Semiahmoo Indian Band v. Canada (C.A.), 1997 CanLII 6347 (F.C.A.)

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A-802-95 / A-642-95

(T-1878-90)

Chief Bernard Charles and **Councillors Mabel Charles and Leonard Wells, as the elected Councillors of the Semiahmoo Indian Band, suing on the their own behalf and on behalf of all other members of the Semiahmoo Indian Band** (*Appellants*)

v.

Her Majesty the Queen in Right of Canada (*Respondent*)

Indexed as: Semiahmoo Indian Bandv. Canada (C.A.)

Court of Appeal, Isaac C.J., McDonald J.A. and Gray D.J."Vancouver, October 28, 29 and 30, 1996; Ottawa, June 24, 1997.

Native peoples " Lands " Crown obtaining absolute surrender of reserve land as needed to expand customs facilities " Most of surrendered land remaining unused for customs facilities, other public purpose for 40 years " Crown refusing to return land to Band " Inalienability of Indian reserve land except upon surrender to Crown " Crown in breach of fiduciary duty " Constructive trust appropriate remedy as giving back to Band interest in surrendered land.

Restitution " Constructive trusts " Equitable principles " Crown " Indians " Crown obtaining absolute surrender of reserve land as needed for customs facilities expansion " Doing nothing with land for 40 years but denying request for return of land " Crown in breach of fiduciary duty " Constructive trust appropriate remedy as redressing Crown's unjust enrichment, giving Indians beneficial interest in land, appreciation in land value.

Practice " Limitation of actions " Indian Band suing Crown in 1990 for breach of fiduciary duty " British Columbia Limitation Act, s. 8 barring action after 30 years " Act, s. 3(4) prescribing 6-year limitation for actions not listed in Act, applicable herein " Action for Crown's breach of fiduciary duty in 1951 surrender of reserve land for customs facility expansion statute-barred under Act, s. 8(1)(c) " Second breach of fiduciary duty in 1969 not barred under 30-year ultimate limitation period of s. 8(1)(c) " Under s. 6(3)(d), running of time can be postponed in case of fraud, deceit " 6-year limitation period to run from May 23, 1989 when Band informed Crown had no intention of constructing expanded customs facility in foreseeable future.

This was an appeal and a cross-appeal from a Trial Division decision dismissing the appellants' motion for summary judgment. In 1889, the Crown designated some 382 acres of land in British Columbia as reserve land for the use and benefit of the Semiahmoo Indian Band. In 1951, the Crown obtained an absolute surrender of 22.408

acres of the reserve, the purpose advanced for the surrender being that the land would be used to accommodate an expanded customs facility at the Douglas Border Crossing, adjacent to the reserve. The Band was paid $550 per acre. Since then, the respondent has retained title to the surrendered land, but most of it remained unused for customs facilities or for any other public purpose. On many occasions subsequent to the surrender, the Band asked the Crown what it was going to do with the surrendered land and whether some or all of it could be returned to it since it did not appear to be required for a public purpose. The Crown, however, refused to return the land to the Band. In 1969, the latter passed a formal council resolution recommending immediate action to reacquire on its behalf the 22.408 acres of land surrendered in 1951. On every subsequent occasion, officials from National Revenue and Public Works responded to the Band's inquiries by stating either that the surrendered land was needed for foreseeable expansion of the customs facility or that a study was being prepared regarding its development. A 1988 report concluded, based on a market overview and site analysis, that a resort on the site would have considerable positive elements. In July 1990, the appellants filed a statement of claim alleging that the Crown had breached its fiduciary duty to the Band in the 1951 surrender. It was almost two years later that a study commissioned by the Department of Public Works recommended a major redevelopment of the customs facilities on a portion of the surrendered land. The Trial Judge held that while the Crown had breached its fiduciary duty to the Band in consenting to the 1951 surrender, the Indians' claim was statute-barred by operation of the 6-year limitation period and the 30-year ultimate limitation period in the British Columbia *Limitation Act*. The issues on appeal and cross-appeal were as follows: (1) whether the Trial Judge erred in finding that the Crown was in breach of its fiduciary duty to the Band in the 1951 surrender; (2) whether the Trial Judge erred in failing to find a post-surrender breach of fiduciary duty by the Crown (after 1951), and in applying the 30-year ultimate limitation period prescribed in section 8 of the B.C. *Limitation Act* to bar the Band's cause of action; (3) whether the Trial Judge erred in failing to find that new causes of action for breach of fiduciary duty arose in the years after 1951 on the basis of equitable fraud; and (4) whether the Trial Judge erred in applying the 6-year limitation period prescribed in subsection 3(4) of the B.C. *Limitation Act*, and in failing to postpone the running of time in accordance with subsection 6(3) of that Act.

Held, the appeal should be allowed, the cross-appeal should be dismissed.

(1) Successive federal statutes concerning Indians have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown. The surrender requirement is the source of the Crown's fiduciary obligation; its purpose is to interpose the Crown between the Indians and the prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. It follows that the Crown owed a fiduciary duty to the Band to avoid an exploitative bargain in the 1951 surrender. While the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian Band in question in order to define the nature and scope of that obligation. In this case, the Band was particularly vulnerable to the influence of the Crown. The 1951 surrender agreement, assessed in the context of the specific relationship between the parties, was an exploitative bargain. In 1951, and for 40 years thereafter, the Crown did not have any definite plans for the construction of an expanded customs facility which necessitated the taking of 22.408 acres of the Band's reserve land. It should not have consented to the absolute surrender, at least not without first ensuring that it contained appropriate safeguards, such as a reversionary clause, to ensure the least possible impairment of the Band's rights. The Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative or does not advance a legitimate public purpose. As a fiduciary, the Crown must be held to a strict standard of conduct. The Band had to, and did, rely upon the Crown's representations that the land was required for customs facilities. In failing to alleviate the Band's sense of powerlessness in the decision-making process, the Crown failed to protect, to the requisite degree, the interests of the Band. The Trial Judge did not err in concluding that the Crown had breached its fiduciary duty when it consented to the 1951 surrender.

(2) Section 8 of the British Columbia *Limitation Act*, the relevant provincial legislation, bars any action after 30 years. On the other hand, subsection 3(4) prescribes a 6-year limitation for actions not listed in the Act, such as claims for breach of fiduciary duty. As to when time starts to run for the 30-year limitation period, the words "right to do so" in paragraph 8(1)(c) of the Act have been construed to mean the date of accrual of the cause of action without reference to the plaintiff's knowledge of the material facts. In the case at bar, the 30-year ultimate limitation period operates to preclude any cause of action that occurred prior to July 3, 1960. The appellants' action for breach of fiduciary duty by the Crown in the 1951 surrender is therefore statute-barred by operation of paragragh 8(1)(c) of the B.C. Act. However, the Crown was under a post-surrender fiduciary duty to correct the error that it made in the original surrender for as long as it remained in control of the land. While the Crown's post-surrender fiduciary duty can be seen as continuing so long as it retains ownership and control over the land, any

breach of that duty must be located at a specific point in time. It would defeat the very purpose of limitation periods to find that a breach of fiduciary duty continues for so long as the Crown retains the surrendered land. The Crown committed a second breach of its fiduciary duty in 1969 when it refused to reconvey the surrendered land to the Band, despite the formal Band council resolution that such action be taken. By 1969, Public Works did not have any reasonable foreseeable use for the land, as a customs facility or otherwise, but was merely retaining the land for the sake of convenience. An action in respect of that breach of fiduciary duty is not barred by operation of the 30-year ultimate limitation period prescribed in paragraph 8(1)(c) of the *Limitation Act* .

(3) It cannot be said that each time the Crown was less than frank in response to an inquiry by the Band, it committed a new equitable fraud, thereby giving rise to a fresh cause of action. The issue of equitable fraud cannot be considered separately from the issue of the proper application of limitation periods. To construe each interaction between the Crown and the Band as a separate fraud would be to create a disjointed reality. The question as to when the Band should have been in a position to bring an action requires an objective test most appropriately applied in the context of subsection 6(3) of the B.C. *Limitation Act*.

(4) The issue is whether subsection 6(3) of the Act should be applied to postpone the running of the 6-year limitation period until such time as the facts reasonably necessary to constitute a cause of action for the second breach of fiduciary duty in 1969 were known to the Band. Paragraph 6(3)(d) provides that the running of time can be postponed in case of fraud or deceit, fraud meaning not only common law fraud, but also equitable fraud. The latter has been defined as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other". There was no specific evidence to suggest that the Crown's overriding intention was to mislead the Band. However, equitable fraud does not require dishonesty or an improper motive, but only that one party acted unconscionably having regard to its relationship with the other. Crown officials did act unconscionably having regard to that relationship and the Crown's conduct towards the Band, as a fiduciary, constituted equitable fraud. The limitation period in subsection 3(4) of the Act should run from May 23, 1989, the date on which the Department of Indian Affairs and Northern Development sent a letter to the Band and enclosed a copy of the consultants' report prepared in 1988 with respect to the development of the surrendered land. It was upon receipt of this report that a reasonable person in the position of the Band would have launched an action against the Crown for breach of its fiduciary duty. The Trial Judge erred in failing to consider that the 6-year limitation period in subsection 3(4) of the B.C. *Limitation Act* could be postponed by operation of subsection 6(3) of that Act.

The constructive trust was one of the remedies available to the Court to redress the Crown's breaches of its fiduciary duty; it is an equitable remedy for unjust enrichment. The three elements which must be proved to establish a claim for unjust enrichment are met. First, the respondent has been unjustly enriched. Although the latter has not made use of the surrendered land, it has retained title for over 40 years in contravention of its fiduciary duty. It matters not whether the Crown has put the land to any profitable use. Second, the Band has suffered a corresponding deprivation since it lost the opportunity to develop the land itself. Because of the Crown's dilatoriness, the surrendered land has sat idle and undeveloped for a period of 46 years. Although the Band received market value for the surrendered land in 1951, it had to be kept in mind that the Band would not have surrendered the land in the normal course of events. Third, there is no juristic reason for the Crown's enrichment. Under fiduciary law, the fiduciary must disgorge any benefits obtained at the expense of the beneficiary. A restitutionary remedy is required to redress fully the wrongs committed by the Crown. The imposition of a constructive trust is appropriate since it gives back to the Band an interest in the surrendered land. It can both recognize and create a right of property. Because the focus of a restitutionary remedy is to place the Band in the same position as it would have been in had the Crown not committed the second breach of fiduciary duty in 1969, the constructive trust should apply to all 22.408 acres. By providing the Band with a beneficial interest in the surrendered land, the imposition of a constructive trust allows the Band to capture the appreciation in value of the surrendered land as undeveloped land. Another remedy available to the Court is an award of equitable damages. The proper approach to equitable damages for breach of fiduciary duty is restitutionary. Equitable damages should be calculated based on the presumption that the Band would have used the land in the most advantageous way during the period that it was improperly held by the Crown. Thus, the Band can only collect equitable damages, if any, incurred from 1969 to the date of this judgment, such damages to be calculated with a view to providing full restitution to it.

statutes and regulations judicially considered

Federal Court Act, R.S.C., 1985, c. F-7, s. 39(1).

Federal Court Rules, C.R.C., c. 663, RR. 500, 1102(2).

Indian Act, R.S.C. 1927, c. 98, ss. 48, 64.

Indian Act, R.S.C., 1985, c. I-5, ss. 37 (as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 2), 38 (as am. *idem*), 39 (as am. *idem*, s. 3), 40 (as am. *idem*, s. 4), 41 (as am. *idem*).

Indian Act (The), S.C. 1951, c. 29, ss. 37, 38.

Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(2),(4), 6(3),(4),(5), 8 (as am. by S.B.C. 1994, c. 8, s. 2).

cases judicially considered

followed:

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344; (1995), 130 D.L.R. (4th) 193; [1996] 2 C.N.L.R. 25; 190 N.R. 89; *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (S.C.C.), [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.

applied:

Apsassin v. Canada (Department of Indian Affairs and Northern Development), reflex, [1988] 3 F.C. 20; [1988] 1 C.N.L.R. 73; (1987), 14 F.T.R. 161 (T.D.); affd *sub nom. Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1993 CanLII 2932 (F.C.A.), [1993] 3 F.C. 28; (1993), 100 D.L.R. (4th) 504; [1993] 2 C.N.L.R. 20; 151 N.R. 241 (C.A.); *Frame v. Smith*, 1987 CanLII 74 (S.C.C.), [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; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (S.C.C.), [1989] 2 S.C.R. 574; (1989), 69 O.R. (2d) 287; 61 D.L.R. (4th) 14; 26 C.P.R. (3d) 97; *Bera v. Marr* 1986 CanLII 173 (BC C.A.), (1986), 27 D.L.R. (4th) 161; [1986] 3 W.W.R. 442; 1 B.C.L.R. (2d) 1; 37 C.C.L.T. 21 (C.A.); *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 249 (C.A.); *Pettkus v. Becker*, 1980 CanLII 22 (S.C.C.), [1980] 2 S.C.R. 834; (1980), 117 D.L.R. (3d) 257; 8 E.T.R. 143; 34 N.R. 384; 19 R.F.L. (2d) 165.

referred to:

Lower Kootenay Indian Band v. Canada, reflex, [1992] 2 C.N.L.R. 54; (1991), 42 F.T.R. 241 (F.C.T.D.); *Sterritt v. Canada (Min. of Indian Affairs and Nor. Dev.)*, reflex, [1989] 3 C.N.L.R. 198; (1989), 27 F.T.R. 47 (F.C.T.D.); *Roberts v. Canada*, [1995] F.C.J. No. 1202 (T.D.) (QL); *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [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; *Kamloops (City of) v. Nielsen et al.*, 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2; (1984), 10 D.L.R. (4th) 641; [1984] 5 W.W.R. 1; 29 C.C.L.T. 97; *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (S.C.C.), [1986] 2 S.C.R. 147; (1986), 75 N.S.R. (2d) 109; 31 D.L.R. (4th) 481; 186 A.P.R. 109; 34 B.L.R. 187; 37 C.C.L.T. 117; 42 R.P.C. 161; *M. (K.) v. M. (H.)*, 1992 CanLII 31 (S.C.C.), [1992] 3 S.C.R. 6; (1992), 96 D.L.R. (4th) 289; 14 C.C.L.T. (2d) 1; 142 N.R. 321; 57 O.A.C. 321; *Hodgkinson v. Simms*, 1994 CanLII 70 (S.C.C.), [1994] 3 S.C.R. 377; (1994), 117 D.L.R. (4th) 161; [1994] 9 W.W.R. 609; 49 B.C.A.C. 1; 97 B.C.L.R. (2d) 1; 16 B.L.R. (2d) 1; 6 C.C.L.S. 1; 22 C.C.L.T. (2d) 1; 57 C.P.R. (3d) 1; 95 DTC 5135; 5 E.T.R. (2d) 1; 171 N.R. 245; 80 W.A.C. 1; *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.*, 1975 CanLII 6 (S.C.C.), [1976] 1 S.C.R. 267; (1975), 53 D.L.R. (3d) 748; 4 N.R. 1; *Fales et al. v. Canada Permanent Trust Co.*, 1976 CanLII 14 (S.C.C.), [1977] 2 S.C.R. 302; (1976), 70 D.L.R. (3d) 257; [1976] 6 W.W.R. 10; 11 N.R. 48; *Sisters of Charity of Rockingham v. The King* (1922), 67 D.L.R. 209 (P.C.).

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APPEAL and CROSS-APPEAL from a Trial Division decision (reflex, (1995), 128 D.L.R. (4th) 542; [1996] 1 C.N.L.R. 210; 101 F.T.R. 198) dismissing the appellants' motion for summary judgment. Appeal allowed, cross-appeal dismissed.

counsel:

Gary S. Snarch and *Murray Braithwaite* for appellants.

John R. Haig, Q.C., for respondent.

solicitors:

Snarch & Allen, Vancouver, for appellants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

Isaac C.J.: This is an appeal from a judgment of the Trial Division, pronounced on 28 September 1995 [reflex, (1995), 128 D.L.R. (4th) 542], which dismissed the appellants' motion for summary judgment. The appeal concerns the nature and scope of the historic fiduciary duty which the Crown in right of Canada owes to Indian bands in the surrender of reserve land, and the application of statutory limitation periods to actions by Indian bands for breach of that duty.

FACTS

The essential facts in this case, most of which the learned Trial Judge ascertained from the documentary evidence obtained from the respondent's files, may be summarized as follows.

In 1889, the respondent designated approximately 382 acres of land in British Columbia as reserve land (the reserve) for the use and benefit of the Semiahmoo Indian band (the Band) within the meaning of the *Indian Act*[1] and its predecessor enactments. The reserve is located just north of the international border between Canada and the United States of America along the body of water known as Semiahmoo Bay.

On at least three separate occasions subsequent to the creation of the reserve, the respondent has "taken back" some of the reserve land; once by means of expropriation,[2] and on at least two other occasions, by obtaining surrenders from the Band. In 1943, the respondent obtained an absolute surrender of 5.74 acres of the reserve, land which was subsequently transferred to the Province of British Columbia to be used as a provincial park.[3] In 1951, the respondent obtained an absolute surrender of another 22.408 acres of the reserve. It is the 1951 surrender that is the subject of the present proceedings.

The 1951 Surrender

In 1949, the Department of Public Works (Public Works) began to consider the possibility that Canada's customs facilities at the Douglas Border Crossing, a crossing adjacent to the reserve, would have to be expanded. The road configuration in the area had become unsatisfactory. This was due in large part to the fact that the creation of the Peace Arch Park by the Province of British Columbia had caused a significant increase in traffic congestion. In August of 1949, overtures were made to the Band to see if they would consider surrendering part of the reserve for an expanded customs facility. The results, however, were inconclusive. At least two members of the Band who had been allocated parts of the land being discussed refused to agree to a surrender at that time, in part because the government had not set out the purchase price that it was prepared to offer.

In the fall of 1951, government officials finally made a proposal to the Band, asking for the surrender of 22.408 acres of the reserve. In her reasons for judgment, the learned Trial Judge found that "not all of this land was needed

immediately for an expanded customs facility. It is not entirely clear why excess land was acquired."[4] A letter internal to Public Works dated 12 July 1951 suggests that at least a small part of the excess land was acquired in order to "provide a barrier for picnickers to gain access to the international Peace Arch Park without reporting to Customs."[5] The Trial Judge speculated, however, that Public Works might have sought the excess land in the 1951 surrender in order to avoid having to acquire a further parcel at some time in the future should the customs facility have to be expanded again.[6]

On 3 November 1951, the Band agreed to an absolute surrender of 22.408 acres of the reserve (the surrendered land) for $550 per acre. No appraisal of the value of the land was done before setting the final price. The Trial Judge found that the Band would not have surrendered the land "in the normal course of events", although "they might have subdivided it for occupation by others under long-term leases."[7] The Band knew at all times that the respondent had the right to expropriate the land for public purposes if the Band refused to surrender it.

The absolute surrender was accepted by the Governor in Council on 27 November 1951 by Order in Council P.C. 6346. The purpose advanced by the respondent for the surrender was that the land would be used to accommodate an expanded customs facility. Since then, the respondent has retained title to the surrendered land, but most of it remains unused for customs facilities or for any other public purpose.

Events After the 1951 Surrender

On many occasions subsequent to the surrender, the Band asked the respondent about its intended use for the surrendered land and about whether some or all of it could be returned to the Band since it did not appear to be required for a public purpose. The Band's first recorded inquiry regarding the surrendered land occurred in 1962, prompted by the offer of a private corporation to lease approximately 2-3 acres of this land from Public Works.[8] Learning of this offer, the Band passed a resolution on 14 May 1962 to negotiate return of this segment of the reserve on the basis that it "has not been developed and is apparently not required."[9] The respondent, however, refused to return the land to the Band because, in the words of the Deputy Minister of the Department of National Revenue (National Revenue), officials of the Customs Branch could "foresee possible expansion of their facilities in the not too distant future."[10]

The Band renewed their efforts to reacquire the surrendered land beginning in 1967, since no development was taking place on it. On 10 July 1967, the Band resolved that the Department of Indian Affairs and Northern Development (DIAND)[11] should undertake to prepare a land-use study to determine the best long-term use for the surrendered land.[12] In a note accompanying the resolution, Chief Bernard Charles explained that the Band was "taking this action only with the hope that in doing so [*sic*] that we will be closer to achieving the long-awaited development of the Semiahmoo."[13]

By letter dated 23 May 1968, Chief Charles again inquired into the delays in the production of the land-use survey.[14] Approximately six months later, the Band received preliminary plans for development on the surrendered land, which included the proposed construction of a marina. In a resolution dated 5 December 1968, the Band approved the preliminary plans.[15]

A final version of a consultant's report concerning the proposed development plan was sent to the Band on 8 April 1969.[16] From the proposed development plan, officials of DIAND's Fraser Indian District learned that the surrendered land would not be used to build an expanded customs facility in the foreseeable future. In an internal DIAND memorandum, one official stated that "In view of total developments in this area it would seem advisable to secure the return of this property as there can be no foreseeable extension of Customs properties in this area."[17]

It was these events which led the Band, in 1969, to pass a formal council resolution recommending that DIAND take immediate action to reacquire on behalf of the Band the 22.408 acres of land surrendered in 1951.[18] Officials of DIAND's Fraser Indian District agreed with the Band's position. In a memorandum dated 20 May 1969, R. J. C. Ford, the District Supervisor, recommended to DIAND's Regional Director for British Columbia and the Yukon that DIAND re-purchase the surrendered land on behalf of the Band because the land had not been developed, nor were there any specific plans to develop it in the foreseeable future.[19]

Various inquiries were made by DIAND to Public Works and National Revenue in order to attempt to carry out this recommendation. National Revenue, however, refused to release the surrendered land "due to foreseeable expansion requirements" for its customs facility at Douglas, B.C.[20] By letter dated 2 June 1969, J. A. MacDonald, then Deputy Minister of DIAND, wrote to the Deputy Minister of Public Works to suggest again that the surrendered land should be returned to the Band. In it, he states that "[i]t appears that the possible expansion foreseen seven years ago [in 1962] by the officials of the Customs Branch has never materialized. Therefore I question whether favourable consideration should be given by your Department to arranging a re-transfer of the area to the Band."[21]

The responses to this further inquiry were primarily to the effect that a land-use study was being undertaken and that no recommendation could be made until such time as the study was completed. [22] At least one response suggested that some of the land could be returned to the Band, and that the land-use study would reveal the exact size of the surplus land that could be released.[23]

The Deputy Minister of Public Works, however, later resiled from this statement. Public Works was reluctant to authorize transfer of the land back to DIAND for the use and benefit of the Band until it was aware of the Band's specific plans for the surrendered land. In a letter dated 29 April 1971, the Deputy Minister of Public Works stated to an Assistant Deputy Minister of DIAND that, since several hundred acres of the reserve remained undeveloped, it seemed "pointless to return it [the surrendered land] to them merely because it is not being used at the present time by the Department of National Revenue." The Deputy Minister of Public Works went on to conclude that "it is reasonable to suggest that the land remain under the control of the Department of Public Works unless the Indian band can clearly demonstrate that it can be put to beneficial use."[24]

This change in the course of negotiations caused considerable consternation amongst members of the Band. Nevertheless, on every subsequent occasion, officials from National Revenue and Public Works responded to the Band's inquiries by stating either that the surrendered land was needed for foreseeable expansion of the customs facility at Douglas, B.C. or that a study was being prepared regarding its development.

There is, in the written record, a dearth of correspondence between the years 1974 and 1987. In 1987, however, the Band retained legal counsel for the first time. This prompted inquiries within DIAND.[25] DIAND, in turn, wrote to Public Works advising them that they had undertaken in 1971 to do a land-use study with respect to the surrendered land but still had not released a report to this end.[26] DIAND inquired as to whether the unused surrendered land could be returned to the Band.

