Citation: ***Songhees First Nation v. Canada (Attorney General),*** 2003 BCCA 187

Date: 20030324

Docket: CA030050

COURT OF APPEAL FOR BRITISH COLUMBIA

2003 BCCA 187 (CanLII)

BETWEEN:

SONGHEES FIRST NATION

RESPONDENT
(PLAINTIFF)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT
(DEFENDANT)

THE ESTATE OF IRENE COOPER, by her administrators WILLIAM GOSSE, HARVEY GEORGE, and CHARLOTTE THOMPSON

DEFENDANT

Before: The Honourable Mr. Justice Low
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

P. Walker, J. Mules — Counsel for the Appellant

R. Janes — Counsel for the Respondent Songhees First Nation

Place and Date of Hearing: Victoria, British Columbia
November 28, 2002

Place and Date of Judgment: Vancouver, British Columbia
March 24, 2003

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Madam Justice Levine

Dissenting Reasons by:
The Honourable Mr. Justice Smith (Page 18 Paragraph 29)

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Reasons for Judgment of the Honourable Mr. Justice Low:

[1] The issue on these appeals is whether the respondent, Songhees First Nation ("the Band"), or the estate of Irene Cooper is entitled to periodic rental payments made to the federal government on certain leases of Songhees Band reserve property. The case turns on a proper interpretation of s. 50 of the ***Indian Act***, R.S.C. 1985, c. I-5, as amended (the "Act").

[2] The Band sued the appellant, the Attorney General of Canada ("the AG Canada"), for recovery of the lease payments and a declaration that it is entitled to receive future payments from the federal government. The parties set the issue down for hearing as a point of law pursuant to Rule 34(1) of the *Supreme Court Rules*. D. Wilson J. ruled in favour of the Band. Brown J. later made an order under Rule 34(2) consequential to the finding on the point of law. Her order declared that the AG Canada holds the lease payments in trust for the Band and must remit the money to the Band. There is a provision in the order granting a stay of proceedings pending appeal from it. The AG Canada appeals both orders.

[3] The parties stated the following point of law:

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> Subject to such defences as may arise on account of the particular conduct of the relevant parties, when an Indian in lawful possession of land on a reserve which has been leased by Her Majesty the Queen in Right of Canada ("Canada") pursuant to s. 58(3) of the ***Indian Act***, R.S.C. 1985, c. I-5, dies and devises his or her interest in that land to a person or persons (the "Heir") not entitled to reside on that reserve under the ***Indian Act***, is Canada obligated to pay the rent collected between the date on which that Indian dies and the date upon which the land is disposed of pursuant to s. 50(2), (3) and (4) to:
>
> (1) the Band on whose reserve the land is situated; or
>
> (2) the Heir; or
>
> (3) some other person or persons, and, if so, to whom?

[4] Section 50 of the Act reads:

> 50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.
>
> (2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.
>
> (3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or

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> descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.
>
> (4) The purchase of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

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[5] On the hearing of an application under Rule 34(1), the court must assume that the facts pleaded are true: see ***British Columbia Teachers Federation v. British Columbia (Attorney General)*** (1986), 7 B.C.L.R. (2d) 316 (C.A.) and ***Macdonald v. Macdonald Estate*** (1996), 21 B.C.L.R. (3d) 379 (S.C.).

[6] The Band pleads the following facts in its amended statement of claim filed 25 April 2001:

1. The plaintiff is a “band” within the meaning of the Act.
2. The AG Canada is the representative of Her Majesty the Queen in Right of Canada (“Canada”). Canada is the vested owner of a tract of land known as the New Songhees Indian Reserve No. 1A and holds the land for the use and benefit of the Band. The land is a reserve within the meaning of the Act.

3. Irene Cooper, a member of the Band, died on 26 April 1996. Until her death, she possessed eight lots on the reserve ("the Cooper Lands"). These are Lots 6, 7-2, 8-2, 39, 40-1, 41-1, 42-1 and 43-1.

4. In 1975, Canada, pursuant to s. 58(3) of the Act, leased some of the Cooper Lands (Lots 6 and 39, or portions thereof), together with other reserve lands, to Slegg Lumber Ltd. (the "Slegg Lease"). The Slegg Lease terminates in 2015.

