transmitting the surrender documents to his Ottawa headquarters, gave the date as "Saturday, September 21st". (Exhibit 294, Appeal Book, Appendix 1, Vol. 4, at p. 485.) which is in controversy, members of the Band consented to the surrender of I.R. 172 to the Crown. The 1945 surrender instrument, signed with an "X" by Chief Succona, Joseph Apsassin and two councillors on behalf of the Band, is dated September 22, 1945 ("the 1945 surrender").[52]*ftnote[52] Exhibit 295, Appeal Book, Appendix 1, Vol. 5, at pp. 506-507. This surrender was accepted by the Governor in Council, October 16, 1945 by order in council P.C. 6506. By the surrender instrument, the Band did "release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever ALL AND SINGULAR, that certain parcel or tract of land and premises . . . composed of St. John Indian Reserve No. 172". The *habendum* and conditions of this instrument reads:

TO HAVE AND TO HOLD the same unto His said Majesty the King, his Heirs and Successors forever, in trust to . . . . . sell or lease . . . . . the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people.

And upon the further condition that all moneys received from the sale or leasing . . . thereof, shall be placed to our credit in the usual way.[53]*ftnote[53] *Ibid*., at p. 507. [Emphasis added.]

By letters patent dated March 30, 1948,[54]*ftnote[54] Exhibit 506 (not printed in the Appeal Book). His Majesty the King sold and conveyed the surrendered lands to the Director of VLA for the sum of $70,000. The letters patent recite:

WHEREAS the lands hereinafter described are part and parcel of those set apart for the use of the St. John Beaver Band of Indians

AND WHEREAS We have thought fit to authorize the sale and disposal of the Lands hereinafter mentioned, in order that the proceeds may be applied to the benefit, support and advantage of the said Indians, in such a manner as We shall be pleased to direct from time to time: AND WHEREAS The Director, The Veterans' Land Act contracted and agreed to and with Our Minister of Mines and Resources, duly authorized by Us in this behalf, for the absolute purchase at and for the price and sum of Seventy Thousand Dollars ($70,000) of lawful money of Canada, of the Lands and Tenements hereinafter mentioned and described, of which we are seized in right of Our Crown.

By the granting clause, the Crown did "grant, sell, alien, convey and assure unto the said Director, the Veterans' Land Act, his successors and assigns forever":

. . . all that Parcel or tract of Land, situate, lying and being in the St. John Indian Reserve No. 172 in the Province of British Columbia in Our Dominion of Canada,

A legal description of the lands is followed by the *habendum*, which reads:

To have and to hold the said Parcel or Tract of Land hereby granted, conveyed and assured unto the said The Director, The Veterans' Land Act, his successors and assigns forever: SAVING, EXCEPTING AND RESERVING NEVERTHELESS unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on, or under, or flowing through or upon any part of the said Parcel or Tract of Land hereby granted as aforesaid.

The circumstances surrounding the 1945 surrender meeting are of particular importance. The Trial Judge found that the members of the Band present at that meeting gave "their free and informed consent to the surrender". That finding is among several made by him at pages 64-67. The surrender meeting was presided over by J. L. Grew who was trained as a fur Supervisor for the Indian Affairs Branch, and sent from Ottawa headquarters to pay treaty to the Band in the summer of 1945. He was accompanied by Joseph Galibois, Indian Agent for Fort St. John and E. E. Peterson, a local trader who ran a nearby store north of Rose Prairie. Interpreters for each language group in the Band were also in attendance. Several witnesses who were present at this meeting testified either on commission (videotape) or in person at the trial and included Messrs. Grew and Galibois. The testimony of most of these witnesses was rejected.

The Trial Judge reviewed and commented upon the value of all of this testimony in arriving at a number of important findings. The testimony of Mr. Grew was found of little value because of his advanced age and memory loss, while that of Mr. Galibois was accepted although his memory was "obviously blurred" regarding events subsequent to the meeting. The Trial Judge was particularly impressed with the testimony of Thomas F. Roach, a former RCMP officer and an independent witness who was present with Mr. Grew when he paid treaty to Band members in July of 1945 at which time they were asked whether they wished to surrender I.R. 172. He was also assisted by the testimony of one J. D. Williams, a game warden. According to this evidence, Mr. Williams attended a meeting with Messrs. Grew and Peterson and several of the Indians in early September of 1945 where the subject of alternative reserve sites was discussed. This evidence was viewed by the Trial Judge as indicating that the Indians knew well in advance of the surrender meeting of the possibility that I.R. 172 would be surrendered. He had also before him various pieces of documentary evidence which had come into existence shortly before or after the surrender meeting was held. These included Mr. Grew's reporting letter of September

24, 1945 and his earlier letter of August 8, 1945, reporting on a discussion he had had with the Band at the treaty meeting held in July of that year.

Because of their importance, the findings of the Trial Judge on this aspect of the case merit full recitation [at pages 66-67]:

To summarize, with regard to the question of informed consent to the 1945 surrender, I make the following findings of fact:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;

2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;

3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;

4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;

5. That neither Mr. Grew, Mr. Gallibois [*sic*] nor Mr. Peterson appeared to have attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;

6. That Mr. Grew fully explained to the Indians the consequences of a surrender;

7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds;

8. That the said alternate sites had already been chosen by them, after mature consideration.

I therefore conclude that not only the majority of but all of the male members of the Band present at the surrender meeting gave their free and informed consent to the surrender and that each, in turn, orally signified his consent in accordance with the voters list attached to the surrender document. There is also evidence which I accept to the effect that the voters list included all of the Indians of the Fort Saint John Band who were entitled to vote and no others.[55]*ftnote[55] Reasons for judgment, Appeal Book, Vol. 2, at pp. 171[ib]-172.

Contemporary Crown policies towards the Indians of Canada and their reserve lands was the subject of some evidence, which was not discussed by the Trial Judge. It is necessary to refer to some of the evidence which was relied upon in argument as the appellants lay much stress on the significance of these policies. Dr. J. E. Chamberlain, a witness called on behalf of the appellants, testified about the Crown's policies regarding the assumption of sovereignty by the British Crown over the traditional territories of the Indians of Canada, the making of treaties with the Crown whereby these territories were ceded to the Crown for settlement, the setting aside of portions of ceded territories as reserve lands to furnish land bases for the Indians, and the protection of these lands from alienation except by surrender to the Crown itself. This witness also testified that during the period from the 1920s to the 1950s, those responsible for Indian Affairs were actuated by the twin principles of protection and advancement. In furtherance of these principles the Crown accepted to protect the Indians of

Canada, regarded in law as minors, from the acts of unscrupulous people and from the results of their own folly, and to advance the Indian people toward self-sufficiency both socially and economically. Government decisions were to be taken in the best interest of the Indian people and government officials were considered to be the best judges of that interest.

The role of reserve lands in relation to these policies was explained by D. J. Allan, Superintendent, Reserves and Trusts in the Indian Affairs Branch before the Special Committee of the House of Commons on Reconstruction and Re-establishment on May 18, 1944 when he testified:

The Indian reserves was (sic) not designed to support the Indian community; it was designed as a place for the Indian to live, and we find that they have to go far beyond the confines of their reserves to make a living.[56]*ftnote[56] Exhibit 246, Appeal Book, Appendix 1, Vol. 4, at p. 401.

The Minister's 1945 annual report to the House of Commons reflects the following general policy of the Crown towards the selling or leasing of reserve lands:

The Department has set its face solidly against alienation by sale of lands for which there is any likelihood of Indian need in future years. Land surplus to immediate needs are administered under leasing arrangements and from such lands substantial revenues have accrued.[57]*ftnote[57] Exhibit 894, Appeal Book, Appendix 1, Vol. 10, at p. 1318.

On June 20, 1946, R. A. Hoey, Director of Indian Affairs in the Department of Mines and Resources, spoke of existing policy towards the Indians of I.R. 172, as follows:

These people will probably be hunters and trappers for many generations to come and it is the intention of the Department to assist them in their trapping operations by introducing methods of conservation that have proved to be so beneficial to the Indian trappers of northern Quebec and northern Ontario. In closing, I may say that it is not the present policy of the Department to endeavour to make farmers out of Indians whether or not they are naturally inclined or adapted for that vocation, but rather to encourage and assist them along the lines of their heredity capabilities, which in this case is undoubtedly trapping.[58]*ftnote[58] Exhibit 383, Appeal Book, Appendix 1, Vol. 5, at p. 600.

There was a further policy which appears to have prevailed in the 1940s. When the Department responsible for the Indians of Canada knew there were minerals under a reserve or they were likely to be there and to be of value, it would reserve the rights to those minerals on the transfer of these lands.

No specific attempt to bring about a sale of I.R. 172 was made until June of 1944, when the British Empire Service League of Fort St. John forwarded a motion to the Minister of Mines and Resources asking that the reserve be made available for the settlement of returned soldiers and that the Indians be moved further away. On July 11, 1944, the local member of Parliament wrote to the League indicating that he too had raised the matter with the Minister's Office. Dr. H. W. McGill, the then Director of Indian Affairs in the Department, was directed to draft a letter of reply to the local member of Parliament. He wrote that he was personally opposed to a sale of I.R. 172 and to the suggestion of Mr. Allan that 10,240 acres could be made available to the Director of VLA if the Indians could be persuaded. It was Dr. McGill's opinion that the Indians would have to change the means of securing their livelihood in the future by relying on the resources of the reserve. He recommended that the League be told that it was not in the present or future interests of the Band to dispose of all or part of the reserve, and that to do so would be contrary to the general policy of the Department. Dr. McGill retired as Director in December 1944 and was succeeded by Mr. Hoey.