In the meantime, Public Works had been receiving considerable expressions of interest in the surrendered land from the private sector, including a local yacht club. As a result, Public Works established a study team in March 1988 to look into possible "interim uses" for the surrendered land.[27] By letter dated 7 July 1988, Public Works informed DIAND that it was their view that "disposal of the [surrendered] lands in this extremely strategic location would be shortsighted." The letter also stated that Public Works was "conducting a study to seek out possible compatible interim uses which would generate revenue whilst the lands are being held."[28]

In July 1988, the Public Works study team retained consultants to prepare a market overview and site analysis for approximately eight acres of the surrendered land. A letter dated 12 July 1988 from Laventhol & Horwath, the consultants hired to perform the study, indicates that Public Works commissioned the study in view of the fact that it had no foreseeable public use in mind for the surrendered land at that time. The letter states in part:

We understand that Public Works Canada controls a site of approximately eight acres near the Canada/U.S. border at White Rock, B.C. This site is not required for any federal government use in the foreseeable future and consideration is now being given to granting a 40-50 year lease to permit its development by the private sector.

While department consideration has been given to several potential uses, it seems possible that a resort development may represent the highest and best use of the land given its location, leasehold nature and access. To better assess this alternative, you have requested our assistance as consultants knowledgeable in the hospitality/resort industry, to prepare a market and site assessment of such a land use.[29]

By letter dated 16 August 1988, the Band's legal counsel informed DIAND that Chief Charles had instructed them to research the Band's legal position with a view to determining whether the Band had a valid claim at law in respect of the surrendered land.[30]

On 27 September 1988, the consultants delivered to Public Works the completed market overview and site analysis study. Approximately one month later, on 28 October 1988, a meeting was held between Chief Charles, the Band's legal counsel, and officials from Public Works and DIAND. At that meeting, Public Works agreed, *inter alia*, to provide the Band with any information that it had on the proposed marina development.[31] There is no indication in the minutes of the meeting, however, that Public Works informed Chief Charles or the Band's legal counsel about the consultants' study that Public Works had received in respect of the surrendered land.

The Band's legal counsel wrote to DIAND again on 10 May 1989, expressing concern that none of the undertakings made by Public Works at the meeting of 28 October 1988 had been carried out.[32] In response, a DIAND official forwarded to the Band's legal counsel under cover of a letter dated 23 May 1989, a copy of the 1988 consultants' report on the proposed development of the surrendered land.[33]

In essence, the 1988 report concluded based on a market overview and site analysis that a resort on the site would have considerable positive elements, and that the proposed marina development by the International Yacht Club of White Rock being considered by Public Works would enhance the suitability of the site as a resort. The report found only one major impediment to such development; the restricted access to the waterfront created by, and the noise generated from, daily train activity on the Burlington Northern Railway's transportation corridor adjacent to the west border of the site. The 1988 report considered the fact that most of the Semiahmoo Indian reserve was in its "natural state" to be a positive factor for the proposed development of a resort.

On 3 July 1990, the appellants filed their statement of claim in this action, alleging that the respondent breached its fiduciary duty to the Band in the 1951 surrender. The Band alleged that the price paid for the land in the original surrender was inadequate and that the respondent failed to protect the best interests of the Band when it consented to an absolute surrender (i.e., without a reversionary clause) of the surrendered land even though the respondent did not have a foreseeable use in mind for the land at the time that it consented to, and encouraged the Band to consent to, the 1951 surrender.

On 29 April 1992, almost two years after this litigation was commenced, consultants commissioned by Public Works completed a study entitled the Douglas Border Crossing Redevelopment Study, which recommended a major redevelopment of the customs facilities on a portion of the surrendered land. The 1992 study was commissioned and completed on the assumption that the existing facility was inadequate.

REASONS OF THE TRIAL JUDGE

The learned Trial Judge found that there was no evidence to support the appellants' claim that the price paid by the respondent for the surrendered land was below market value. The Trial Judge also found that there was no term, express or implied, in the surrender agreement which required that the surrendered land be returned to the Band if it was not used for the purposes of establishing an expanded customs facility. Nevertheless, the Trial Judge concluded that the respondent breached its fiduciary duty to the Band in consenting to the 1951 surrender.

The Trial Judge held that the respondent, as a fiduciary of the Band, was obliged either to condition the taking of reserve land with a reversionary clause whereby the land reverts to the Band if it was not used for the stated public purpose, or to ensure, by some other mechanism, that the surrender and use of the land for the public purpose caused the least possible impairment of the rights of the Band. The Trial Judge held that the respondent failed to live up to its fiduciary duty in this case because it obtained the surrender without a present need for the whole area, and it failed to design the surrender in such a way as to impair minimally the rights of the Band. Instead, the respondent acquired more land than it required for its stated purpose (expanding the existing customs facility), and it did so by way of absolute surrender. The Trial Judge, therefore, concluded that the respondent breached its fiduciary duty to the Band in consenting to the 1951 surrender.

The Trial Judge, however, held that the cause of action of the Band for this breach of fiduciary duty was statute-barred by operation of the 6-year limitation period and the 30-year ultimate limitation period found in the British

Columbia *Limitation Act*.[34] The Trial Judge cited a number of cases in support of this conclusion, but did not analyze them in her reasons for judgment.[35] The Trial Judge rejected without reasons the argument that, because the respondent has retained ownership and control of the surrendered land, the breach of fiduciary duty did not simply occur in 1951 but rather constituted a "continuing breach" by the respondent which was not barred by any limitation period. The Trial Judge also rejected without reasons the constitutional arguments made by counsel for the Band.

ISSUES ON APPEAL AND CROSS-APPEAL

The appellant Band objects to the Trial Judge's conclusion that the Band's claim for breach of fiduciary duty is statute-barred by operation of the B.C. *Limitation Act*. The respondent cross-appeals on the basis that the Trial Judge erred in finding that the respondent breached its fiduciary duty to the Band in the 1951 surrender. The issues on appeal and cross-appeal are best organized as follows:

(1) whether the Trial Judge erred in finding that the respondent was in breach of its fiduciary duty to the Band in the 1951 surrender;

(2) whether the Trial Judge erred in failing to find a post-surrender breach of fiduciary duty by the respondent (after 1951), and in applying the 30-year ultimate limitation period prescribed in section 8 [as am. by S.B.C. 1994, c. 8, s. 2] of the B.C. *Limitation Act* to bar the Band's cause of action;

(3) whether the Trial Judge erred in failing to find that new causes of action for breach of fiduciary duty arose in the years after 1951 on the basis of equitable fraud; and

(4) whether the Trial Judge erred in applying the 6-year limitation period prescribed in subsection 3(4) of the B.C. *Limitation Act*, and in failing to postpone the running of time in accordance with subsection 6(3) of that Act.

(1) WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE RESPONDENT WAS IN BREACH OF ITS FIDUCIARY DUTY TO THE BAND IN THE 1951 SURRENDER.

By cross-appeal, the respondent contends that the Trial Judge erred in finding that the respondent breached a fiduciary duty owed to the Band in consenting to the 1951 surrender. In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*,[36] more commonly known as *Apsassin*, the Supreme Court of Canada analyzed the nature of the Crown's fiduciary duty in light of the surrender requirement in the *Indian Act* and its predecessor enactments. The Trial Judge did not have the benefit of the decision of the Supreme Court in *Apsassin* prior to release of her reasons in this case. Nevertheless, I am of the opinion that the reasons for judgment of the Trial Judge on this issue accord with the reasoning of the Supreme Court.

In *Apsassin*, McLachlin J. used a two-step approach in order to determine whether or not there exists a pre-surrender fiduciary duty and, if yes, to determine the nature and scope of that duty. Firstly, did the *Indian Act* provisions impose such a duty? Secondly, applying previous decisions which define when a fiduciary duty arises, did the particular circumstances of the case give rise to such a duty?

Indian Act Surrender Provisions

Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown.[37] *The Indian Act* of 1951,[38] proclaimed into force on 4 September 1951, is the relevant legislation for the 1951 surrender as the surrender occurred in November of 1951. Sections 37 and 38 of that Act, the primary surrender provisions, read:

37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to His Majesty by the band for whose use and benefit in common the reserve was set apart.

38. (1) A band may surrender to His Majesty any right or interest of the band and its members in a reserve.

(2) A surrender may be absolute or qualified, conditional or unconditional.

The authorities indicate that the surrender requirement is the source of the Crown's fiduciary obligation. In *Guerin et al. v. The Queen et al.*,[39] Dickson J. (as he then was) stated that "[t]he purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."[40]

In *Apsassin*, Madam McLachlin J. elaborates upon Dickson J.'s use of the word "exploited" in *Guerin* in order to refine the scope of the Crown's fiduciary obligation. She states:

It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident"a decision that constituted exploitation"the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.[41] [Emphasis added.]

Applying the ratio in *Guerin* and *Apsassin* to this case, it follows that the respondent owed a fiduciary duty to the Band to avoid an exploitative bargain in the 1951 surrender.

Law on Fiduciary Duties

The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty.[42] This approach applies equally in the context of the fiduciary duty owed to Indian bands when they surrender reserve land. In my view, while the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian band in question in order to define the nature and scope of that obligation.

In *Guerin*, Dickson J. notes the following explanation of the source of fiduciary obligations by Professor Ernest Weinrib: "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."[43] Elaborating on this approach to fiduciary duties in *Frame v. Smith*, Wilson J. proposed the following indicia of a fiduciary relationship:

Relationships in which a fiduciary obligation have [*sic*] 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.[44]

In virtually all cases dealing with reserve land, the Crown has considerable power over the affected Indian band by virtue of the surrender requirement. In this case, however, the Band was particularly vulnerable to the influence of the Crown. The evidence indicates that land had been taken from the Band by expropriation before and that, prior to the 1951 surrender, Public Works was considering expropriation as a means of obtaining the reserve land at issue in this case.[45] It is clear from the reasons of the Trial Judge that the Band's discretion to give or to withhold their consent to the 1951 surrender was significantly influenced by their knowledge that, regardless of their decision on the issue of surrender, there was a risk that they would lose their land through expropriation in any event.

It is in the context of these findings that the Trial Judge defined the respondent's pre-surrender fiduciary duty, and then concluded that this duty was breached in the 1951 surrender. The Trial Judge described the nature and scope of the respondent's duty as follows:

When land is taken in this way and it is not known what, if any, use will be made of it, or whether the land is going to be used for government purposes, I think there is an obligation on the fiduciary to condition the taking by a reversionary provision, or ensure by some other mechanism that the least possible impairment of the plaintiffs' rights occurs. I am persuaded there was a breach of the fiduciary duty owed to the plaintiffs.[46]

Did the respondent breach its pre-surrender fiduciary duty?

Having regard to the circumstances of this case, I am in respectful agreement with the Trial Judge's characterization of the respondent's pre-surrender fiduciary duty. I also agree with the Trial Judge's conclusion, based on the facts, that the respondent breached this duty when it consented to the 1951 surrender. In my view, the 1951 surrender agreement, assessed in the context of the specific relationship between the parties, was an exploitative bargain. There was no attempt made in drafting its terms to minimize the impairment of the Band's rights, and therefore, the respondent should have exercised its discretion to withhold its consent to the surrender or to ensure that the surrender was qualified or conditional.

The Trial Judge found that, in 1951, the respondent did not have any definite plans for the construction of an expanded customs facility in the foreseeable future which necessitated the taking of 22.408 acres of the Band's reserve land. In fact, for over 40 years, no development plan was prepared for the surrendered land. It was only after this litigation was commenced that the respondent commissioned a study that did recommend redevelopment of the Douglas Border Crossing. The report for this study was not received until 1992.