5. The rent for the Slegg Lease for the period from 1 October 1995 was $122,000 per annum. It was to be increased as of 1 October 2000. Of the rent payable under the Slegg lease, 35.37% is attributable to the Cooper Lands (the AG Canada pleads that 70.74 is the correct percentage but nothing turns on this and I expect the parties resolved the difference when counsel spoke to the order made by Brown J.).

6. In 1993, Canada leased eight lots in the reserve to Songhees Retirement Park Limited until 2042. Four of these lots are part of the Cooper Lands (Lots 40-1, 41-1, 42-1 and 43-1).

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7. The annual rent for the retirement park lease was $98,000 to 31 October 1998 when it increased to $98,960, of which 42% is attributable to the Cooper Lands.

8. There has been no sale of the Cooper Lands under s. 50(2) of the Act.

9. No heir of Irene Cooper is entitled to reside on the reserve.

[7] The AG Canada pleads the following additional facts:

1. By her valid last will and testament, Irene Cooper devised all her rights and interests in the Cooper Lands to her grandson, William Gosse, her son, Harvey George and her daughter, Charlotte Thompson (the “Devisees”).

2. The Devisees are not members of the Band and accordingly are not entitled to reside on the Songhees Reserve.

3. The leases to Slegg Lumber Ltd. and Songhees Retirement Park Limited were for the benefit of Irene Cooper.

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4. At all material times, Canada held the reserve lands, including the Cooper Lands, for the use and benefit of the Band "pursuant to s. 18 of [the Act] and subject to other provisions of [the Act], including s. 58(3)."

5. Prior to the death of Irene Cooper, Canada collected the rents and paid those monies to her. After her death, Canada forwarded such monies to her heirs.

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[8] The Estate of Irene Cooper is a defendant in the action and filed a statement of defence. That pleading adds nothing to the facts that are essential to resolution of the issue of law before the court. The estate took no part in the appeal.

[9] In his reasons for judgment, Wilson J. stated:

> [17] Ms. Cooper's rights, privileges, powers and immunities connected to the allocated parcels are defined by the Act. She had no right, privilege or power to bequeath a right to possession or occupation, of the parcels, to a person who was not a member of the plaintiff band. Therefore, such a right, privilege or power would not be included in "her property". This was not something she had to bequeath to her heirs or to transfer to her personal representative.

[10] Wilson J. held that according to ***R. v. Devereux*** (1965), 51 D.L.R. (2d) 546 (S.C.C.), the "only right" the Devisees could succeed to is the right to receive the proceeds of sale,

not the rent. He found no difference between the corporeal interest in possessing or occupying the lands and the incorporeal interest in receiving the rents. Furthermore, he held that Ms. Cooper's rights to possession and occupation terminated upon her death because the notion of "residing" is a necessary condition for enjoyment of the rights to possession or occupation. Since her heirs are "not entitled to reside", there is no transition period from the date of death to the date the beneficiaries take possession. Accordingly, he found that the "early vesting principles" relied upon by AG Canada were inapplicable because there is "nothing to vest."

[11] Wilson J. noted that the Act does not expressly define who has the right to possession or occupation during the period between the date of death and the date of possession or occupation by a qualified purchaser or between the date of death and the date the right reverts to the Band. He concluded that the Band must be the repository of those rights during that period. He held that the general proposition is that the Band members have a collective statutory right of use and benefit, and that a "temporary exception" to that general proposition occurs when there is a specific allocation to an individual. This "temporary exception" is valid only so long

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as the conditions of residence and membership are met. In the absence of those conditions, such as in this case, the right reverts to the Band. Therefore, he held that the Band has the right to receive the lease rental payments.

[12] There are five grounds of appeal stated but I think they can be simply summarized. The AG Canada says that the learned chambers judge did not properly interpret s. 50 of the Act and ought to have applied principles of the common law of real property, including the principles of fragmentation of interest and early vesting.

[13] The AG Canada argues that a proper view of the scheme of the statute preserves the revenues of the reserve land for the estate of Irene Cooper and for her heirs even if the heirs are not Band members and therefore not entitled to acquire possession of the land.