The Crown appears to have consistently resisted the sale of all or any portion of I.R. 172 until the summer of 1944 when it decided to sound out the Band on the possibility of selling the reserve lands. At a July 19, 1944 meeting of

the Band, the Indian Agent, Dr. H. A. W. Brown, determined that the Band was prepared to consent to a cash sale to the Government of Canada on certain terms. In reporting on this meeting to the Indian Affairs Branch in Ottawa by letter of July 21, 1944, Dr. Brown stated:

At the Treaty Meeting held here on the 19th. inst. I discussed the matter of the sale of this Reserve with the Indians of the Fort St. John Band; and they are all agreed that they would consent to a cash sale to the Government for a sum the proceeds of which would net them per share $50 interest annually. But they are unwilling to consider a sale by auction to other parties than the Government at the present time; as they are well aware that possible and very probable developments such as railways and rapid settlement of surrounding lands will greatly increase the value of the Reserve as time goes on. They suggested that in addition to a cash sum for the sale of this Reserve they be granted another tract of land elsewhere, not necessarily for agricultural purposes, but that they might have a landed "stake" in the country which they might feel was their "home".[59]*ftnote[59] Exhibit 254, Appeal Book, Appendix 1, Vol. 4, at p. 409.

However, it is apparent from a memorandum of June 4, 1945 from Mr. Allan to Mr. Grew, that the Band was not willing to part with the reserve. Mr. Allan wrote:

The Indians have refused a surrender for sale or leasing purposes. It is their land and their decision as to the surrender is final and there is nothing that we can do about it. The land, therefore, may not be sold unless and until the Indians change their mind and the Department cannot properly bring any pressure to bear on them as it is a decision which they must be permitted to arrive at freely and without pressure from the Department.[60]*ftnote[60] Exhibit 278, Appeal Book, Appendix 1, Vol. 4, at p. 440.

After paying treaty to the Band at a meeting held earlier that summer, Mr. Grew reported to Mr. Allan on August 8, 1945, with respect to "the proposal to sell or lease the Reserve #172". In this report, Mr. Grew stated that the Chief, Councillor and other members of the Band "all said they were willing to surrender the land for sale or lease providing they would be supplied with land elsewhere on which they could build cabins, grow gardens and put up hay to feed their horses during the winter"[61]*ftnote[61] Exhibit 283, Appeal Book, Appendix 1, Vol. 4, at p. 447. and that the Indians thought they had signified the same willingness on two earlier occasions.

By a memorandum of August 11, 1945 addressed to Mr. Grew who was then in Edmonton, Mr. Hoey noted that I.R. 172 was "in demand for ordinary settlement" and that holding the land when it was not being used was "difficult and embarrassing". He noted further that the Band was "already more or less permanently located in four groups" off the reserve and suggested that "they would require at least for their immediate use only sufficient land for their homes and, possibly, gardens, hay land and pasture". He also suggested that the Branch "might start at each point by selecting and purchasing the sites presently occupied by them and then add to their holdings later by purchase when the money starts to come in from the sale of Reserve No. 172 and as their need for further land develops". He instructed Mr. Grew as follows:

In the meantime it is felt that you should return immediately to Fort St. John before the Indians leave for their trapping grounds, make a careful examination of the four sites, taking with you the best maps procurable, and lying out on the maps the approximate boundaries of the new locations which are presently occupied by Indians or support their improvements. It is suggested that at each instance the area selected should not much exceed ten acres for each family, plus common lands or hay lands to supply their present needs. We need not look too far into the future as we can acquire additional lands for them to fully satisfy their needs from the proceeds of the sale of Reserve No. 172 once collections begin. To this end we are sending you a general surrender for sale or lease purposes covering Reserve No. 172, and authorizing you to convene a Band meeting to vote on the said surrender. The present population of the Band according to last year's pay list is 122 and of that number 30 qualify as voting members. If you can get an affirmative vote therefor from 16 or more of the adult males over twenty-one years of age, the surrender will be valid.

In this connection the surrender will be unconditional and for sale or lease purposes, and you may explain to the members when you have them together that the full proceeds of the sale, without deduction except for the cost of any necessary surveys, will be placed to their credit in a trust account and the interest thereon used to promote their welfare. Once the Reserve is sold or leased, it should realize sufficient to provide comforts and subsistence to their aged and destitute members and an annual distribution in cash of $50.00 to $100.00 per family, or in other words give the Band an annual income of approximately $5,000.00 a year, and this amount might be expected to increase as the lands were more fully disposed of or profitably leased. This could not, of course, happen immediately, but is a result that might eventually be looked forward to in three to five years.

You should also explain that it is the purpose of the Department to pay for the land the Indians obtain on their new locations out of the proceeds of the sale of Reserve No. 172 and for this reason and as they are paying for it themselves, they should not in the first instance select any larger acreage than is sufficient to meet their immediate needs. We would not anticipate any difficulty in adding lands when the cash was available to meet their future needs.

You might also explain to the Band that once you have made the selection of the new lands, surveys would be required to fix boundaries and that it would be necessary to proceed with the surveys almost immediately in order to obtain proper descriptions for the conveyance to this Department on their behalf from the Province of British Columbia.[62]*ftnote[62] Exhibit 287, Appeal Book, Appendix 1, Vol. 4, at pp. 472-473.

At about the same time, it seems that the federal Minister responsible for the Indians, Hon. J. Allison Glen, was looking for ways of making I.R. 172 available for white settlement. In his letter of August 13, 1945 to the Minister of Lands of British Columbia, the Minister acknowledged that "ever since the Great War of 1914-18 there has been recurring pressure placed on this Department to make the Reserve or parts of it available for white agricultural settlement" and that recent events had reduced the Indians "to a state of dependency upon the cold charity of governments."[63]*ftnote[63] Exhibit 289, Appeal Book, Appendix 1, Vol. 4, at p. 478. While Mr. Glen's portfolio was that of Minister of Mines and Resources, federal legislation made him the Minister responsible for Indian Affairs in the Government of Canada. (*The Department of Mines and Resources Act*, S.C. 1936, c. 33, s. 5). With the adoption of *The Veterans' Land Act*, 1942, the Minister of Mines and Resources became responsible for Veterans Affairs. This Minister continued to wear two hats until October 21, 1944 when the Department of Veterans Affairs was established upon the proclamation of *The Department of Veterans Affairs Act*, S.C. 1944-45, c. 19. S. 8(1) of that statute had the effect of transferring to the Minister of Veterans Affairs the duties respecting veterans affairs formerly vested in the Minister of Mines and Resources. He had this to say about the pressure he was under with respect to I.R. 172:

Within the past few months the question has again been brought to the fore, partly because with fixed prices and good crops the farming community has been prosperous, but largely due to the necessity of providing suitable good land for veterans of the war just concluded. Whether or not we can persuade the Indians to surrender this Reserve or part of it, and whether we should make the attempt, will depend largely on what provision can be made for them in other directions that will guarantee them a living. As they are traditionally a hunting and trapping Band, we may probably look for the solution in that direction.[64]*ftnote[64] *Ibid*., at p. 479.

The Minister also suggested that the province might provide alternative blocks of land in the Band's trapping areas "sufficient to support their homes, with common pasturage and hay lands for their pack horses" and "exclusive trapping rights over a block of territory sufficient to maintain them." Near the end of this letter, the Minister added:

Were we able to secure from you these concessions, it is believed that we could obtain a surrender for sale or lease purposes of the present Reserve or a substantial part of it, for the use of white settlers and returned soldiers. The arrangement suggested in our judgment would be beneficial both to the white man and to the Indians and would in

some measure remove the criticism that this administration is tying up good agricultural lands for possibly a couple of generations before the Indian owners could be sufficiently trained to become efficient farmers or herdsmen.

This office is aware that lands of this quality are at a premium. We are further aware of the pressure placed upon both Governments to make this land available for white settlement. From our view point we have to have something to offer to the Indian over and above the money he would receive from the sale of his land before he can properly be asked to give it up. Some work has already been done toward that end, but we cannot proceed further without your co-operation and, frankly, it is felt here that it is in your own interest and in the interest of your people that you should give our proposal sympathetic consideration.[65]*ftnote[65] *Ibid*., at p. 480. The Minister of Lands of British Columbia approved of the idea of making I.R. 172 available for ordinary settlement and promised Mr. Glen his co-operation. (Exhibit 323, Appeal Book, Appendix, Vol. 4, at p. 482).

The respondent submits the following as matters of paramount importance, bearing on the Band's decision to surrender I.R. 172: the wishes the Indians themselves expressed by the consent that they gave at the surrender meeting; the fact that they were making virtually no use of I.R. 172; the further fact that they were interested in maintaining the strength of their society by continuing their traditional hunting and trapping economy and residing away from white society. The Crown, it appears, was able to acquire groups of registered trap lines so as to form exclusive trapping territory for the Band to the north of I.R. 172. This led Mr. Grew to report in August of 1945 that:

It does not seem likely that the Indians will ever make use of it [the reserve] for farming themselves as they are essentially trappers & are now provided with potentially good fur country in their registered trap lines.[66]*ftnote[66] Exhibit 283, Appeal Book, Appendix 1, Vol. 4, at p. 450.

The fur country in which these trap lines were located was considered by Mr. Grew "as good as any in Canada probably".[67]*ftnote[67] Exhibit 284, Appeal Book, Appendix l, Vol. 4, at p. 455. The evidence does show that the Band made very little use of I.R. 172 previous to its surrender. The Band gathered there for a few weeks in the summer time to receive treaty pay and to socialize. Band members continued as in the past to live in scattered areas of the bush lying to the north of I.R. 172 where they engaged in hunting and trapping. The following picture was presented by C. P. Schmidt, Inspector of Indian Agencies, Alberta Inspectorate, on October 29, 1943:

No one has lived on Fort St. John Reserve permanently, for the past 18 years. The old men would not settle down; they refused to come back and live on their reserve during the winter, saying that it was too far from their big game and trapping grounds. The young men followed the advice of their elders, and the reserve has been deserted, with the exception of about two weeks in summer, at time of Treaty payment, when they camped there in four separate groups at places near water.[68]*ftnote[68] Exhibit 235, Appeal Book, Appendix 1, Vol. 4, at p. 385. Schmidt, however, did add the following caveat as to a possible future need of I.R. 172 as a permanent home for the Indians:

Being in contact with the whites, for whom they work; also, the Alaska Highway having opened their eyes to modern ways of living, etc., I think that the very close contact with white people will change their views, and that they will want to make permanent homes for themselves on the reserve.