The Trial Judge also found that the Band's ability to give or to withhold their own consent to the absolute surrender in 1951 was fettered by their knowledge of the respondent's power to expropriate. In her reasons for judgment, the Trial Judge stated the following:

It is important to underline that the band knew that the defendant, at all times, had the right to expropriate the land for public purposes if the band refused to surrender. Secondly, I agree with counsel for the plaintiff's characterization of the evidence that the band would not have surrendered the land, in the normal course of events, even though they might have subdivided it for occupation by others under long-term leases.[47]

The respondent's assertion that the Band gave full and informed consent to the absolute surrender rings hollow in the face of these findings. In my respectful view, in finding that the Band surrendered their land to the respondent despite the fact that they "would not have surrendered the land, in the normal course of events" the Trial Judge concluded, based on the evidence, that the Band felt powerless to decide any other way. The bargain, in other words, was exploitative. For this reason, the respondent should not have consented to the absolute surrender, at least not without first ensuring that it contained appropriate safeguards, such as a reversionary clause, to ensure the least possible impairment of the Band's rights.

I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction. The Trial Judge's findings of fact, however, suggest that this is precisely what the respondent did. I note, for example, the first sentence of her reasons for judgment reads: "The issue in this case is whether the defendant breached its fiduciary duty to the plaintiffs when it encouraged (required) the surrender of part of the plaintiffs' reserve." (Emphasis added.) In failing to alleviate the Band's sense of powerlessness in the decision-making process, the respondent failed to protect, to the requisite degree, the interests of the Band.

The fact that the Trial Judge did not view the $550 per acre received by the Band for the surrendered land as "below market value" does not negate the possibility of a breach of fiduciary duty. The focus in determining whether or not the respondent breached its fiduciary duty must be on the extent to which the respondent protected the best interests of the Band while also acknowledging the Crown's obligation to advance a legitimate public purpose. In this case, the Band did not want to surrender the land at all but felt it had no choice. The respondent consented to an absolute surrender agreement in order to take control of much more land than they in fact required, and they did so without any properly formulated public purpose. For these reasons, I find that the respondent did

breach its fiduciary duty to the Band in the 1951 surrender even though the Band may have received compensation for the surrendered land somewhere in the neighbourhood of market value.

The Band had to, and did, rely upon the respondent's representations to the effect that the land was required for customs facilities, thereby implying that an absolute surrender was necessary and that the interests of the Band were being safeguarded as much as possible. While it is true that the express wording of the surrender instrument does not indicate that the land was being acquired for the purpose of a customs facility, a court should not confine its analysis so narrowly. The "oral terms" of a surrender are part of the backdrop of the circumstances that determine whether the Crown has acted unconscionably. As stated by Dickson J. in *Guerin* , they serve to "inform and confine the field of discretion within which the Crown was free to act."[48]

On the basis of the foregoing, I find that the Trial Judge did not err in concluding that the Crown breached its fiduciary duty when it consented to the 1951 surrender. The spectre of expropriation clearly had a negative impact on the ability of the Band to protect their own interests in the "negotiations" which ultimately led to the surrender. While the Crown must be given some latitude in its land-use planning when it actively seeks the surrender of Indian land for a public purpose, the Crown must ensure that it impairs the rights of the affected Indian band as little as possible, which includes ensuring that the surrender is for a timely public purpose. In these circumstances, the Crown had a clear duty to protect the Band from an exploitative bargain by refusing to consent to an absolute surrender which involved the taking of reserve land for which there lacked a foreseeable public need. I would, therefore, dismiss the cross-appeal.

(2) WHETHER THE TRIAL JUDGE ERRED IN FAILING TO FIND A POST-SURRENDER BREACH OF FIDUCIARY DUTY BY THE RESPONDENT (AFTER 1951), AND IN APPLYING THE 30-YEAR ULTIMATE LIMITATION PERIOD PRESCRIBED IN SECTION 8 OF THE B.C. *LIMITATION ACT* TO BAR THE BAND'S CAUSE OF ACTION.

The appellants contend that, where the Crown is the "beneficiary" of an exploitative transaction, its fiduciary duty mandates the application of the *Sparrow*[49] justification test in order to determine whether the imposition of a limitation period can be raised by the Crown. In view of the conclusions which I have reached on the other issues in the appeal, I do not find it necessary to deal with this constitutional argument. Assuming without deciding that the B.C. *Limitation Act* applies to actions brought by Aboriginal peoples against the Crown, the first issue to be dealt with is whether or not there was a post-surrender breach of fiduciary duty by the respondent in respect of which the appellants' action is not statute-barred by operation of the limitation periods in that Act.

The Legislative Framework

Subsection 39(1) of the *Federal Court Act*[50] makes actions in the Federal Court of Canada subject to the limitation periods applicable in the province in which a cause of action arises. That subsection 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.

The surrendered land is situated in British Columbia, and the appellants' cause of action seeks return of that land. The relevant provincial legislation is, therefore, the B.C. *Limitation Act*. Section 8 of that Act establishes the general "ultimate" limitation period; a provision that bars any action after 30 years. The relevant provision reads:

8. (1) Subject to section 3 (3) and subsection (1.1) of this section but notwithstanding a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11 (2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies shall be brought

. . .

(c) in any other case, after the expiration of 30 years from the date on which the right to do so arose.

Subsection 3(2) of the B.C. *Limitation Act* prescribes a 10-year limitation for actions for breach of trust, and subsection 3(4) prescribes a 6-year limitation for actions not listed in the Act. There is no specific limitation period in the Act for claims for breach of fiduciary duty. For this reason, in *Apsassin*, Stone J.A. held that subsection 3(4) of the Act would apply to a breach of fiduciary obligation relating to the alienation of reserve land,[51] and the Supreme Court agreed.[52] Subsection 3(4) reads:

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.

When does time start to run for the 30-year limitation period?

Paragraph 8(1)(c) of the B.C. *Limitation Act* refers to the date upon which the right to bring an action arose as the relevant date for commencement of the running of the ultimate limitation period. Subsection 6(3) specifically provides for the postponement of the running of time for the specific limitation periods in the B.C. *Limitation Act*, such as the 6-year limitation in subsection 3(4), until a plaintiff has knowledge of the material facts necessary to recognize the cause of action.[53] In cases such as *Bera v. Marr*[54] and *Apsassin*, however, subsection 6(3) was held not to apply to the 30-year ultimate limitation period prescribed by paragraph 8(1)(c). That is, the "right to do so" in paragraph 8(1)(c) has been construed to mean the date of accrual of the cause of action without reference to the plaintiff's knowledge of the material facts.

In *Bera v. Marr*, the British Columbia Court of Appeal considered the interaction between section 6 and the ultimate limitation period in section 8 of the B.C. *Limitation Act*. Esson J.A. stated the following for a majority of the Court:

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.[55]

At trial in *Apsassin*, Addy J. adopted this position. He stated that, "although the effects of sections 6 and 7 are cumulative, these sections are not to be taken into account in calculating the 30 year period mentioned in subsection (1). Thus, neither disability nor knowledge come into play with respect to the 30 year ultimate limitation."[56] On appeal ultimately to the Supreme Court, McLachlin J. agreed with Addy J.'s approach on this issue, stating that "[t]he 6- and 10-year limitations, but not the general 30-year ultimate limitation, may be postponed in certain circumstances."[57]

In the case at bar, the appellants filed their cause of action on 3 July 1990. The 30-year ultimate limitation period, therefore, operates to preclude any action for which the event giving rise to the right to bring the cause of action occurred prior to 3 July 1960. The appellants' action for breach of fiduciary duty by the respondent in the 1951 surrender is therefore statute-barred by operation of paragraph 8(1)(c) of the B.C. *Limitation Act*, through the enabling provision in subsection 39(1) of the *Federal Court Act*. The appellants, however, claim that the respondent breached its fiduciary duty at least a second time post-surrender, and that the second breach constituted a fresh cause of action within the 30-year ultimate limitation period.

The *Apsassin* Decision

The appellants rely upon the decision of the Supreme Court in *Apsassin* to support their claim that the respondent's failure to rectify its original breach of fiduciary duty, once it was aware that the respondent had no reasonable foreseeable use for the surrendered land, constituted a second breach of fiduciary duty that is within the 30-year limitation period. From *Apsassin*, I derive the following principles with respect to the Crown's post-surrender fiduciary duties:

(i) The mere fact that the Crown has failed to restore surrendered land to an Indian band suffering from poverty that is not related to the land surrender does not mean that the Crown has breached its fiduciary duty.[58]

(ii) The fact that the *Indian Act* is entirely silent on the subjects of surrender variation, surrender revocation, and re-surrender does not mean that all surrenders are permanent and irrevocable.[59]

(iii) The duty of the Crown as a fiduciary is that of a person of ordinary prudence in managing his or her own affairs, and acting with reasonable diligence.[60]

(iv) Even in the context of an absolute surrender for sale, the Crown has a post-surrender fiduciary duty to advance the best interests of the Indian band, to the extent possible, having regard to the terms of the surrender agreement. Therefore, so long as the Crown has the power, whether under the terms of the surrender instrument or under the *Indian Act*, to exert control over the surrendered land in a manner that serves the best interests of the band, the Crown is under a fiduciary duty to exercise that power.[61]

(v) More particularly, the Crown has a post-surrender fiduciary duty to correct any errors in surrender agreements which have a negative impact upon the Indian band.[62]

The respondent contends that *Apsassin* has no application to this case because there, the Crown's error inadvertently deprived the Indian band of a specific right (i.e., minerals), while here there was no such error. The transaction in this case was an absolute surrender of the land and the respondent's post-surrender fiduciary duty was limited to ensuring that the price paid to the band for the surrendered land approximated market value. I am unable to accept this contention because it fails to appreciate the nature of the original breach of fiduciary duty which the Trial Judge found. As a result, the respondent misconstrues the nature of its ameliorative obligation. This obligation was to ensure that in advancing the stated public purpose of acquisition of the lands for expansion of the customs facility, the rights of the Band be impaired as little as possible. To the extent then (and as the Trial Judge found) that more land was taken in the absolute surrender than was required for the stated public purpose, the absolute surrender was exploitative even though the price paid was roughly equal to the market value of the land. It is all the more so because, as the Trial Judge found, the Band would not have sold the lands "in the normal course of events", but did so only because the members of the Band were keenly aware that expropriation of the land was a real possibility.

In *Apsassin*, the Crown's mistake in the original surrender was in failing to reserve the mineral rights for the benefit of the Indian band contrary to a long-standing government policy to do so. In my view, the Crown made a similar mistake in this case as to the quality or scope of the surrender that was required. The Crown obtained an absolute surrender from the Band when, having regard to the uncertainty of the public need for the land, a conditional or qualified surrender would have sufficed. In both cases, the result was that the original surrender did not impair as little as possible the interests of the affected Indian band. Therefore, I am of the view that in this case, as in *Apsassin*, the Crown was under a post-surrender fiduciary duty to correct the error that it made in the original surrender for as long as it remained in control of the land.

In *Apsassin*, the Supreme Court points to section 64 of the *Indian Act*[63] of 1927 as empowering DIAND to correct erroneous transfers of surrendered lands. Section 64 reads:

64. If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made.

There is no equivalent provision in the successor statutes such that it can be relied on in this case. Nevertheless, I do not consider the absence of such a provision to be fatal to the existence of a post-surrender fiduciary duty on the Crown to act in the best interests of an Indian band in respect of surrendered land, particularly where, as here, the Crown still owns and controls the land. As McLachlin J. noted in *Apsassin*, "That section gave [DIAND] the power to revoke erroneous grants of land, even as against *bona fide* purchasers. It is not unreasonable to infer that the enactors of the legislation intended [DIAND] to use that power in the best interests of the Indians."[64] This does not mean, however, that absent a provision of this kind, the Crown does not owe a fiduciary duty to an affected

Indian band post-surrender. Section 64 was not the source of the Crown's post-surrender fiduciary duty. It merely provided DIAND with the power to correct erroneous transfers of surrendered land to third party purchasers. In this case, the Crown still owns and controls the surrendered land; land which was obtained by the Crown in breach of its fiduciary duty to the Band. In these circumstances, I am of the view that the Crown has a post-surrender fiduciary duty to correct the original breach. It is a post-surrender fiduciary duty which is owed by the Crown, and not simply by DIAND. The fact that Public Works, and not DIAND, is in possession of the surrendered land does not mean that the Crown is somehow shielded from its obligation to correct the breach of fiduciary duty committed in consenting to the exploitative bargain that was the original surrender agreement.