Later, on August 26, 1944, Dr. Brown reported:

This Band does not use Reserve 172. They are hunting and trapping Indians and live in the bush scattered over an area of about 100 x 50 miles.[69]*ftnote[69] Exhibit 244, Appeal Book, Appendix 1, Vol. 4, at p. 397. The Director of Indian Affairs reacted thusly at the end of Dr. Brown's report: "The time will come when the younger people will make use of their Reserve land."

DISCUSSION

The validity of the 1940 surrender is not in issue. The appellants contend that: the Crown was under a fiduciary obligation previous to the 1945 surrender which required the Crown to advise the Band against surrendering the Indians' interest in I.R. 172 and that this obligation was breached; the Crown failed to strictly comply with one of the formalities of the *Indian Act* for surrendering I.R. 172 and thereby breached a fiduciary obligation; the Crown breached fiduciary obligations by selling I.R. 172 rather than leasing it and by failing to reserve the mineral rights if, indeed, those rights were capable of being included in the 1945 surrender. The appellants further contend that the Crown's fiduciary obligations were not extinguished by the transfer of I.R. 172 to the Director of VLA on March 30, 1948, but remained outstanding until the various parcels of I.R. 172 were finally deeded to individual purchasers and also that their claims are not statute barred. The appellants are not seeking the return of I.R. 172 but claim compensation for breach of fiduciary obligations.

I now turn to discuss the issues in the appeal and cross-appeal.

Breach of Fiduciary Obligations

Previous to the 1945 surrender

The appellants contend that the 1945 surrender was not valid because, previous to the surrender, the Crown breached a fiduciary obligation owed to the Indians by failing to advise them that it was not in their best interests to surrender I.R. 172. They add that this is especially so given that the dominant purpose of surrendering I.R. 172 was to benefit the Crown or ultimate grantees of these lands and not to benefit the Indians in the long term. The core of the appellants' attack is that the Trial Judge asked himself the wrong question by determining that the Indians present at the surrender meeting of September 22, 1945 had given their free and informed consent to the surrender of I.R. 172, and that this led him to conclude erroneously that the Crown had fulfilled whatever duty was owed to the Indians. The appellants further contend that the 1945 surrender was not valid because the Crown breached a particular pre-surrender fiduciary obligation by failing to comply with all of the formalities for surrendering I.R. 172 as imposed by section 51 of the *Indian Act*. In any event, the appellants submit that the mineral rights which were surrendered in 1940 did not pass to the Crown with the 1945 surrender.

On the basis of *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, the appellants submit that a fiduciary obligation may be imposed upon the Crown previous to a surrender of reserve lands for the same reasons that one may be imposed subsequent thereto. The Trial Judge disagreed. He viewed [at page 45] the following passage from the judgment of Dickson J. (as he then was), at page 382, as meaning that "the special fiduciary relationship arises upon surrender":

. . . it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. 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.

He expressed the view at page 46 that apart from treaty obligations, "there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender", and that the Crown's duty was somewhat less than that of a fiduciary. He described this lesser duty in the following terms, at page 47:

I must hasten to state however, that, wherever advice is sought or whenever it is proferred, regardless of whether

or not it is sought or whether action is taken, there exists a duty on the Crown to take reasonable care in offering the advice to or in taking any action on behalf of the Indians. Whether or not reasonable care and prudence has been exercised will of course depend on all of the circumstances of the case at that time and, among those circumstances, one must of course include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the indians of which the Crown might reasonably be expected to be aware. Since this situation exists in the case at bar, the duty on the Crown is an onerous one, a breach of which will bring into play the appropriate legal and equitable remedies.[70]*ftnote[70] Reasons for judgment, Appeal Book, Vol. 2, at p. 111.

In my view, as was recognized in *Guerin*, *supra*, before a fiduciary obligation may be imposed it must first be shown that the Crown was in a fiduciary relationship to the Indians during the relevant period. A number of recent decisions of the Supreme Court of Canada throw light on the nature of the Crown's relationship to the Indians. I take as the starting point the decision in *Guerin*. The question in issue there involved the provisions of subsection 18(1) of the *Indian Act*, R.S.C. 1952, c. 149, which read:

18. (1) Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

After the Band had surrendered a portion of its reserve lands for leasing to a golf club, the lands were eventually leased on terms less favourable than those approved of at the surrender meeting. By not acting in accordance with that approval, the Crown was found by the Supreme Court of Canada to have breached a fiduciary obligation owed to the Indians. At page 376, Dickson J. held that "the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians." He went on to explain the nature of the relationship existing between the Crown and the Indians, at page 376:

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown . . .

The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. [Emphasis added.]

Guerin was considered by this Court in *Kruger v. The Queen*, reflex, [1986] 1 F.C. 3 where it was pointed out both by Heald J.A. at page 12 and by Urie J.A. at page 48, that the decision therein must be viewed in the factual context in which it was made, which is to say that the Indians had there surrendered their interest on conditions which were approved of at the surrender meeting. In addition, the finding of Mahoney J. (as he then was) at trial [reflex, (1981), 125 D.L.R. (3d) 513] that the Crown owed a fiduciary duty, was not challenged on the appeal. That case involved the expropriation by the Crown for airport purposes of two parcels of the lands comprising portions of a reserve, the second taking being followed by a formal surrender. Urie J.A., for the majority, concluded that the Crown was not guilty of a breach of the fiduciary duty. Heald J.A., on the other hand, had this to say at page 12 with respect to whether *Guerin* had foreclosed the finding of a fiduciary relationship previous to the surrender of reserve lands:

I do not think, however, that what was said by Mr. Justice Dickson relative to the fiduciary relationship existing between the Crown and the Indians can be construed in such a way as to be authority for the proposition generally that the fiduciary relationship arises only where there is a surrender of Indian lands to the Crown.

The appellants attempt to show that the fiduciary relationship that was found to exist in *Guerin*, *supra*, has been further clarified and extended in a series of recent Aboriginal rights cases in the Supreme Court of Canada. I shall identify the passages most relied upon in argument. In *Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (SCC), [1988] 2 S.C.R. 654, the Court observed at page 677 that in *Guerin*, it had been "recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them." In *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 S.C.R. 322, Wilson J. stated for the Court, at page 335:

The obligation owed by the Crown in this case results from the very nature of aboriginal title. This Court's most recent affirmation that the nature of the Indian interest in aboriginal lands is *sui generis* is found in *Canadian Pacific Ltd. v. Paul*, 1988 CanLII 104 (SCC), [1988] 2 S.C.R. 654. As noted in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, the obligation owed by the Crown in respect of lands held for the Indians is recognized in, although not created by, s. 18(1) of the *Indian Act*. The Crown must hold the land comprising Reserve No. 12 for the use and benefit of one of the Bands. The question is: which one?

In *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85, at page 108, Dickson C.J. again took note of the unique character of the Indians' interest in land. La Forest J., for the majority, observed at page 130:

The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use . . . . [Emphasis added.]

Finally, in *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, the Supreme Court addressed itself to the rights that were recognized and affirmed by subsection 35(1) of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. At page 1108, Dickson C.J. and La Forest J., for the Court, commented that in *Guerin*, "[t]he *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constituted the source of such a fiduciary obligation", and then added:

In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]

I agree with the respondent's submission that in none of these post-*Guerin* cases was the Supreme Court of Canada required to deal squarely with the question of whether a fiduciary relationship between the Crown and the Indians exists previous to the surrender of reserve lands. If the passage from the judgment of Dickson J. in *Guerin*, *supra*, that was relied upon by the Trial Judge, was intended as the benchmark for the courts to apply to the relationship of the Crown towards the Indians, then I would have to conclude that a fiduciary relationship or obligation could not have arisen previous to the surrender of I.R. 172. I would note, however, that this passage appears to be directed specifically to the question of obligation rather than to that of relationship, for Dickson J. stated that upon surrender there comes into being a "distinctive fiduciary obligation" binding upon the Crown "to deal with the land for the benefit of the surrendering Indians". He made the same point at page 385 when he stated that "a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf" after "an Indian Band surrenders its interest to the Crown". It is arguable, too, that some of the language I have quoted from the subsequent decisions of the Supreme Court of Canada may suggest that the fiduciary relationship, built on the twin pillars of aboriginal, native or Indian title, and inalienability of that title except by surrender to the Crown, exists equally in the period previous to surrender. As La Forest J. pointed out in *Mitchell*, *supra*, in the passage quoted above, the cession of the Indians' traditional homelands was on the understanding "that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use." and, as he and Dickson C.J. stated in *Sparrow*, *supra*, "the Government has the

responsibility to act in a fiduciary capacity with respect to aboriginal peoples."

The appellants contend that assistance on this question may be found in other decisions of the Supreme Court of Canada which have dealt with a variety of fiduciary relationships and obligations. These decisions were considered by that Court in *M.(K) v. M.(H.)*,[71]*ftnote [71] 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6. That case was concerned with a claim in tort as well as in equity for breach of a fiduciary obligation brought by a daughter against her father for acts of incest committed by the father while the daughter was a young child. The foundation of the equitable claim was discussed by La Forest J., on behalf of the Court, at pages 59-69.[72]*ftnote[72] *Ibid*. At page 62[73]*ftnote[73] *Ibid*. he referred to a series of the Court's own decisions over the past decade as establishing a "fiduciary principle" which could be "applied through a well-defined method." He based himself on the broad principles referred to by Dickson J. in *Guerin*, *supra*, at page 384, on the approach taken by Wilson J., dissenting, in *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99 and on the further discussion in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574.

In *Frame*, *supra*, Wilson J. stated, at page 136:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

This approach was expressly approved of in *Lac Minerals*, *supra*, by Sopinka J. at page 599 and by La Forest J. at page 646. It was also noted by McLachlin J. in *Canson Enterprises Ltd. v. Boughton & Co.*, 1991 CanLII 52 (SCC), [1991] 3 S.C.R. 534, at pages 543-544. In *Lac Minerals*, Sopinka J. underlined the importance of vulnerability among the three characteristics which had been identified by Wilson J. in *Frame*, when he stated at pages 599-600:

The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in *Hospital Products Ltd. v. United States Surgical Corp.*, *supra*, at p. 488, that:

There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other . . . .

The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin*, *supra*, at p. 384 that:

" . . . the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

To the same effect is the discussion by Professor Ong in "Fiduciaries: Identification and Remedies" (1986), 8 *U. of Tasm. L. Rev.* 311, in which he suggests that the element which gives rise to and is common to all fiduciary relationships is the "implicit dependency by the beneficiary on the fiduciary". This condition of dependency moves equity to subject the fiduciary to its strict standards of conduct.

See also *Hodgkinson v. Simms*, 1992 CanLII 1083 (BC CA), [1992] 4 W.W.R. 330 (B.C.C.A.).

In *M.(K.)*, *supra*, La Forest J. suggested at page 63,[74]*ftnote[74] *Ibid*. "that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary." He then pointed to the refinement of the process for identifying fiduciary relationships that he had suggested in *Lac Minerals*, *supra*, where he had identified three different senses of the term "fiduciary", the first being the one used by Wilson J. in *Frame*. At page 65,[75]*ftnote[75] *Ibid*. he recited a passage from his judgment in *Lac Minerals* [at page 646] as to the first of these senses in consideration of what had been stated in that connection by Wilson J.:

There the issue was whether a certain class of relationship, custodial and non-custodial parents, was a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way.

In my view, these cases support the existence of a fiduciary relationship between the Crown and the Indians previous to the 1945 surrender, just as one has been recognized once a surrender has taken place. The Indians' interest in I.R. 172 could not be alienated except by surrender to the Crown which had power and responsibility under the *Indian Act* to manage and control these lands and to protect the Indians in the possession and use thereof.[76]*ftnote[76] S. 4 of the *Indian Act*, R.S.C. 1927, c. 98 provided that:

4. The Minister of the Interior, or the head of any other department appointed for that purpose by the Governor in Council, shall be the Superintendent General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians in Canada.

In *Guerin*, *supra*, at p. 349, Wilson J. noted that s. 18(1) of the *Indian Act*, R.S.C. 1952, c. 149 itself constituted "the acknowledgement . . . that the Crown has a responsibility to protect" the interest of Indian bands in their reserves. These words foreshadowed those of La Forest J. in *Mitchell*, *supra*, at p. 130. Because of its position, the Crown was able to initiate the formal surrender procedure at a time when it was under pressure to make I.R. 172 available for white settlement. The Indians were essentially trappers who had little or no formal education, lacked sophistication in matters of business and were, in my view, most dependent on the Crown for advice in the management of their assets the chief of which was the interest they held in I.R. 172. They were thus in a position of considerable vulnerability *vis-à-vis* the Crown, in my view.

Assuming that a fiduciary relationship did exist previous to the surrender of I.R. 172, and I am inclined to the view that one did, there remains the question whether the Crown breached an obligation imposed by that relationship. In *M.(K.)*, *supra*, La Forest J. discussed the nature of that obligation. At page 65[77]*ftnote[77] *Supra*, footnote 71. he quoted the following statement of his own in *Lac Minerals* [at pages 646-647]:

The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.

He then went on to add in *M.(K.)*, at pages 65-66:[78]*ftnote[78] *Ibid*.

In *Lac Minerals* I stressed the point, which also emerges from *Frame v. Smith*, that the substance of the fiduciary

obligation in any given case is not derived from some immutable list of duties attached to a category of relationships. In other words, the duty is not determined by analogy with the "established" heads of fiduciary duty. Rather, the nature of the obligation will vary depending on the factual context of the relationship in which it arises. Recently, I had occasion to return to this point in the context of a doctor-patient relationship in *McInerney v. MacDonald*, 1992 CanLII 57 (SCC), [1992] 2 S.C.R. 138. I there stated, at p. 149:

In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in *Canson Enterprises Ltd. v. Boughton & Co.*, 1991 CanLII 52 (SCC), [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others.

In the present case, the Trial Judge, while unwilling to view the Crown as a fiduciary previous to the surrender, described the degree of prudence and care to which a fiduciary is subject in dealing with the subject-matter of his or her duty, when he stated, at page 48:

The test to be applied is an objective one: good faith and a clear conscience will not suffice. It is similar to a trust in another respect: where a trustee is in any way interested in the subject-matter of the trust, there rests upon him a special onus of establishing that all of the rights and interests both present and future of the beneficiary are protected and are given full and absolute priority and that the subject-matter is dealt with for the latter's benefit and to the exclusion of the trustee's interest to the extent that there might be a conflict. A similar onus rests on the Crown in the case at bar regarding the equitable obligation which it owed the plaintiffs.[79]*ftnote[79] Reasons for judgment, Appeal Book, Vol. 2, at p. 112.

If, as I have stated, a fiduciary relationship existed between the Crown and the Indians previous to the surrender of I.R. 172, I am of the view that this relationship was capable of imposing an obligation on the Crown. The obligation, it seems, consisted of a duty to advise the Indians whether it was in their best interests to surrender I.R. 172 for sale or lease, having regard to the fact that the Crown itself sought the surrender of the reserve so as to make the lands available for the settlement of returning war veterans. It would seem strange that the Crown could allow the Indians to surrender their interest in the primary asset if it considered or ought to have considered that to do so would not be in their long-term interests but would be detrimental to those interests. In my view, the Crown as a fiduciary was required to put the interests of the Indians ahead of its own interests in the surrendering of the reserve lands.

Was this duty breached? I find that there is a substantial barrier to concluding that it was. I have already recited the findings of the Trial Judge at pages 66-67. He found on the evidence that Mr. Grew, the Crown representative at the surrender meeting, had "fully explained to the Indians the consequences of a surrender", that the Indians had understood that "by the surrender they were giving up forever all rights to I.R. 172" and that they had given their "free and informed consent to the surrender". These findings, the first two of which are not challenged, should not be disturbed. The appellants, although required to do so, were not able to point to any "palpable or overriding error" on the part of the Trial Judge in his assessment of the facts he so found: *Stein et al. v. The Ship "Kathy K" et al.*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802 and subsequent decisions.[80]*ftnote[80] See e.g. *Lewis v. Todd and McClure*, 1980 CanLII 20 (SCC), [1980] 2 S.C.R. 694; *Beaudoin-Daigneault v. Richard*, 1984 CanLII 15 (SCC), [1984] 1 S.C.R. 2; *Klimashewski v. Klimashewski Estate*, 1987 CanLII 13 (SCC), [1987] 2 S.C.R. 754; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, 1987 CanLII 68 (SCC), [1987] 1 S.C.R. 1247; *Fletcher v. Manitoba Public Insurance Co.*, 1990 CanLII 59 (SCC), [1990] 3 S.C.R. 191; *Sunrise Co. v. Lake Winnipeg (The)*, 1991 CanLII 107 (SCC), [1991] 1 S.C.R. 3; *Ontario (Attorney General) v. Bear Island Foundation*, 1991 CanLII 75 (SCC), [1991] 2 S.C.R. 570; *Lapointe v. Hôpital Le Gardeur*, 1992 CanLII 119 (SCC), [1992] 1 S.C.R. 351. On the basis of the Trial Judge's findings, I am obliged to conclude that the Band was made aware of the consequences of surrendering I.R. 172 before they gave their consent and that they approved the surrender notwithstanding that advice. That being so, I am of the view that no breach of the

fiduciary obligation has been shown to have occurred in this regard.

The appellants advance the argument that the Crown breached a specific fiduciary obligation by failing to comply with a statutory requirement for surrendering reserve lands. The formalities to be observed are set forth in section 51 of the *Indian Act* and particularly in subsection 51(3). Section 51 reads:

51. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

An appreciation of the appellants' submission requires a brief recitation of the facts upon which it is based. On September 22, 1945, after the surrender meeting had ended, Mr. Grew attended before one J. S. Young, a nearby Justice of the Peace. At that time, Mr. Young signed a document as if it had been sworn to by Mr. Grew, Chief Succona and Joe Apsassin, even though none of the three had subscribed his name. This document and the evidence contained in Mr. Grew's reporting letter of September 24, 1945 to the Indian Affairs Branch was considered by the Trial Judge. It was his view that subection 51(3) did not specifically require that the affidavit be submitted, but only that assent to the surrender "shall be certified on oath" and that this had been done by Mr. Young. It was also his view that subsection 51(3) was "sufficiently compiled with" and in any event, its provisions were merely directory and not mandatory. With respect, I am unable to view the document signed by Mr. Young as satisfying the precise requirements of subsection 51(3). The assent of the Band at the surrender meeting was to be established by the oath of Mr. Grew, who was the official authorized to attend the meeting by the Superintendent General, and "by some of the chiefs or principal men present thereat and entitled to vote". The statement of Mr. Young that Mr. Grew, Chief Succona and Mr. Apsassin had appeared before him and had sworn to the statements attributed to them in that document falls short of satisfying the requirements of subsection 51(3). In short, none of these three persons "certified on oath" as they were required to do.

There remains the question of whether this formality had to be complied with strictly in order for the surrender to be valid. The statute provides that the surrender "shall" be certified on oath. While the word "shall" in a statute is presumed to be imperative, a statute may itself contain some indication that a failure to comply with the duty which that word imposes will not nullify the action otherwise authorized. In such a case the provisions are viewed as merely directory. In the present case, it has been suggested that the provisions of section 51 are designed for the protection of the Indians and that "the Crown was duty bound to proceed according to that section": *Lower Kootenay Indian Band v. Canada* reflex, (1991), 42 F.T.R. 241 (F.C.T.D.), at page 284.