The "Continuing Breach" Argument

The respondent argues that what the appellants are really alleging is a continuing breach of the respondent's original fiduciary duty"that is, the respondent's failure to impair the Band's rights as little as possible when it consented to an absolute surrender in 1951. The respondent contends that government officials did not become aware of any new facts post-surrender which should have led them to conclude that the Crown had no reasonable foreseeable use for the surrendered land.

On its face, this argument has an attractive ring. But, for the reasons that follow, I find it singularly unpersuasive. While the respondent's post-surrender fiduciary duty can be seen as continuing so long as the respondent retains ownership and control over the land, I am of the view that any breach of that duty must be located at a specific point in time.[65] It would defeat the very purpose of limitation periods to find that a breach of fiduciary duty continues for so long as the Crown retains the surrendered land. It is for this reason that the Supreme Court used an objective test for breach of fiduciary duty in *Apsassin* and prior cases. That is, a post-surrender breach of fiduciary duty by the Crown is pinpointed, for the purposes of limitation periods, at the point in time when a reasonable person would have realized their original breach and exercised their power to correct it.

The Trial Judge's error, however, was in focusing on whether or not there could be a continuing breach of fiduciary duty, rather than locating the respondent's post-surrender fiduciary duty to the Band in respect of the surrendered land, and asking whether or not that duty was breached at one or more specific points in time. The Trial Judge states, at page 547 of her judgment, "I have considered whether the fact that the Crown has retained full ownership of the land, rather than transferring it to a third party, is relevant to whether there could be said to be a continuing breach. I have concluded that it is not."[66] I agree that it would defeat the very purpose of limitation periods to construe the respondent's actions in this case as constituting a continuing breach of the fiduciary duty it owed to the Band. However, by framing her analysis in this way, the Trial Judge failed to appreciate that, in accordance with the *Apsassin* decision, the Crown has a post-surrender fiduciary duty to safeguard the interests of the Band as much as possible so long as it retains ownership and control over the surrendered land. The proper inquiry is to determine whether this continuing post-surrender fiduciary duty was breached at any point in time; not to look for a so-called "continuing breach."

The Second Breach of Fiduciary Duty

I find that the respondent committed a second breach of its fiduciary duty in 1969 when the respondent refused to reconvey the surrendered land to the Band, despite the formal Band council resolution that such action be taken (which came after many prior inquiries by the Band as to the Crown's intended use for the land). DIAND's original "error" in the 1951 surrender was in its assumption that the entire surrendered land was required for immediate use for an expanded customs facility, which led it to arrange an absolute surrender. By 1969, eighteen years had passed since the original surrender and no development on the land had taken place for the purposes of an expanded customs facility, and there was no plan for such development. Nevertheless, the respondent answered the Band's formal request by stating that the land was needed for "future expansion of Customs facilities". But, there is no evidence whatsoever of any specific plans for such expansion until 1992, after this action had already been commenced.

By 1969 at the latest, DIAND was aware, or ought to have become aware, of the following "material facts": (i) that the Band wanted the land back for economic development on the reserve if it was not going to be used by the respondent for a public purpose. (As early as 1962, the Band began making inquiries regarding the respondent's intended use for the land, and the possibility of reacquiring some or all of the excess surrendered land); (ii) that private interests had approached Public Works to buy or lease portions of the surrendered land since it was not

being developed by the respondent; and (iii) that Public Works did not in fact have any definite plans for development of the land in the foreseeable future. In my view, by 1969, a reasonable person in DIAND's position would have realized that Public Works did not have any reasonable foreseeable use for the land (as a customs facility or otherwise), but rather was merely retaining the land for the sake of convenience.

DIAND's internal correspondence discloses that its officials were in fact aware of these material facts in 1969. Perhaps the best illustration of this knowledge is a memorandum written by R. J. C. Ford, Fraser District Supervisor for DIAND, to the Regional Director for British Columbia and the Yukon dated 20 May 1969. In it, Mr. Ford recommends that action be taken by DIAND to repurchase the surrendered land from Public Works on behalf of the Band. His reasons for this recommendation are particularly enlightening:

1) A portion of the Semiahmoo Indian reserve comprising 22.408 acres was sold to the Department of Public Works, the site to be used for a Canadian Customs warehouse.

2) This land transfer was carried out under authority of PC-6346 dated 27 November 1951 and PC-2643 dated 6 May 1952 at a rate of $550.00 per acre.

3) This land has not been developed to date and we are unable to obtain any data as to if or when the area would be developed.

4) In consideration that the land has not been developed, the Semiahmoo Band has by Band Council [Resolution] requested that the land be returned.

5) This area presently held by the Department of Public Works is required for inclusion in the proposed development of the Semiahmoo Indian reserve.

6) This District recommends that action be initiated to purchase the above-mentioned lands on behalf of the Semiahmoo Band.[67]

The respondent's failure to reconvey any portion of the surrendered land to the Band despite its knowledge, by 1969, of these material facts constituted a breach of its post-surrender fiduciary duty. Reasonable diligence required that the respondent move to correct its own error in obtaining an absolute surrender of the surrendered land when it came into possession of facts suggesting the error and the potential value to the Band of the land at issue. As stated in *Lower Kootenay Indian Band v. Canada*, "had the Crown moved with some degree of alacrity, the band could have benefitted from an earlier termination of what had turned out to be a bad deal for them."[68] The respondent was remiss in its fiduciary duty by failing to take any effective ameliorative action from, at the latest, 1969 onwards.

It should be noted that adopting the respondent's interpretation of the Supreme Court's decision in *Apsassin* would lead to the illogical result that the Crown has a post-surrender fiduciary duty to correct inadvertent errors in original surrender agreements when it becomes aware of such errors, but the Crown does not have a post-surrender fiduciary duty to provide relief when it becomes aware that a government department has obtained an excessive surrender of Indian land without a public purpose to justify it.

For these reasons, I conclude that the respondent did breach its fiduciary duty to the Band a second time, in 1969, and that an action in respect of this breach of fiduciary duty is not barred by operation of the 30-year ultimate limitation period prescribed in paragraph 8(1)(c) of the B.C. *Limitation Act*. This conclusion, however, does not end the inquiry with respect to limitation periods because section 8 operates in addition to, and not instead of, the relevant specific limitation period in the B.C. *Limitation Act*. Consequently, I must now consider whether or not the 6-year limitation period prescribed in subsection 3(4) operates to preclude the Band's claim for the second breach of fiduciary duty in 1969.

(3) WHETHER THE TRIAL JUDGE ERRED IN FAILING TO FIND THAT NEW CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AROSE IN THE YEARS AFTER 1951 ON THE BASIS OF EQUITABLE FRAUD.

As I have already noted, on several occasions subsequent to the 1951 surrender, the respondent was forced to

consider its plans for the excess surrendered land as a result of inquiries from the Band and others (1962, 1968-1973 and 1988). The appellants have argued that, each time the matter was considered, the respondent had no reasonable foreseeable use for the surrendered land, and therefore there was no valid justification for retaining it. However, rather than offering frank disclosure of all material facts, the respondent withheld material information from the Band. The appellants contend that, post-surrender, the respondent had an on-going duty to inform the Band of any information relating to the respondent's current and intended use of the surrendered land, and that each instance of non-disclosure constituted a fresh cause of action for equitable fraud and wilful concealment.

With respect, I do not accept the appellants' argument that each time the respondent was less than frank in response to an inquiry by the Band, the respondent committed a new equitable fraud, thereby giving rise to a fresh cause of action. The issue of equitable fraud cannot be considered separately from the issue of the proper application of limitation periods. In my view, to construe each interaction between the Crown and the Band as a separate fraud by the Crown is to create a disjointed reality. It is an attempt to give effect to the concept of a continuing breach of fiduciary duty through the back door, in order to skirt the issue of limitation periods altogether. Rather, the issue of the just application of limitation periods in the circumstances of the case at bar must be considered frontally. Thus, the question is, having regard to the special relationship between the Crown and the Band, and the conduct of the Crown, when should the Band have been in a position to bring a cause of action? It is an objective test most appropriately applied in the context of subsection 6(3) of the B.C. *Limitation Act*.

(4) WHETHER THE TRIAL JUDGE ERRED IN APPLYING THE 6-YEAR LIMITATION PERIOD PRESCRIBED IN SUBSECTION 3(4) OF THE B.C. *LIMITATION ACT*, AND IN FAILING TO POSTPONE THE RUNNING OF TIME IN ACCORDANCE WITH SUBSECTION 6(3) OF THAT ACT.

The relevant specific limitation period for actions by Indian bands against the Crown for breach of fiduciary duty in the Province of British Columbia is the 6-year limitation period in subsection 3(4) of the B.C. *Limitation Act*. As noted earlier, the second breach of fiduciary duty in 1969 is not barred by the 30-year ultimate limitation period. The issue here is whether or not subsection 6(3) of the B.C. *Limitation Act* should be applied to postpone the running of the 6-year limitation period until such time as the facts reasonably necessary to found the cause of action for the second breach of fiduciary duty in 1969 were known to the Band.[69] Put another way, from what date should the 6-year limitation period run? Should it run from 1969, in which case the Band's action for the second breach of fiduciary duty is statute-barred? Or, should subsection 6(3) operate to postpone the running of the 6-year limitation period because the respondent's conduct amounted to equitable fraud? If yes, how long should the running of time be postponed?

Section 6, B.C. *Limitation Act*

I begin by reproducing the relevant provisions in section 6 of the B.C. *Limitation Act*:

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;

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

. . .

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.

(4) For the purpose of subsection (3),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;

(b) "facts" include

(i) the existence of a duty owed to the plaintiff by the defendant; and

(ii) that a breach of a duty caused injury, damage or loss to the plaintiff;

. . .

(5) The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.

Applying subsection 6(5), the appellants have the burden of proving that the running of time should be postponed pursuant to subsection 6(3). Paragraph 6(3)(d) establishes that the running of time can be postponed where there existed fraud or deceit. A purposive reading of this provision suggests that it refers not only to common law fraud, but also to equitable fraud.

Equitable Fraud

The leading modern definition of equitable fraud is found in *Kitchen v. Royal Air Forces Association*. It reads: "conduct, which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other."[70]

The respondent contends that there is no evidence in this case which could lead to the conclusion that Crown officials acted in an "unconscionable" manner. Typically, the word "unconscionable" connotes a very high threshold. The *Shorter Oxford English Dictionary* , for example, provides one definition of "unconscionable" as "having no conscience; unscrupulous; monstrously extortionate, harsh, etc.". On this threshold, the respondent's conduct certainly could not be labelled unconscionable. However, in the context of equitable fraud, the respondent's conduct must be assessed having regard to the special relationship between the Crown and the Semiahmoo Indian Band.

In *Guerin*, Dickson J. considered the concept of equitable fraud in the context of the Crown's fiduciary relationship to an Indian band and its application to limitation periods. He stated:

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.[71]

In *Guerin*, the Crown committed equitable fraud because it did not disclose to an Indian band the terms of a lease on their lands, thereby concealing the existence of the band's cause of action for breach of fiduciary duty by the Crown. In that case, the band had a cause of action because the lease that the Crown had negotiated on their behalf was vastly under-valued. In this case, the Crown did not conceal any of the terms of the surrender. The Band was fully aware that they had consented to an absolute surrender. Nevertheless, it is my view that the respondent's

conduct in its dealings with the Band beginning, at the latest, after the second breach of fiduciary duty in 1969, amounted to equitable fraud.

The Band relied upon the respondent for all of their information post-surrender as to the respondent's current and intended uses for the surrendered land. But, whenever the Band sought information from Crown officials, the latter neglected to provide frank disclosure about their lack of plans for the surrendered land. Instead, they led the Band to believe, each time, that they had definite plans for use of the surrendered land or that a study was being conducted to that end. There is no specific evidence to suggest that the respondent's overriding intention was to mislead the Band. However, equitable fraud does not require dishonesty or an improper motive; it requires only that the respondent acted unconscionably having regard to its relationship with the Band. In this case, I find that Crown officials did act unconscionably having regard to that relationship, and thus conclude that the respondent's conduct toward the Band, as a fiduciary, constituted equitable fraud.