The Trial Judge's view [at page 70] that the word "shall" in subsection 51(3) was directory is based on the doctrine enunciated by the Privy Council in *Montreal Street Railway Company v. Normandin*, [1917] A.C. 170, at pages 174-175:

It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising there. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed. p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

He further noted that *Montreal Street Railway* was followed by the Trial Division in *Melville (City of) v. Attorney General of Canada*, [1982] 2 F.C. 3 and by this Court in *Jasper Park Chamber of Commerce (The) v. Governor General in Council*, [1983] 2 F.C. 98. At page 71, the Trial Judge concluded:

Examination of the object of the statute reveals that a decision which would render the surrender null and void solely because of non-compliance with the formalities of subsection 51(3) would certainly not promote the main object of the legislation where all substantial requirements have been fulfilled; it might well cause serious inconveniences or injustice to persons having no control over those entrusted with the duty of furnishing evidence of compliance in proper form. In the subsection, unlike subsection (1), where it is provided that unless it is complied with no surrender shall be valid or binding, there is no provision for any consequences of non-observance. I therefore conclude that the provisions of subsection 51(3) are merely directory and not mandatory.[81]*ftnote[81] Reasons for judgment, Appeal Book, Vol. 2, at pp. 178-179.

The effect of non-compliance with a statute's mandatory provisions has been the subject of a number of subsequent decisions.[82]*ftnote[82] See: *Reference Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *Regional Municipality of Ottawa-Carleton v. Canada Employment and Immigration Commission* (1986), 86 CLLC 14,053 (F.C.A.); *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)* (Court File A-294-92, judgment rendered October 23, 1992); *McCain Foods Ltd. v. Canada (National Transportation Agency)*, 1992 CanLII 2416 (FCA), [1993] 1 F.C. 583 (C.A.).

In challenging the Trial Judge's view, the appellants rely on *Ramia (Edward), Ltd. v. African Woods, Ltd.*, [1960] 1 All E.R. 627 (P.C.). That case was concerned with the failure to comply with a statutory formality in the acquisition of West African tribal lands that a "concession" by native chiefs "shall be executed by the interested parties in the presence of the Chief Regional Officer or a government agent" who "shall certify to the due execution of such concession by such party". The Privy Council, at page 630, adopted the following views of Sir Henley Coussey in the West African Court of Appeal:

. . . the affirmative words are absolute, explicit and peremptory and when you find in an ordinance only one particular mode of effecting the object, one train of formalities to be observed, the regulative provisions . . . prescribe[d] are essential and imperative.

It is argued, similarly, that subsection 51(3) lays down "one train of formalities" for effecting the object of section 51, and that the failure of the Crown to comply strictly with each of these formalities resulted in a breach of its fiduciary obligation and the invalidity of the 1945 surrender.

It is my view that this issue is to be decided in the statutory context. I agree with the Trial Judge that in the circumstances strict compliance with the particular formality in subsection 51(3) was not essential to the validity of the surrender. The opening words of section 51 provide that "no release or surrender . . . shall be valid or binding" unless assented to by a majority of the male members of a band of the stipulated age at a meeting held in the presence of the Crown's representative. It thus appears that the main object of section 51 was to ensure that no

surrender could be effected without the prior assent of the concerned Indians. Subsection 51(2), respecting entitlement to vote, is related to it and must also be satisfied for an assent to be effective. Subsection 51(3) does not itself address the validity of the surrender, and appears to provide for a formality to be fulfilled subsequent to the assent and as a means of showing that the assent was duly given. Subsection 51(4), which provides for submission of the surrender documents to the Governor in Council for acceptance or refusal of the surrender "[w]hen such assent has been so certified", may suggest that no acceptance is possible unless the subsection 51(3) certificate is among the surrender documents. As I have stated, the main object of section 51 is set forth in its opening words which prohibits the surrender of reserve lands unless the surrender is first assented to in the manner therein specified. I respectfully agree with the Trial Judge that the formality in question, although stated to be imperative, should be taken as directory. Other evidence established to the satisfaction of the Trial Judge that the required assent had been given at the surrender meeting in the presence of the Crown's representative. I therefore conclude that the Crown did not breach a fiduciary obligation by failing to observe the particular formality under the *Indian Act*.

Subsequent to the 1945 surrender

The appellants submit that, assuming the 1945 surrender to be valid, there was a post-surrender fiduciary obligation binding on the Crown according to the terms of the surrender itself. Those terms, as we have seen, obliged the Crown to hold the surrendered lands in trust for "sale or lease". It is argued that in this form of surrender, the Band's interest in the lands was not completely extinguished as it would have been if the surrender had been absolute: *Smith v. The Queen*, 1983 CanLII 134 (SCC), [1983] 1 S.C.R. 554. The surrender of reserve lands "in trust to lease the same" has been held not to extinguish the Indians' reversionary interest: *Surrey (Corpn.) v. Peace Arch Enterprises Ltd. and Surfside Recreations Ltd.* reflex, (1970), 74 W.W.R. 380 (B.C.C.A.). This legal position, according to the appellants, gives rise to the following submissions.

The position of the appellants is that in the post-surrender period the Crown as a fiduciary was duty bound to consider whether a lease of I.R. 172 rather than an outright sale was in the Band's best interests. In this respect, I am of the view that even though the surrender instrument directed that the lands be held by the Crown in trust for "sale or lease", the Crown could not ignore the wishes of the Band itself as expressed at the surrender meeting. It was the Band's desire that after surrender the lands should be sold and the proceeds used to acquire alternative reserve sites, to pay for the support of aged and destitute members and to distribute a stipulated cash amount to each family. These being the terms of the disposition approved by the Band at the surrender meeting, I am unable to say that the Crown breached a fiduciary obligation by selling the lands rather than leasing them.

The appellants argue that the Crown failed to discharge fiduciary obligations subsequent to the surrender of I.R. 172 by allowing the mineral rights in the reserve lands to be transferred to the Director of VLA on March 30, 1948 and also in transferring those rights for no additional consideration in terms of the purchase price paid. These arguments assume that the mineral rights passed to the Crown upon the 1945 surrender. Before addressing these issues, I should deal first with the preliminary argument that the mineral rights did not pass to the Crown. The existence of minerals in I.R. 172 was apparently not known in 1945 and, as we shall see, the Trial Judge found on the evidence that the respondent could not reasonably have anticipated that any potential mineral rights would have had real value in 1948 or previously. This evidence included that of the expert witnesses adduced by both sides and directed towards showing the potential existence of minerals and the value of mineral rights. It was not until 1976 that oil was found in a unique trap between rock layers on I.R. 172.

The appellants assert that the mineral rights in I.R. 172 did not pass under the 1945 surrender because they had been already surrendered "in trust for lease" in the 1940 surrender. This argument is based firstly on the language of section 54 of the *Indian Act* and on the definitions of "reserve" and "Indian lands" contained in paragraphs 2(*j*) and 2(*e*) respectively. These sections read:

2. In this Act, unless the context otherwise requires,

. . .

(*e*) "Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown;

. . .

(*j*) "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

. . .

54. All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

The appellants advance the following as the true interpretation of these provisions: upon surrender a reserve or portion thereof is governed by section 54; the surrendered lands are "Indian lands" as distinct from being a "reserve" or a portion of a reserve; as the *Indian Act* contains no provisions for the surrender of "Indian lands", once such lands are surrendered they cannot be later "surrendered". The following views of Taschereau J. in *St. Ann's Fishing Club v. The King*, 1950 CanLII 28 (SCC), [1950] S.C.R. 211, at page 215 are also relied upon:

The effect of a surrender is to make a reserve or part of a reserve, "Indian Lands", defined in section 2 of the *Indian Act*, para. (*k*) as "any reserve or portion of a reserve which has been surrendered to the Crown".

It should be noted that in expressing these views His Lordship was addressing the application of the Act to the lease of an island which had been part of a reserve until it was surrendered, and did not there suggest that minerals contained on or in a reserve are to be considered "Indian lands". In the case at bar, the Trial Judge rejected the appellants' interpretation of section 54 and paragraphs 2(*j*) and 2(*e*) when he stated, at page 56:

Furthermore, in the Act, a reserve is contemplated as being an extent or stretch of territory which is defined therein as a "tract or tracts of land set apart . . . and includes . . . the trees, wood . . . minerals, metals and other valuables". That simply means that the land of the reserve includes these objects and does not mean that a right or interest such as a leasehold interest in any of these objects constitutes a reserve.[83]*ftnote[83] Reasons for judgment, Appeal Book, Vol. 2, at p. 139.

I do not find this interpretation to be unreasonable, given that the defined term "reserve" means any tract or tracts of land set apart and that this definition is extended to include the various things specifically mentioned, the same being of the land, as if to emphasize or to clarify that they are encompassed by the opening words of the definition. However, if I am wrong in this view, there is I believe a further reason for concluding that the mineral rights were effectively included in the 1945 surrender.

The appellants assert that the mineral rights in I.R. 172 were not capable of being surrendered to the Crown for "sale or lease" under the 1945 surrender because those rights had been surrendered to the Crown for "lease" under the 1940 surrender. In order to effect a surrender of these same rights, they say, there would have had to have been a vote by the Band to cancel the 1940 surrender and an acceptance of that cancellation by the Governor in Council. Because these steps were not taken prior to the 1945 surrender, the mineral rights were not capable of being included in that surrender and therefore did not pass to the Crown by virtue of that surrender. That the Act makes no provision for the cancellation of a prior surrender is of no consequence given that the Crown had an administrative mechanism[84]*ftnote[84] See evidence of Joe Leask, transcript, Vol. 21, at p. 3026, lines 9-27, p.

3037, line 22 to p. 3041, line 9. analogous to one used for surrender whereby a surrender could be cancelled and the cancellation accepted by the Governor in Council. Such a procedure is said to be evidence of the proper interpretation of the Act.

The difficulty I find with this argument is that it appears to run counter to the apparent intention of the Indians as indicated by the consent they were found at trial to have given to the surrender of all rights in the reserve and to the words of grant contained in the 1945 surrender. The Trial Judge found on the evidence that by the 1945 surrender "the Indians were giving up forever all rights to I.R. 172". The 1945 surrender instrument itself appears to complement this finding for, as was noted above, by the grant clause the Band did "release, remise, surrender, quit claim and yield up . . . forever . . . that certain parcel or tract of land and premises . . . composed of St. John Indian Reserve No. 172". (Emphasis added.) The lands which were the subject of the surrender were thus identified as the "Reserve", and it would seem reasonable that this word was used in the statutory sense set forth in paragraph 2(*j*) and thus included "minerals, metals and other valuables thereon or therein" rather than the surface rights alone. I would add that nothing in the record suggests that in 1945 the Band wished mineral rights to continue to be subject to the terms of the 1940 surrender. Nor do I find therein anything to suggest that there existed any outstanding third party rights which derived from the 1940 surrender as, for example, licences or permits to explore for minerals in or on the reserve. It would seem to me that the overall effect of the 1945 transaction was essentially the same as might have been achieved by first cancelling the 1940 surrender with consent of the Indians followed by the acceptance of that cancellation by the Governor in Council. According to the Trial Judge's finding the Indians agreed to the release of their rights in I.R. 172; their consent was reflected in the language of the formal surrender instrument and the surrender was afterwards accepted by the Governor in Council.

A further argument advanced by the appellants is that the Trial Judge's conclusion that the mineral rights passed under the 1945 surrender goes against a settled common law principle to the effect that once subsurface rights in land are severed they cannot be included in a subsequent assignment of the land. In *Berkheiser v. Berkheiser and Glaister*, 1957 CanLII 56 (SCC), [1957] S.C.R. 387, Kellock J. stated at page 395:

It is quite competent for the owner of land so to convey mineral lying in or under the land that thereafter two separate estates in fee exist, the one in the mineral conveyed and the other in that which is retained.

In *Lonsdale (Earl of) v. Lowther*, [1900] 2 Ch. 687, Farwell J., stated at page 697:

If a man has once effectually appointed the property he cannot afterwards grant the same property, either by the same or any subsequent deed, because there is nothing on which the grant can operate.

I am not persuaded that these cases are applicable in the present circumstances. The 1945 surrender, as I have suggested, speaks in general terms to the effect that the bands surrendered all of the lands and premises composing the reserve to His Majesty forever. I have already indicated my agreement with the Trial Judge, for the reasons he gave, that in 1945 the Band intended to release and did release the whole of its interest in I.R. 172 including the reversionary interest left over from the 1940 surrender.

I pass now to consider whether the Crown breached a fiduciary obligation in its dealing with the mineral rights. The appellants contend that the Crown did so in two distinct ways. They say that the Crown was required to reserve those rights in the March 30, 1948 letters patent when I.R. 172 was conveyed to the Director of VLA and, in any event, that the Crown ought to have obtained monetary consideration in respect of the mineral rights that were included in that conveyance. They point to evidence which indicates that in 1949 the Director of Indian Affairs, Mr. Allan, was initially confused with respect to whether the mineral rights in I.R. 172 had been retained when the reserve lands were conveyed to the Director of VLA. There is also some speculation in the record that the transfer of these mineral rights by that conveyance occurred through inadvertence rather than by design.[85]*ftnote[85] Exhibit 848, Appeal Book, Appendix 1, Vol. 8, at p. 1043.

The appellants submit, as to the first point, that it was common at the time of the March 30, 1948 conveyance for governments to retain mineral rights, and for freehold property holders in Western Canada to do likewise. The second assertion in my view is not made out on the evidence. As the validity of the first assertion is disputed, the Court granted the parties the opportunity of filing supplementary submissions subsequent to the hearing. The submissions filed are based almost exclusively on the effect of various pieces of provincial and federal legislation. In these submissions, the appellants rely on the British Columbia *Lands Act*, R.S.B.C. 1924, c. 131 which remained in force until 1951. Sections 119 and 120 of that Act read:

119. No Crown grant issued for land the title to which has been acquired after the twenty-seventh day of February, 1899, shall convey any right to coal or petroleum which may be found on such land, and all Crown grants issued for such land shall contain an express reservation to the Crown of all coal and petroleum found therein.

120. No Crown grant issued for land the title to which has been acquired after the first day of March, 1913, shall convey any right to the natural gas which may be found in or under such land, and all Crown grants issued for such land shall contain an express reservation to the Crown of all natural gas found therein, and shall be in Form No. 11 in the Schedule.

The federal legislation which the appellants rely upon is the *Dominion Lands Act*, R.S.C. 1927, c. 113. Section 8 of that Act reads:

8. Lands mentioned and described in section thirty-four of this Act, or which are withdrawn from the operation of this Act, or that have been disposed of, shall not be open to entry or available for a homestead, but other surveyed lands which are suitable for agriculture and are unoccupied shall be open for entry: Provided that no entry for a homestead shall convey any right to salt, coal, petroleum, natural gas, gold, silver, copper, iron or other minerals within or under the land covered by the entry, or any exclusive or other property or interest in, or any exclusive right or privilege with respect to any lake, river, spring, stream or other body of water within or bordering on or passing through the land covered by the entry.

That Act applied to "Dominion lands" situated in several provinces and territories and in the Peace River district of British Columbia.

The respondent's supplementary submission is that section 8 of the *Dominion Lands Act* has limited relevance. It is directed to entry upon Dominion lands by homesteaders and provides that entry alone did not convey mineral rights. It had no application to reserve lands where, by virtue of paragraph 74(*a*) of the Act, the Governor in Council had withdrawn such lands from its operation. The order in council of April 11, 1916, setting aside I.R. 172, did expressly withdraw the lands of that reserve "from the operation of the Dominion Lands Act". The respondent compares the treatment of grantees under *The Soldier Settlement Act, 1919*, S.C. 1919, c. 71, with those under *The Veterans' Land Act, 1942*. Section 57 of the former Act reserved "all mines and minerals" while the latter Act contained no such similar provision. Indeed, paragraph 2(*b*) of the 1942 Act defined "land" in such a way so as to include "granted or ungranted Dominion . . . lands . . . and all rights or interests in, or over, or arising out of" such lands. The respondent also relies on section 3 of the *Public Lands Grants Act*, R.S.C. 1927, c. 114 as showing that a conveyance of "public lands" operated as a conveyance in fee simple or equivalent estate. However, as that same section applied only to grants of public lands in the provinces and territories therein mentioned and as these did not include British Columbia, I am unable to see that this legislation has any direct relevance.

In my view, these various provincial and federal legislative provisions present a mixed picture as to the practice of governments with respect to the reservation of mineral rights in Crown lands. The British Columbia *Land Act* which was in force in 1948 [R.S.B.C. 1948, c. 175] did provide for the reservation of such rights in Crown grants. At the federal level, the effect of section 8 of the *Dominion Lands Act* was to reserve mineral rights in Crown lands whenever homesteaders entered upon such lands, but that Act had no application to I.R. 172 because it was

withdrawn from its operation in 1916. *The Veterans' Land Act, 1942*, on the other hand, did not provide for the reservation of mineral rights. No federal legislation was drawn to the Court's attention respecting the retention of mineral rights in reserve lands either before or after the surrender of same. As I understand the evidence, the federal Crown's policy at the time was to retain mineral rights in such lands only if minerals were known or likely to exist and to be of value. That evidence was before the Trial Judge and presumably was considered by him in making the findings which I have already recited. It seems to me that the application of that policy in the circumstances did not result in a breach of any fiduciary obligation.

The Trial Judge dealt also with the potential value of the mineral rights which is the basis of the appellants' second point. He considered the evidence of D. W. Axford, an expert witness called by the respondent, who along with the appellants' expert witness, testified as to the possible existence of minerals in I.R. 172 at the relevant time and to the potential value of mineral rights. He was evidently most impressed with Mr. Axford's testimony for, at page 184 F.T.R., he found as follows:

The witness was extensively and thoroughly cross-examined and I fully accept his conclusions regarding the economic value of I.R. 172, namely, that the mineral rights either had no value whatsoever or were of a minimal or very very low value and that this would have been perceived by anyone at the time. No individuals or groups were interested and hydrocarbon minerals rights elsewhere in Canada were of very little value. Even in Alberta, minerals were offered with a property without any consideration for the mineral rights. He gave several striking examples of this and testified that it applied generally even until 1960. He described the mineral rights under I.R. 172 even subsequently to 1960 as of modest value, until the actual discovery of oil in the hydrographic trap.[86]*ftnote[86] Reasons for judgment, Appeal Book, Vol. 2, at p. 125.

At page 49 F.C. he made the following further finding:

I find that, taking into account the fiduciary relationship then existing between Her Majesty the Queen and the plaintiffs, none of her officers, servants or agents, exercising due care, consideration and attention in the discharge of those fiduciary duties, could reasonably be expected to have anticipated at any time during 1948 or previously that there would be any real value attached to potential mineral rights under I.R. 172 or that there would be any reasonably foreseeable advantage in retaining them.[87]*ftnote[87] *Ibid*., at p. 126.

There is here a strong finding to support the respondent's position that potential mineral rights had minimal value. Accordingly, I am not persuaded that the Crown breached a fiduciary obligation in this respect.

The appellants submit that the Crown cannot be so easily relieved of fiduciary obligations. The finding they say is one thing; the legal results flowing from that finding is quite another. As a fiduciary, the Crown assumed trust-like obligations which imposed a duty to deal with the surrendered lands in the way that a prudent person would do in managing his or her own affairs: *Fales et al. v. Canada Permanent Trust Co*., 1976 CanLII 14 (SCC), [1977] 2 S.C.R. 302. They argue that it is immaterial that the Crown could not have anticipated the presence of valuable minerals under I.R. 172 by reasonable foresight because that standard of negligence is not applicable to a fiduciary obligation. In *Canson Enterprises*, *supra*, McLachlin J., concurring, pointed out at pages 552-553:

. . . it does not lie in the mouth of a fiduciary who has assumed the special responsibility of trust to say the loss could not reasonably have been foreseen. This is sound policy. In negligence we wish to protect reasonable freedom of action of the defendant, and the reasonableness of his or her action may be judged by what consequences can be foreseen. In the case of a breach of fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen.

That case, it appears, was concerned solely with the extent to which a solicitor was liable to compensate his client for breach of a fiduciary obligation by failing to disclose a material fact at the time the client purchased a parcel of

land. The breach of duty was not itself in issue before the Supreme Court of Canada.