When should the 6-year limitation period start to run?

I must now answer the question; how does this finding of equitable fraud affect the running of the 6-year limitation period in subsection 3(4) of the B.C. *Limitation Act*? The relevant wording of subsection 6(3) bears repeating:

6. (3) . . .

. . . 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.

Subsection 6(3) establishes an objective test for the running of time; given their knowledge of the material facts, when would a reasonable person in the place of the Band have been able to bring an action? Applying this test, it is my view that the limitation period in subsection 3(4) should run from on or about 23 May 1989, the date on which DIAND sent a letter to the Band and enclosed a copy of the consultants' report prepared in 1988 with respect to the development of the surrendered land. The letter and consultants' report were sent on 23 May 1989 and one would assume that, in the ordinary course, it would have been received by the Band a few days thereafter. It was this report which, for the first time, clearly indicated to the Band that the respondent had no intention of constructing an expanded customs facility on the unused portion of the surrendered land in the foreseeable future. In my respectful view, it was upon receipt of this report that a reasonable person in the position of the Band, receiving appropriate advice, would have initiated a cause of action against the Crown for breach of its fiduciary duty.

The Band first requested return of the surrendered land in 1962. It did not, however, seek legal advice in connection with this matter until 1987[72] and it was not until the Band received the consultants' report in 1989 that their suspicion was confirmed that the Crown did not have a foreseeable public need for the surrendered land. It is arguable that the respondent consistently delayed making any decision with respect to the surrendered land since 1962, and that the reasonable person would have pursued legal action long before 1989. However, in my view, this Court must consider the Band's dependence upon the Crown, and the unique nature of the fiduciary relationship that exists between them, in applying the reasonable person standard. Over the course of four decades, the respondent consistently indicated to the Band that development on the surrendered land was planned for the foreseeable future or that studies were being conducted to determine the best uses for the land. When would a reasonable person have stopped believing the Crown?

In coming to the conclusion that the 6-year limitation period in subsection 3(4) should not begin to run until on or about 23 May 1989, I find it important to bear in mind that it is only in the last approximately fifteen years that Indian bands have been able to exercise the same degree of diligence with respect to their legal rights as might be expected of an ordinary member of society. To be more specific, it was not until the Supreme Court's 1984 decision in *Guerin* that courts clearly began to recognize a cause of action against the Crown for breach of

fiduciary duty in land surrenders. In *Sparrow*, the Supreme Court made this observation in the following way:

For many years, the rights of the Indians to their aboriginal lands"certainly as legal rights"were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community."[73]

The Supreme Court further noted that, "[a]s recently as *Guerin v. The Queen* , 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335, the federal government argued in this Court that any federal obligation was of a political character."[74]

In accordance with paragraph 6(3)(i) of the B.C. *Limitation Act*, the 6-year limitation period in subsection 3(4) does not start to run until the "reasonable plaintiff", having obtained the appropriate advice, would regard the facts known to it as showing that a cause of action has "a reasonable prospect of success". In my view, until the *Guerin* decision, it could not be said that the reasonable plaintiff would have viewed the band's cause of action as having "a reasonable prospect of success". Until *Guerin* , most Aboriginal peoples believed that their only avenue for redress for unfair treatment in land surrenders was in the political arena. That is, if any relief was to be obtained, it was in negotiating with the Crown, which is precisely what the Band did on many occasions over the course of the four decades which followed the 1951 surrender. It was not long after the *Guerin* decision, in 1987, that the Band sought legal advice in connection with the surrendered land. And, shortly after receiving the consultants' report confirming their suspicion that the respondent had no foreseeable use for the surrendered land, the Band commenced this cause of action.

Thus, I conclude that the Trial Judge erred in failing to consider that the 6-year limitation period in subsection 3(4) of the B.C. *Limitation Act* could be postponed by operation of subsection 6(3). The limitation period for the Crown's second breach of fiduciary duty should run from on or about 23 May 1989, placing the present cause of action (commenced 3 July 1990) well within the 6-year prescription period in subsection 3(4).

CONCLUSION

For all of the foregoing reasons, I would allow the appeal and dismiss the cross-appeal. The respondent's original breach of fiduciary duty in consenting to the 1951 surrender agreement is statute-barred by operation of the 30-year ultimate limitation period in paragraph 8(1)(c) of the B.C. *Limitation Act*. However, I find that the respondent breached its fiduciary duty to the Band a second time in 1969 when it failed to correct its original breach, and that this second breach is not barred by operation of the 30-year ultimate limitation period, nor by the 6-year limitation period in subsection 3(4), the running of the latter having been postponed until on or about 23 May 1989.

REMEDY

By direction dated 8 January 1997, the Court requested further written submissions from the parties on the issue of the appropriate remedy to order if the Court were to conclude that the respondent did in fact breach its fiduciary duty to the Band in such a manner as to give rise to a cause of action that is not statute-barred. Both parties agreed in their written submissions that there are three main remedies available to the Court in order to remedy such a breach of fiduciary duty: (1) the implementation of a constructive trust; (2) an award of equitable damages; or (3) an accounting for profits (or a combination thereof).

The constructive trust is an equitable remedy for unjust enrichment.[75] While courts have been particularly receptive to the constructive trust as a remedy in cases involving breach of fiduciary duty, it is not an appropriate remedy in all such cases. As La Forest J. stated in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, "[b] reaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate. It is not every case of such a breach of duty, however, that will attract recovery based on the gain of

the defendant at the plaintiff's expense."[76]

It is not entirely clear from the authorities whether, in a case of breach of fiduciary duty, it is necessary to show unjust enrichment in order to justify a restitutionary remedy or whether it is sufficient to show that ordinary damages, calculated on common law principles, would not provide adequate compensation to the beneficiary for the impugned breach. Since it is a basic rule of fiduciary law that a fiduciary must not benefit at the expense of the beneficiary, it is arguable that proof that a fiduciary benefited from a breach of fiduciary duty is proof of unjust enrichment. For the sake of completeness, however, I shall consider explicitly whether the elements of unjust enrichment are made out in this case.

The respondent breached its fiduciary duty to the Band at least twice. First, in consenting to the original surrender (a cause of action that is statute-barred) and, second, in 1969, when the respondent failed to correct its original breach by reconveying the unused surrendered land to the Band (a cause of action that is not statute-barred). The relevant issue in this case is whether the respondent was unjustly enriched by the latter breach.

In *Pettkus v. Becker*,[77] Dickson J. held that there are three elements which must be proved to establish a claim to unjust enrichment: (1) enrichment of the defendant; (2) a corresponding deprivation suffered by the plaintiff; and (3) absence of a juristic reason for the enrichment. Since the original surrender, the respondent has not done anything with the surrendered land. Can it be said that the respondent has been enriched by its second breach of fiduciary duty if the surrendered land has not been used for any public (or private) purpose? It should also be noted that the Trial Judge found that the Band received a price for the surrendered land which was not below market value. If the Band has had the use of these funds ever since, can it be said that they have suffered a corresponding deprivation as a result of the loss of the surrendered land? Notwithstanding these apparent obstacles, I am of the view that the respondent has been unjustly enriched in this case.

Although the respondent has not made use of the surrendered land, it has retained title to the land for over 40 years in contravention of its fiduciary duty to the Band. In 1969, the respondent breached its fiduciary duty a second time because it refused to redesignate the surrendered land as part of the Band's reserve despite its recognition that the land was not required in the foreseeable future for expansion of the customs facilities at Douglas, B.C. The respondent recognized the strategic value of the land, and decided to retain it. By refusing to reconvey the surrendered land to the Band, the respondent was enriched because it retained the land from 1969 to the present without title being fettered by redesignation of the land as part of the Band's reserve. In my respectful view, a further finding that the respondent used the land productively"for example, by generating a profit or by using it for a public purpose"is not required in order to justify a finding that the respondent has been enriched.

It is also clear that the Band has suffered a corresponding deprivation. As a result of the respondent's failure to reconvey the surrendered land to the Band, the Band has been deprived of the opportunity to develop the land themselves. The Band made it clear to the respondent by 1969 (at the latest) that, pursuant to their development plans for the reserve, they wanted the surrendered land back if it was not going to be used for the stated public purpose. The Band even offered to repay the monies that they had obtained in the original surrender agreement. However, because of the respondent's dilatoriness, the surrendered land has sat idle and undeveloped from the date of surrender to the present; a period of forty-six years. Moreover, the surrendered land has a unique value to the Band, and thus, the fact that they received market value for the land (as undeveloped property) in the original surrender agreement does not detract from the conclusion that they suffered a deprivation as a result of the respondent's failure to reconvey the land to the Band in 1969. Although the cause of action for the original breach of fiduciary duty in 1951 is statute-barred, it is useful to keep in mind (for the purposes of remedying the second breach) the Trial Judge's finding that the Band would not have surrendered the land in the normal course of events.[78] The Band may have received monetary compensation for the surrendered land in 1951, but they wanted to retain their land. Therein lies the deprivation.

There is no juristic reason for the respondent's enrichment. It is a simple rule of fiduciary law that the fiduciary must disgorge any benefits obtained at the expense of the beneficiary.[79] In this case, the respondent obtained the surrendered land in contravention of its fiduciary duty to the Band. It is a fiduciary duty born out of the "honour of the Crown", and it is the role of the courts to ensure that the Crown lives up to that duty. In this case, a restitutionary remedy is required in order to redress fully the wrongs committed to the Band by the respondent.

Furthermore, it is well settled that fiduciary law contains within it an element of deterrence.[80] A restitutionary remedy in this case will signal to the respondent that it must act with due regard to the best interests of affected Indian bands when dealing with land retained by the respondent post-surrender. In other words, when the respondent retains land obtained by way of surrender, its fiduciary obligations do not end when the Band "signs on the dotted line".

Once it is decided that a restitutionary remedy is appropriate, the next step is to determine which restitutionary remedy. The constructive trust is only one of the restitutionary remedies available to a court. One alternative is to award equitable damages. As stated by La Forest J. in *Lac Minerals*:

While, as the Chief Justice observed, "The principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v. Becker* , at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in appropriate circumstances.[81]

La Forest J. goes on to state that "a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property."[82] In my respectful view, this is an appropriate case in which to impose a constructive trust on the surrendered land in favour of the Band. The Trial Judge found that the respondent breached its fiduciary duty in the original surrender agreement because it failed to minimally impair the rights of the Band by obtaining an absolute surrender of more land than it required for its stated public purpose. The Trial Judge also found that the respondent took land from the Band that they would not have surrendered in the normal course of events. While this original breach is not actionable, the respondent further breached its fiduciary duty by not reconveying the land to the Band in 1969, when it was clear to Crown officials that the land was not in fact required for any public purpose and that the Band wanted it back. By failing to reconvey the surrendered land to the Band, the respondent frustrated the Band's efforts to reobtain a specific and unique property to which, as this Court has held, the Band was otherwise entitled. The imposition of a constructive trust simply does for the respondent what its fiduciary duty required of it back in 1969; it gives back to the Band an interest in the surrendered land.

In my view, it is of no import that a band's interest in its reserve land, like Aboriginal title, has been held by some courts to be a *sui generis* personal right, and not a true proprietary right.[83] As stated by La Forest J. in *Lac Minerals*:

. . . it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property.[84]

By virtue of the respondent's breaches of its fiduciary duty, the Band lost, and was not able to regain, its interest in the surrendered land. Given the unique value placed upon land by the First Nations in general, and upon the surrendered land by the Band in particular, a monetary award *simpliciter* would be an inadequate remedy for the respondent's actionable breach of fiduciary duty.[85] In my view, it is appropriate in these circumstances for the Court to create a beneficial interest in the surrendered land for the Band by imposing a constructive trust.