The appellants seek to demonstrate that even after the transfer of I.R. 172 to the Director of VLA on March 30, 1948, the Crown continued to be subject to a fiduciary obligation because the lands in question remained vested in the Crown. The argument here is that the Crown dealt with itself by being at the same time both the vendor and the purchaser of I.R. 172. The appellants say that the transfer involved only a change of management and control which was akin to a transfer from one department or branch of government to another as the Crown is indivisible. As it was put by Newcombe J. in *Reference re Saskatchewan Natural Resources*, [1931] S.C.R. 263, at page 275:

There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

See also *Attorney-General of Canada v. Higbie*, 1944 CanLII 29 (SCC), [1945] S.C.R. 385. Under these circumstances, the fiduciary obligation was not extinguished by the conveyance. The appellants also say that the 1948 conveyance did not affect the fiduciary relationship between the Crown and the Indians because it was made to an agent of His Majesty. Attention is here directed to subsection 5(1) of *The Veterans' Land Act, 1942* which reads:

5. (1) For the purposes of acquiring, holding, conveying and transferring and of agreeing to convey, acquire or transfer any of the property which he is by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only, the Director shall be a corporation sole and he and his successors shall have perpetual succession, and as such the agent of His Majesty in the right of Canada.

The appellants thus allege that the Director of VLA, although constituted as a corporation sole under the Act, is rendered an "agent" of the Crown by this subsection. They also submit that, by virtue of subsection 5(2), conveyances by the Director of VLA were to be treated as Crown grants because they constituted "new titles to the land conveyed" and had the same and full effect "as grants from the Crown of previously ungranted Crown lands." Finally, they argue that as subsection 5(6) of the Act immunes the Crown from local taxation of lands held by the Director of VLA, this again indicates that the Director is to be treated as an emanation of the Crown and that, although he is constituted as a "corporation sole" pursuant to subsection 5(1) of the Act, he is by subsection 3(1) made "responsible only to the Minister" who had overall responsibility for administering the Act.

The Trial Judge rejected all of these contentions. In the course of doing so, he stated at pages 77-78:

The Veterans' Land Act, 1942 (R.S.C. 1970, c. V-4) provides that the Director is a corporation sole with perpetual succession, having power to hold and transfer property which he is "by this Act authorized to acquire, hold, convey, transfer, agree to convey, or agree to transfer, but for such purposes only" [underlining added] (subsection 5(1)), and that "All property acquired for any of the purposes of the Act shall vest in the Director as such corporation sole" (subsection 5(4), formerly subsection 5(3)). The Director obtains land by grant in fee simple from the Crown as in the case of any other person or corporation.[88]*ftnote[88] Reasons for judgment, Appeal Book, Vol. 2, at pp. 187-188.

I respectfully agree that after I.R. 172 vested in the Director of VLA it was no longer subject to the Crown's fiduciary obligation in relation to the under valuation of the lands and the consequent diminution of the price paid. The narrow issue is whether the Director was saddled with the burden of the Crown's fiduciary obligation given the statutory framework under which he operated in acquiring, holding and conveying land as a corporation sole. This is not a case where His Majesty conveyed land to himself. Nor is it a case of a mere interdepartmental transfer. There was here an acquisition by the Director pursuant to negotiations, and the vesting of the title in the Director as a corporation sole without any apparent notice of a fiduciary obligation. It is true, as subsection 5(1) makes clear, that in acquiring, holding and conveying land the Director of VLA, as a corporation sole, acted as an

agent of His Majesty. However, he did so only in respect of the things he was expressly authorized to do under the subsection. I do not read the subsection as clothing him with the capacity or authority of acting as an agent of His Majesty for any other purpose. While the conveyances to the war veterans and to others, as subsection 5(6) provides, carried the effect of grants from the Crown, they were not Crown grants *per se*. I am unable to agree that the Crown's fiduciary obligation continued after the time I.R. 172 was conveyed to the Director of VLA.

The appellants make the alternative submission that any fiduciary obligation on the Crown was transmitted to the Director of VLA because he was aware of the existence of the duty and of its breach. They call in aid of this submission the case of *Fonthill Lbr. Ltd. v. Bk. Montreal*, [1959] O.R. 451 (C.A.), where Schroeder J.A. stated on behalf of the Court, at page 467:

It is well settled that if A holds property in a fiduciary capacity as e.g. as a trustee or an agent, and B takes from A a transfer of the property with knowledge of a breach of duty committed by A in making the transfer, then B holds the property [cad96]under a transmitted fiduciary obligation to account for it', to the *cestui que trust* or principal: *John V. Dodwell & Co.*, [1918] A.C. 563, at p. 569.

I have difficulty in accepting the appellants' argument that the Director of VLA had knowledge of the fiduciary duty merely because, as early as 1942, I.R. 172 was among lands being considered by him for soldier settlement. Obviously, in 1948 he was aware that he was acquiring I.R. 172. I do not find any evidence that the Director had knowledge of the breach of fiduciary duty brought about by the sale at undervalue. The evidence seems clear that the sale price of I.R. 172 was arrived at through a lengthy process of negotiations, and represented a compromise in the eyes of the Director.

The appellants take their submissions one step further. They maintain that any fiduciary obligation resting on the Director of VLA was not finally extinguished until the Director transferred all of his interests in the lands, including mineral rights, to individual war veterans. I understand this submission to have a bearing on the issue of limitation. Between May 1952 and April 1977, the lands comprising I.R. 172 were deeded to individual purchasers. Prior to that period, the lands had been sold under individual agreements for sale, which were entered into between September 1948 and April 1956. Under section 10 of *The Veterans' Land Act, 1942*, a veteran holding or occupying lands sold to him by the Director of VLA was merely a tenant at will "until the Director grants or conveys the land to him" and under section 11, title to the land remained "in the Director until the sale price and other charges . . . are fully paid." The appellants allege that until these latter events occurred, the fee simple in I.R. 172 remained in the Director of VLA. If, contrary to the view I have already expressed, I accepted that the Crown's fiduciary obligation in respect of I.R. 172 was transmitted to the Director of VLA, the Director would have remained subject to that obligation until the fee simple in the lands was finally conveyed to individual grantees.

Before concluding my consideration of whether any fiduciary obligation was breached, I must turn to the cross-appeal. The Trial Judge found that the Crown did breach a fiduciary obligation by agreeing to a purchase price of $70,000 upon the sale of I.R. 172 to the Director of VLA on March 30, 1948, without investigating the possibility of obtaining a better price. It is sufficient here to recite the following passage from the judgment of the Trial Judge. He said, at page 76:

The sufficiency of the sale price is therefore a real issue and not merely a speculative or a theoretical one. The defendant had a duty to convince the Court that it could not reasonably have been expected to obtain a better price. There was no evidence as to what other offers were sought and what efforts were made to obtain a better price elsewhere. Since the onus of establishing that a full and fair price was in fact obtained in March 1948 has not been discharged by the defendant, I find that the latter was guilty of a breach of its fiduciary duty towards the plaintiffs in that regard.[89]*ftnote[89] Reasons for judgment, Appeal Book, Vol. 2, at p. 186.

I am in full agreement with these views.

Limitations

After concluding that the Crown had breached a fiduciary obligation in respect of the purchase price received for the reserve lands when they were conveyed to the Director of VLA, the Trial Judge considered whether the appellants' claim in that regard was statute barred. It was his view that the claim was barred by virtue of subsection 8(1) of the *Limitations Act*, S.B.C. 1975, c. 37 (now [*Limitation Act*] R.S.B.C. 1979, c. 236).

The applicability of provincial limitation and prescription laws to proceedings in the Court is provided for in subsection 38(1) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10. That subsection reads:

38. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in such province, and a proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within and not after six years after the cause of action arose.

In applying the *Limitations Act* of 1975, the Trial Judge relied on this Court's decision in *Kruger*, *supra*. In that case, however, the question was not squarely addressed in argument, although Heald J.A. did consider whether the claim was barred by the operation of the *Statute of Limitations*, R.S.B.C. 1936, c. 159 and by the *Limitations Act* of 1975. Urie J.A., by way of *obiter*, found that the action would have been dismissed in any event because it was barred by the provisions of subsection 3(4) of the latter statute. In the present case, the appellants contend that the statute which was referentially incorporated was not the *Limitations Act* of 1975 but the *Statute of Limitations*, R.S.B.C. 1948, c. 191 as it stood when the *Federal Court Act* came into force. The 1948 statute, it appears, did not include provisions similar to those contained in subsection 8(1) of the 1975 statute. Nor did it deal expressly with a claim for compensation for breach of fiduciary obligation.

The parties rely on several authorities on the question of which of these two British Columbia statutes was referentially incorporated pursuant to subsection 38(1) of the *Federal Court Act*. The case of *Mainwaring v. Mainwaring* (1942), 57 B.C.R. 390 (C.A.), was concerned with whether the phrase "law of England" as used in an order of the Supreme Court of British Columbia's rules of practice had the effect of incorporating that law as it existed at the date the order was passed or from time to time. At pages 395-396, McDonald C.J.B.C. stated:

There has been some argument as to whether "the law of England" means that law as at the date when Order LXXA became effective, or whatever may be the law of England from time to time. Diverse opinions on this point were expressed in *O'Leary* v. *O'Leary*, reflex, [1923] 1 W.W.R. 501; but I cannot feel that there is real doubt. Legislation by reference in this same way has often been the subject of decision, and it has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law incorporated: see e.g., *Reg.* v. *Inhabitants of Merionethshire* (1844), 6 Q.B. 343; *The Queen v. Smith* (1873), L.R. 8 Q.B. 146; *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63, at p. 69; *Kilgour* v. *London Street R.W. Co.* (1914), 30 O.L.R. 603, at p. 606. The effect of such legislation is as though the extrinsic law referred to was written right into the Act: *In re Wood's Estate* (1886), 31 Ch. D. 607, at p. 615.

This approach has been held to apply where a federal statute imposes liability on the federal Crown but leaves the liability to be determined according to provincial laws. Thus, in *Gauthier v. The King* (1918), 56 S.C.R. 176, Fitzpatrick C.J., in commenting on *The King v. Armstrong* (1908), 40 S.C.R. 229, stated at page 180:

Although this was a case under section 16(*c*) of the "Exchequer Court Act" by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the province at the time when the Crown first became liable in respect of such cause of action as is sued on. In other words, the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

In *R. v. Glibbery*, [1963] 1 O.R. 232 (C.A.), a question arose as to whether "the laws of the province" made applicable under a provincial regulation, incorporated the laws in effect as of the date of the regulation or such laws as amended from time to time. In concluding the latter to be the case, McGillivray J.A., for the Court stated, at page 236:

Were the laws thus referred to those of 1952 then compliance with the Regulations would require a motorist entering upon the Dominion property to have a vehicle equipped to satisfy 1952 standards and to have a licence as required in that year. Such an interpretation would defeat the obvious effort of the legislation to impose a conformity of laws in order to avoid the confusion and inconvenience which would otherwise occur. It is obviously intended by these Regulations to make applicable to proceedings under the *Government Property Traffic Act* those portions of the *Highway Traffic Act* as they exist from time to time which do not conflict with the Regulations themselves.

Thus, it appears that the intention of the legislature as discerned from the incorporating statute, may guide the courts in determining the time as of which a law is referentially incorporated.

Two decisions of the Exchequer Court of Canada may suggest that the intention of Parliament in sections 31 and 32 of the *Exchequer Court Act* [R.S.C. 1927, c. 34], the precursors of subsection 38(1), was to incorporate a provincial limitation of actions statute in force from time to time: *Zakrzewski, Peter v. The King*, [1944] Ex.C.R. 163; *Parmenter, Leonard A. v. The Queen*, [1956-1960] Ex.C.R. 66. The relevant provisions of the *Exchequer Court Act* considered in these cases were substantially in the same form as subsection 38(1) of the *Federal Court Act*. The Court also took account of section 8 of the *Petition of Right Act*, R.S.C. 1927, c. 158, which enabled the Crown to raise in its "statement of defence . . . any legal or equitable defences which would have been available if the proceeding had been a suit or action in a competent court between subject and subject". In *Zakrzewski*, at pages 169-170, Thorson J. had this to say:

It seems clear to me that Parliament intended by section 8 of the Petition of Right Act and section 32 of the Exchequer Court Act to put the Crown in the same position when it came to write its statement of defence to a petition of right as a subject would occupy if the proceeding were in a suit or action between subject and subject. I cannot read the two sections as indicating any other intent and must hold that the provincial laws relating to prescription and the limitation of actions, referred to in section 32 of the Exchequer Court Act, of which the Crown may avail itself in a petition of right, are those of the province in which the cause of action arose that are in force in such province at the time the Crown is called upon to make its defence to the petition of right.

The appellants submit that these two decisions were wrongly decided, but I am not so persuaded. They were concerned with the interpretation of substantially the same statutory language as that which is contained in subsection 38(1). I do, however, agree that they may be distinguished on the narrow ground that they were based on the language of either section 31 or 32 of the *Exchequer Court Act* and of section 8 of the *Petition of Right Act*.

On the other hand, subsection 38(1) refers generally to "the laws . . . in force". These are words of fairly broad import. It seems to me that given that the evident purpose of the subsection was to provide which limitations of actions regime would apply to future proceedings in the Court, Parliament intended to incorporate provincial limitations laws in force from time to time. The acceptance of the contrary view would mean freezing the operation of subsection 38(1) to those provincial laws which were "in force" as of the date the *Federal Court Act* took effect. It would also render the subsection potentially obsolete from the outset, and necessitate its ongoing re-enactment to keep abreast of changes in provincial limitations laws. The inclusion of the phrase "from time to time" would no doubt have had the effect which that phrase conveys but that effect is not, in my view, foreclosed by the formulation adopted in subsection 38(1).

The *Limitations Act* of 1975 came into force on July 1, 1975 and, by virtue of subsection 14(2), applies with few exceptions "to actions that arose before" that date. The relevant provisions of this Act [as amended, with minor

changes, by R.S.B.C. 1979, c. 236] are as follows:

3. . . .

(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

. . .

6. (1) The running of time with respect to the limitation period fixed by this Act for an action

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods fixed by this Act for an action

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the *Family Compensation Act*; or

(h) for breach of trust not within subsection (1)

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

. . .

8. (1) Subject to subsection 3 (3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7 or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose, or in the case of an action against a hospital, as defined in section 1 or 25 of the *Hospital Act*, or hospital employee acting in the course of employment as a hospital employee, based on negligence, or against a medical practitioner based on professional negligence or malpractice, after the expiration of 6 years from the date on which the right to do so arose.

. . .

14. (1) Nothing in this Act revives any cause of action that is statute barred on July 1, 1975.

(2) Subject to subsections (1) and (3), this Act applies to actions that arose before July 1, 1975.

(3) If, with respect to a cause of action that arose before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before July 1, 1977, the limitation period governing that cause of action shall be the shorter of

(a) 2 years from July 1, 1975; or

(b) the limitation period that formerly governed the cause of action.

Subsection 3(4), applying as it does to "[a]ny other action", seems to contain the only provision that would include a right of action for breach of fiduciary obligation. As the sale of I.R. 172 was made on March 30, 1948, the appellants' right of action would have been extinguished on the anniversary date six years afterward unless the time for bringing the action was postponed. Paragraph 6(1)(a) of the *Limitations Act* of 1975 provides for the postponement of the limitation period for an action based on "fraud or fraudulent breach of trust to which a trustee was a party or privy". In paragraphs 6(3)(d) and (e), the running of time is postponed in certain circumstances for an action based on "fraud or deceit" or "in which material facts relating to the cause of action have been wilfully concealed".

The appellants submit that the subsection 3(4) limitation period was postponed in this case because, even though the learned Trial Judge found that the breach of statutory duty was "non-fraudulent", the "fraud" and "concealment" includes equitable fraud in the sense discussed by Dickson J. in *Guerin*, *supra*, at page 390:

It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band.

The appellants say that the Crown committed equitable fraud by failing to furnish the appellants with all of the information surrounding the 1945 surrender that they requested in 1948 and that was requested on their behalf in 1970. They submitted that it was not until the new district manager of the Fort St. John Indian Agency was appointed in 1975 that they became aware of their legal rights after which, in 1977, they sought legal advice with the assistance of the district manager. On the basis of this argument, the appellants contend that the action was commenced within time.

The British Columbia Court of Appeal recently applied the provisions of the *Limitations Act* of 1975 in two medical malpractice suits: *Bera v. Marr* 1986 CanLII 173 (BC CA), (1986), 27 D.L.R. (4th) 161; *Wittman (Guardian Ad Litem) v. Emmott* 1991 CanLII 1119 (BC CA), (1991), 77 D.L.R. (4th) 77. In *Wittman*, Wallace J.A., for the Court, in applying subsection 8(1) at page 85, adopted the following views of Esson J.A. in *Bera*, *supra*, at page 186:

There are strong policy reasons for not construing the date as of which the right to bring action arose in a manner different from that which has heretofore been given to them in the *Limitation Act*. To do so would be destructive of a balanced legislative scheme. Sections 6 and 8 are obviously designed to work together with s. 3(1) to provide relief against the injustice which can be created by hidden facts and, on the other hand, to provide reasonable protection against stale claims. All of that is premised upon the "right to do so" meaning the date of accrual of the cause of action without reference to knowledge. If that premise is disturbed, s. 6 will be made more difficult of application and s. 8 will cease to provide any real protection against stale claims.

In the present case, the Trial Judge relied particularly on *Bera*, *supra*, in finding that the appellants' right of action was barred by subsection 8(1), as it arose more than 30 years earlier "notwithstanding . . . a postponement or suspension of the running of time under section 6, 7 . . . ." I too conclude that the appellants' right of action for breach of fiduciary duty was statute barred on March 30, 1978 pursuant to subsection 8(1) of the *Limitations Act* of 1975.

The appellants contend that the limitations provisions should not be given retrospective effect. Unless such effect is required by express provision or by necessary implication, limitations statutes are not to operate retrospectively when to do so would impair or destroy a right which a party to a dispute has already acquired. Thus, a defence available under earlier legislation will not be affected by subsequent legislation: *Martin v. Perrie*, 1986 CanLII 73 (SCC), [1986] 1 S.C.R. 41. See also *Angus v. Sun Alliance Insurance Co.*, 1988 CanLII 5 (SCC), [1988] 2 S.C.R. 256, *per* La Forest J., at page 266. The difficulty I see with the appellants' argument is that subsection 14(2) of the *Limitations Act* does expressly provide that the statute is to have retrospective effect. Consequently, in my view, the claim is statute barred by virtue of subsection 8(1).

Before leaving the subject of limitations, I should say a word as to the possible bearing of *M.(K.)*, *supra*, upon this aspect of the appeal. There, La Forest J. traced in some detail the development by the courts of the doctrines of reasonable discoverability and of fraudulent concealment. The defendant in that case claimed that the tort action was barred by a limitation period specified in paragraph 45(1)(*j*) of the *Limitations Act*, R.S.O. 1980, c. 240. However, there was no limitation period in that statute that included the bringing of an action for breach of fiduciary duty. La Forest J. noted at page 69,[90]*ftnote[90] *Supra*, footnote 71. that the *Limitations Act* of Ontario is one of the few remaining limitations statutes that "is not made applicable to civil actions in general." He gave examples of provisions in other limitations statutes that "capture any common law or equitable claim" and among these was subsection 3(4) of the British Columbia *Limitations Act* of 1975. At page 46,[91]*ftnote[91] *Ibid*. in noting that the British Columbia statute was "very different" from the Ontario statute, he observed that section 6 creates a "statutory reasonable discoverability test". Another point of distinction, as was pointed out by the Trial Judge in the present case at page 84, is that the British Columbia statute also provides in subsection 8(1) "for what is termed an ultimate limitation period."

In summary, it seems to me that the *Limitations Act* of 1975 extends to a claim for breach of a fiduciary obligation and that the six years' limitation period provided for in subsection 3(4) may be greater if the circumstances are such as to be covered by section 6, but in no event can that period extend beyond the 30-year limitation set forth in subsection 8(1).

DISPOSITION

I would dismiss the appeal and the cross-appeal, with costs.