The most contentious aspect of the constructive trust remedy in this case is to determine whether it should apply to all or part of the surrendered land, and, if the latter, what part. The Band wants an order declaring that the respondent holds all 22.408 acres of the surrendered land as a constructive trustee for the Band. The respondent, on the other hand, submits that only that portion of the land that is not required for future customs expansion as at the date of this Court's judgment should be subject to the constructive trust.

I am not prepared to accept the respondent's submission that the constructive trust should only be applied to that portion of the surrendered land not required by the respondent for an expanded customs facility as of the date of this Court's judgment. Rather, I am of the view that the constructive trust should be imposed upon that portion of the land that remained unused for the stated public purpose as at the date of the second breach of fiduciary duty. In reaching this conclusion, I re-emphasize that the constructive trust is not founded upon a pre-existing property right, but rather is an equitable remedy which creates a property right. The focus of a restitutionary remedy in this

case must be to place the Band in the same position as it would have been in had the respondent not committed the second breach of fiduciary duty in 1969. Thus, I am of the view that the constructive trust should apply to all 22.408 acres of the surrendered land. In my respectful view, the respondent has not provided any convincing reason why this would be an inappropriate remedy in this case.

Even if the respondent was correct that the constructive trust should only be imposed on that portion of the surrendered land that is not required for foreseeable expansion of the customs facility as at the date of this Court's judgment, I am not prepared to accept, on the evidence before me, the respondent's submission that it has a present or foreseeable need for all or part of the surrendered land at this time.

In support of its expansion plans, the respondent pointed to a study commissioned in 1992 which recommends a major redevelopment of the customs facility at Douglas, B.C.[86] I am not convinced by the Douglas Border Crossing Redevelopment Study, nor has the respondent provided any other evidence to support the assertion, that there is in fact a present or foreseeable public need for the surrendered land in order to build an expanded customs facility at Douglas, B.C. I advance three reasons for this conclusion.

Firstly, it should be noted that the Douglas Border Crossing Redevelopment Study, and all of the related correspondence provided by the respondent, was generated after this litigation had already been commenced. In fact, a review of the correspondence reveals that it was largely in response to this litigation.[87] An internal memorandum dated 26 April 1994 states expressly that "[t]he 1992 `Douglas Border Crossing Redevelopment Study' was commissioned and completed on the assumption that the existing facility is inadequate and cannot properly handle existing traffic" (emphasis added).[88] The respondent has not provided any evidence to support the truth of that assumption. In fact, the (pre-litigation) 1988 market analysis and site overview study commissioned by Public Works was based on the opposite assumption that the surrendered land was not required for any public purpose in the foreseeable future (40 to 50 years). In light of the evidence, I am inclined to believe the 1988 Study as more accurately reflecting the truth of the situation.

Secondly, the respondent has not provided any explanation as to why a customs facility could not be built on land subject to a beneficial interest held by the Band. In one internal memorandum, a Crown official bluntly stated that "there is no requirement for Federal ownership of land upon which a land border duty free shop is located."[89]

Finally, even if there is now a legitimate public need to build a new customs facility, I am of the view that the respondent's breach of its fiduciary duty in 1969 justifies the imposition of a constructive trust on the whole of the surrendered land. The land has sat unused by the respondent for over 40 years. If the respondent is now of the opinion that there is a pressing need for a new customs facility on the surrendered land, they should have to enter into good faith negotiations with the Band with a view to repurchasing, or leasing, the land that they need. The respondent's dilatoriness in dealing with the surrendered land over the last 40 years should not be used as a means to thwart the imposition of what is now an appropriate remedy for the respondent's breach of its fiduciary duty to the Band in 1969. As stated by Wilson J. in *Lac Minerals*, "[t]he imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award."[90]

By providing the Band with a beneficial interest in the surrendered land, the imposition of a constructive trust allows the Band to capture the appreciation in value of the surrendered land as undeveloped land. However, it may be that the constructive trust provides inadequate compensation in this case because, had the Band been able to retain the surrendered land (that is, but for the respondent's breaches of its fiduciary duty), the Band could have potentially earned much more by developing the land. On the other hand, however, the Court must not over-compensate the Band. Therefore, the remedy ordered in this case must also take into consideration the fact that the Band received $550 per acre for the undeveloped land as part of the 1951 surrender agreement. These two issues merit further deliberation. This Court, however, is not the proper forum for resolving these issues.

The *quantum* of equitable damages over and above the constructive trust, if any, required in order to provide the Band with full restitution, and the amount that the Band should have to repay to the Crown for the compensation that they received in the 1951 surrender agreement, are matters best left to the Trial Division. These are complicated issues which will require the testimony of expert witnesses to assist in the valuation. Therefore, I am of the view that this Court should order a reference for determination of these two issues in accordance with

subsection 1102(2) of the *Federal Court Rules* [C.R.C., c. 663]. Subsection 1102(2), and the relevant part of Rule 500, read:

Rule 1102. . . .

(2) In lieu of the Court receiving evidence or further evidence under paragraph (1), it may direct a reference under Rule 500 as though that Rule and Rules 501 to 507 were incorporated in this Part as far as applicable.

Rule 500. (1) The Court may, for the purpose of taking accounts or making inquiries, or for the determination of any question or issue of fact, refer any matter to a judge nominated by the Associate Chief Justice, a prothonotary, or any other person deemed by the Court to be qualified for the purpose, for inquiry and report.

There is no perfectly accurate formula for calculating the equitable damages required in order to provide full restitution to the Band in this case. Rather, it is a task which we can only ask the referee to perform the best that he or she can.[91] That being said, however, it may be useful to provide some guidelines with respect to the measure of damages that is appropriate in this case.

It is well settled that the proper approach to equitable damages for breach of fiduciary duty is restitutionary.[92] Courts have always imposed on defaulting trustees and other fiduciaries an obligation to make restitution which is "of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract."[93] As stated by Dickson J. (as he then was) in *Fales et al. v. Canada Permanent Trust Co.*, the measure of damages is "the actual loss which the acts or omissions have caused to the trust estate."[94] There is no inquiry as to whether the loss suffered by the plaintiff flowed from the breach. The issues of causation, foreseeability and remoteness are not considered. Rather, the inquiry is whether the loss would have happened had there been no breach. Applying this approach to the case at bar, equitable damages should be calculated based on the presumption that the Band would have used the land in the most advantageous way during the period that it was improperly held by the Crown. This is the approach that Wilson J. recommended in *Guerin*. She stated:

The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see *McNeil v. Fultz* (1906), 38 S.C.R. 198), so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the Band to prove that it would have developed the land; in equity a presumption is made to that effect . . . .[95]

In calculating the equitable damages, however, the designated judge of the Trial Division must keep in mind, firstly, that the Band is already being compensated, at least, in part for the respondent's actionable breach of fiduciary duty by the imposition of the constructive trust and, secondly, that the focus must be on providing restitution for the actionable breach. In this case, the respondent's original breach of fiduciary duty in consenting to the 1951 surrender agreement is statute-barred by operation of the 30-year ultimate limitation period. It is the respondent's second breach of fiduciary duty in 1969 that is actionable and, therefore, it is in respect of this breach that the Court can properly order a remedy. The second breach relates to the fact that the respondent failed to reconvey the surrendered land to the Band when it became clear to Crown officials that the respondent had obtained a surrender of land that was not in fact required for a foreseeable public need. Any remedy must flow from the latter breach; not the wrongful surrender in the first instance. Thus, the Band can only collect equitable damages, if any, incurred from 1969 to the date of judgment by this Court. The measure of these damages is, in essence, the incremental value that the Band would have derived from development of the surrendered land in the most advantageous way available to them.

In order to ensure full restitution, the referee will also have to determine whether the Band suffered any damage to the remainder of the reserve during the period from 1969 to the date of this Court's judgment and, if yes, the referee will have to quantify that amount. For example, did the loss of the surrendered land impede development on the remainder of the reserve? In expropriation law, damage to the value of the remainder of a property as a result of a partial taking may be compensable under the principle of injurious affection. Damage by injurious

affection, also known as "consequential damage", recognizes *inter alia* that, "[w]here part of an owner's land is expropriated, the piece or pieces of land remaining may be rendered less valuable as a result of their severance from the expropriated portion. Here a claim may be made for `injurious affection by severance'."[96]

The principle of injurious affection flows from the overriding objective of compensation in expropriation cases, which is to make the expropriated owner "economically whole". Injurious affection is a statutory remedy for partial takings by the Crown.[97] It is, therefore, not strictly applicable in this case. However, given that compensation in expropriation cases has the same objective as restitutionary relief in an action for breach of fiduciary duty committed by the Crown in the context of a land surrender, this issue should be taken into consideration in the calculation of equitable damages.

I am also of the view that this is not an appropriate case to order accounting for profits in lieu of equitable damages. The respondent's breaches of fiduciary duty were not in obtaining the surrender of a portion of the Band's reserve for profit. Rather, its breaches were precisely the opposite. The respondent obtained the surrendered land in order to fulfil a stated public need, an expanded customs facility, but they have not done anything at all on the land since then. As a result, the Band has been deprived not only of its land, but also of the economic stimulus which would have accompanied development on the surrendered land. In this case, a disgorgement of profits in lieu of equitable damages would punish the Band for the respondent's failure to do anything at all with the land.

Finally, the referee will also have to determine the value of the compensation received by the Band in the 1951 surrender agreement, adjusted for compound interest to the date of this Court's judgment. This amount will reduce the net monetary compensation owed to the Band by the Crown, over and above the Band's beneficial interest in the surrendered land created by the constructive trust. Alternatively, if the amount of the compensation received by the Band in 1951 plus interest is higher than the equitable damages, the Band will have to repay the net amount to the respondent.

In making these calculations, the referee must bear in mind the overriding objective of the remedy in this case, which is to try to place the Band, in so far as it is possible, in the same position that they would have been in but for the respondent's actionable breach of its fiduciary duty, in 1969, when it failed to reconvey the surrendered land to the Band.

Based on my consideration of the remedy required in this case, I would dispose of the appeal and cross-appeal in the following way. I would: order that the appeal be allowed and the cross-appeal be dismissed; declare that the respondent holds the surrendered land as a constructive trustee for the Band; order that the land be restored as part of the Band's reserve; and order that a reference be held in the Trial Division in accordance with subsection 1102 (2) of the *Federal Court Rules* for determination of: (i) the amount of equitable damages, if any, to be awarded to the Band as compensation over and above the Band's beneficial interest in the surrendered land created by imposition of the aforesaid constructive trust, such equitable damages, if any, to be calculated with a view to providing full restitution to the Band and in accordance with the principles set out in these reasons; and (ii) the amount to be repaid by the Band for the compensation received in the 1951 surrender agreement, adjusted for compound interest to the date of judgment by this Court. The appellants shall have their costs incurred both here and in the Court below, and their costs of the reference in the Trial Division.

McDonald J.A.: I agree.

Gray D.J.: I agree:

[1] R.S.C., 1985, c. I-5, as amended from time to time (the *Indian Act*).

[2] The evidence shows that on or about 6 June 1928, the Crown expropriated 15.78 acres of land that had been part of the reserve. The minutes of the Governor in Council P.C. 949 dated 6 June 1928 evidence the approval of the transfer of 15.78 acres of land previously designated as part of the reserve to Public Works under s. 48 of the *Indian Act*, R.S.C. 1927, c. 98, without the consent of the Band. As it later turned out, the land was not required by Public Works and so, by Order in Council P.C. 318 dated 10 February 1936, the land was transferred to the Province of British Columbia. Appeal Book, Vol. 1, at pp. 33, 34, 72, 77, 80 and 82.

[3] The 5.74 acres of surrendered reserve was transferred to the Province of British Columbia by Order in Council P.C. 5988 dated 28 July 1943. Appeal Book, Vol. 1, at pp. 34 and 86.

[4] reflex, (1995), 128 D.L.R. (4th) 542 (F.C.T.D.), at p. 544.

[5] Letter from Chief of Accommodation, Public Works, to Chief Architect, Public Works, dated 12 July 1951. Appeal Book, Vol. 1, at p. 111.

[6] *Supra*, note 4, at p. 544.

[7] *Ibid.*

[8] Appeal Book, Vol. 1, at p. 153.

[9] Band Council Resolution dated 14 May 1962. Appeal Book, Vol. 1, at p. 155.

[10] Letter dated 11 July 1962 from H. A. Young, Deputy Minister of National Revenue, to G. F. Davidson, Deputy Minister of the Department of Citizenship and Immigration. Appeal Book, Vol. 1, at p. 163.

[11] For the sake of simplicity, I will refer to the Department of Indian Affairs and Northern Development, and its successor departments, throughout the judgment as "DIAND".

[12] Appeal Book, Vol. 1, at p. 177.

[13] Appeal Book, Vol. 1, at p. 178.

[14] Appeal Book, Vol. 1, at p. 179.

[15] Appeal Book, Vol. 1, at p. 182.

[16] Appeal Book, Vol. 1, at p. 187.

[17] Memorandum of R. J. C. Ford, Supervisor of the Fraser Indian District, to A. E. Stubbe dated 8 April 1969. Appeal Book, Vol. 1, at p. 188.

[18] Band Council Resolution 987/30-21. Appeal Book, Vol. 1, at p. 193.

[19] Memorandum from R. J. C. Ford, Fraser District Supervisor for DIAND to the Regional Director, B.C. & Yukon dated 20 May 1969. Appeal Book, Vol. 1, at p. 192.

[20] Letter from W. A. Mills, Regional Chief, Customs Operations, National Revenue, to W. W. Ryan, District Director, Public Works, dated 8 May 1969. Appeal Book, Vol. 1, at p. 191. See also letter from A. W. Walkley, Manager, Operations, Public Works to J. V. Boys, DIAND's Regional Director for B.C. and the Yukon, dated 30 May 1969. Appeal Book, Vol. 2, at p. 197.

[21] Appeal Book, Vol. 2, at p. 199.

[22] See correspondence in Appeal Book, Vol. 2, at pp. 215-216.

[23] Letter from J. A. MacDonald, now Deputy Minister of Public Works, to J. B. Bergevin, an Assistant Deputy Minister of DIAND, dated 3 November 1970. Appeal Book, Vol. 2, at p. 212.

[24] Appeal Book, Vol. 2, at p. 217.

[25] Appeal Book, Vol. 2, at pp. 242-248.

[26] Appeal Book, Vol. 2, at p. 249.

[27] Appeal Book, Vol. 2, at pp. 251-256.

[28] Appeal Book, Vol. 2, at p. 259.

[29] Appeal Book, Vol. 2, at p. 260.

[30] Appeal Book, Vol. 2, at p. 267.

[31] Appeal Book, Vol. 2, at p. 311.

[32] Appeal Book, Vol. 2, at p. 319.

[33] Appeal Book, Vol. 2, at p. 320.

[34] R.S.B.C. 1979, c. 236 (the B.C. *Limitation Act*).

[35] The Trial Judge cites: *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, reflex, [1988] 3 F.C. 20 (T.D.); affd 1993 CanLII 2932 (F.C.A.), [1993], 3 F.C. 28 (C.A.); *Lower Kootenay Indian Band v. Canada*, reflex, [1992] 2 C.N.L.R. 54 (F.C.T.D.); *Sterritt v. Canada (Min. of Indian Affairs and Nor. Dev.)*, reflex, [1989] 3 C.N.L.R. 198 (F.C.T.D.); and *Roberts v. Canada*, [1995] F.C.J. No. 1202 (T.D.) (QL), at pp. 146-199.

[36] ;*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344 (hereinafter *Apsassin* (S.C.C.)).

[37] Ss. 37 to 41 of the present *Indian Act* [as am. by R.S.C., 1985 (4th Supp.), c. 17, ss. 2, 3, 4].

[38] S.C. 1951, c. 29.

[39] 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335 (hereinafter *Guerin*).

[40] *Ibid.*, at p. 383.

[41] *Apsassin* (S.C.C.), *supra*, note 36, at p. 371.

[42] See e.g. *Apsassin* (S.C.C.), *supra*, note 36; *Frame v. Smith*, 1987 CanLII 74 (S.C.C.), [1987] 2 S.C.R. 99; and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (S.C.C.), [1989] 2 S.C.R. 574.

[43] E. Weinrib, "The Fiduciary Obligation" (1975), 25 *U.T.L.J.* 1, at p. 7, quoted by Dickson J. in *Guerin*, *supra*, note 39, at p. 384.

[44] *Frame v. Smith*, *supra*, note 42, at p. 136.

[45] See correspondence in Appeal Book, Vol. 1, at pp. 106-111.

[46] *Supra*, note 4, at p. 547.

[47] *Supra*, note 4, at p. 544.

[48] *Guerin*, *supra*, note 39, at p. 388. The words of Gonthier J. in *Apsassin* (S.C.C.), *supra*, note 36, at pp. 358-359, are also instructive: "In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings." See also *Lower Kootenay Indian Band v. Canada* , *supra*, note 35.

[49] ;*R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075 (*Sparrow*).

[50] R.S.C., 1985, c. F-7 (the *Federal Court Act*).

[51] ;*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1993 CanLII 2932 (F.C.A.), [1993] 3 F.C. 28 (C.A.), at p. 138 (*Apsassin* (F.C.A.)).

[52] *Apsassin* (S.C.C.), *supra*, note 36, at p. 407 (McLachlin J.).

[53] S. 6(3) in effect legislates the common law discoverability principle as developed by the Supreme Court of Canada in such cases as *Kamloops (City of) v. Nielsen et al.*, 1984 CanLII 21 (S.C.C.), [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (S.C.C.), [1986] 2 S.C.R. 147; and *M.(K.) v. M.(H.)*, 1992 CanLII 31 (S.C.C.), [1992] 3 S.C.R. 6.

[54] 1986 CanLII 173 (BC C.A.), (1986), 27 D.L.R. (4th) 161 (B.C.C.A.).

[55] *Id.*, at p. 186.

[56] ;*Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, reflex, [1988] 3 F.C. 20 (T.D.), at p. 84 (*Apsassin* (F.C.T.D.)).

[57] *Apsassin* (S.C.C.), *supra*, note 36, at p. 402. See also *Lower Kootenay Indian Band v. Canada*, *supra* note 35.

[58] *Apsassin* (S.C.C.), *supra*, note 36, at p. 380.

[59] *Id.*, at p. 357 (Gonthier J.) and at pp. 389-390 (McLachlin J.)

[60] *Id.*, at p. 366 (Gonthier J.) and at p. 401 (McLachlin J.).

[61] *Id.*, at p. 405.

[62] *Id.*, at p. 366.

[63] R.S.C. 1927, c. 98.

[64] *Apsassin* (S.C.C.), *supra*, note 36, at p. 405.

[65] *Roberts v. Canada*, *supra*, note 35, at pp. 146-199 of QL; The Federal Court Trial Division also rejected the argument that a "continuing" cause of action can circumvent a limitation defence in *Lower Kootenay Indian Band* , *supra*, note 35.

[66] *Supra*, note 4, at p. 547.

[67] Memorandum from R. J. C. Ford, Fraser District Supervisor for DIAND to the Regional Director, B.C. & Yukon dated 20 May 1969. Appeal Book, Vol. 1, at p. 192.

[68] *Supra*, note 35, at p. 108.

[69] The appellants' submissions rely on s. 6(1)(b) and s. 6(3). The appellants' reliance upon s. 6(1)(b) is misplaced. S. 6(1)(b) has to do with the postponement of limitation periods for actions for the recovery of trust property by a beneficiary. While the fiduciary relationship between the Crown and an Indian band is trust-like, it is *sui generis* and cannot properly fall within a provision dealing with trusts. The authorities have clearly rejected the application of s. 3(2) of the B.C. *Limitation Act*, which prescribes a 10-year limitation period on actions for breach of trust, to cases involving breach of fiduciary duty. See e.g., *Apsassin* (F.C.A.), *supra*, note 51, at p. 138. Therefore, it would be improper, in my view, to apply s. 6(1)(b) when seeking to postpone a limitation period in the context of an action for breach of fiduciary duty. Rather, the appellants' remedy, if any, lies in s. 6(3)(d).

[70] [1958] 2 All E.R. 241 (C.A.), at p. 249, quoted with approval in *Guerin*, *supra*, note 39, at p. 356 (Wilson J.) and at p. 390 (Dickson J.).

[71] *Guerin*, *supra*, note 39, at p. 390.

[72] See letter from Snarch & Allen, Barristers & Solicitors, to DIAND dated 16 November 1987. Appeal Book, Vol. 2, at p. 238.

[73] *Sparrow*, *supra*, note 49, at p. 1103.

[74] *Id.*, at p. 1105.

[75] See *Pettkus v. Becker*, 1980 CanLII 22 (S.C.C.), [1980] 2 S.C.R. 834, at p. 847, *per* Dickson J. [as he then was] ("The principle of unjust enrichment lies at the heart of the constructive trust.").

[76] 1989 CanLII 34 (S.C.C.), [1989] 2 S.C.R. 574, at p. 674 (*Lac Minerals*).

[77] *Supra*, note 75, at p. 848.

[78] See *Lac Minerals*, *supra*, note 76, at p. 668, *per* La Forest J. ("The appropriate remedy in this case cannot be divorced from the findings of fact made by the courts below.")

[79] See *Lac Minerals*, *id.*, at p. 618, *per* Sopinka J. ("A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust.")

[80] See e.g., *Hodgkinson v. Simms*, 1994 CanLII 70 (S.C.C.), [1994] 3 S.C.R. 377, at p. 453, *per* La Forest J. ("The law of fiduciary duties has always contained within it an element of deterrence . . . . In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.")

[81] *Lac Minerals*, *supra*, note 76, at p. 674.

[82] *Lac Minerals*, *id.*, at p. 678.

[83] See *Guerin*, *supra*, note 39, *per* Dickson J. At p. 379, Dickson J. states that "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases". He then goes on to discuss, at p. 382, how attempts to characterize an Indian band's interest in land is futile and, for the most part, irrelevant to the issues being decided in these cases:

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 that 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.

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.

[84] *Lac Minerals*, *supra*, note 76, at p. 676.

[85] See *Lac Minerals*, *id*., at pp. 676-679.

[86] The "Douglas Border Crossing Redevelopment Study", prepared by Cornerstone Planning Group Limited (dated 29 April 1992). Appeal Book, Vol. II, at pp. 323-338.

[87] See correspondence in Appeal Book, Vol. II, at pp. 339- 348.

[88] Memorandum dated 26 April 1994 from C. V. Veinotte, Director General, Management Services Directorate, Customs Operation Branch to A. J. Villeneuve, Regional Collector, Pacific Region. Appeal Book, Vol. II, at p. 355.

[89] Memorandum dated 30 June 1994 from C. V. Veinotte, Director General, Management Services Directorate, Customs Operation Branch to S. Parent, Director General, Capital Assets Program Directorate, Finance and Administration Branch. Appeal Book, Vol. II, at p. 363.

[90] *Lac Minerals*, *supra*, note 76, at p. 632.

[91] See e.g., *Penvidic Contracting Co. Ltd. v. International Nickel Co. of Canada Ltd.*, 1975 CanLII 6 (S.C.C.), [1976] 1 S.C.R. 267, at pp. 279-280.

[92] *Hodgkinson v. Simms*, *supra*, note 80, at p. 440, *per* La Forest J.

[93] *Guerin*, *supra*, note 39, at p. 361.

[94] 1976 CanLII 14 (S.C.C.), [1977] 2 S.C.R. 302, at p. 320.

[95] *Guerin*, *supra*, note 39, at pp. 362-363.

[96] E. C. E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd. ed. (Toronto: Carswell, 1992), at p. 331.

[97] See Todd, *id.*, at p. 329 ("the claimant of compensation for injurious affection, as distinct from the plaintiff in common law action, must base the claim on some statutory provision"). See also *Sisters of Charity of Rockingham v. The King* (1922), 67 D.L.R. 209 (P.C.), at p. 211 *per* Lord Parmoor ("No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is `injuriously affected,' unless he can establish a statutory right.").