[14] The Band argues that the overall purpose of the Act defeats the argument of the AG Canada. It says that the Act "provides a scheme for protecting the interests of a band in its reserves, while allowing members to enjoy the benefits of the reserve". The Act "benefits band members by establishing a scheme of statutory rights of possession amongst band members which allows for individual enjoyment of reserve land and a limited market for the trade of such statutory rights

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amongst band members". Section 50 of the Act balances "testamentary freedom … against the policy of maintaining the reserve … intact for the band."

[15] The Band further argues that the law relating to native lands is *sui generis* and that common law principles have little or no application. The Band cites the Supreme Court of Canada in ***St. Mary's Indian Band v. Cranbrook (City)***, [1997] 2 S.C.R. 657 at para. 14 for the proposition that great caution must be exercised in analogizing from ordinary common law rights to Indian land rights:

> 14. I want to make it clear from the outset that native land rights are *sui generis*, and that nothing in this decision should be construed as in any way altering that special status. As this Court held in ***Guerin v. The Queen***, [1984] 2 S.C.R. 335, ***Canadian Pacific Ltd. v. Paul***, [1988] 2 S.C.R. 654, and ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, [1995] 4 S.C.R. 344 native land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving this case.

[16] The Band says that the scheme of the Act dictates that revenues generated by the reserve land, if not used for the benefit of individual Band members, must be used to benefit the Band as a whole. The Act does not allow for a legal person other than the Band or a Band member to obtain any

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benefit from the reserve land other than specifically permitted under s. 50.

[17] I agree with the Band's position.

[18] In my opinion, this case requires nothing more than an interpretation of s. 50 of the Act. We are guided by the following passage from the judgment of Iacobucci J. in ***Bell ExpressVu Limited Partnership v. Rex*** (2002), 212 D.L.R. (4th) (S.C.C.) at pg. 19 to 20, summarizing the modern approach to statutory interpretation.

> In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, ***Stubart Investments Ltd. v. The Queen***, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; ***Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours***, [1994] 3 S.C.R. 3, at p. 17; ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27, at para. 21; ***R. v. Gladue***, [1999] 1 S.C.R. 688, at para. 25; ***R. v. Araujo***, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; ***R. v. Sharpe***, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; ***Chieu v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of

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> the ***Interpretation Act***, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

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[19] Two points quickly emerge from a reading of s. 50. First, there is an apparent inconsistency between s-s (1) and the opening words of s-s. (2). The opening words of s-s. (2) seem to assume an event forbidden by s-s. (1), namely, a testamentary disposition of a right to possess or occupy reserve land to a person who is not a band member. Second, the section is silent as to the disposition of revenues from the reserve land pending sale to a band member of the right to occupy and possess it or pending reversion to the band. No other section of the Act addresses the subject.

[20] In s. 2, the Act defines “reserve” as “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band”.

[21] Section 18 of the Act is the first of a number of sections that discuss reserves. It reads:

> 18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine

> whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

[22] The relevant sections relating to possession of reserve lands are as follows:

> 20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.
>
> (2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.
>
> 24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.
>
> 25. (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.
>
> (2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

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> 28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

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[23] These sections clearly advance the overall intent of the legislation set out in s. 18(1), namely, that reserve lands are for the use and benefit of the band. Only a band member may occupy or use reserve land and then only after allocation by the band and approval of the Minister. A band member who holds a certificate of possession may transfer the statutory right the certificate represents only to the band or to another band member. If the band member who holds a certificate of possession ceases to be a band member and does not transfer his right of possession within six months to the band or to a band member, the right of possession reverts to the band. All the sections regulating the use and occupancy of the lands emphasize that such rights can be acquired only by band members or, by reversion, the band. Section 50 reads to the same effect.

[24] The leases of the Cooper Lands were permitted by s. 58(3):

> (3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

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[25] “Designated lands” are defined in s. 2 as reserve lands released or surrendered by the band. The effect of s. 58(3) is that the Minister can lease reserve land lawfully possessed by a band member “for the benefit of” the band member. Hence the Minister in the present case entered into the commercial leases of parts of the Cooper Lands for the benefit of Irene Cooper. Upon her death, the leases were no longer for the benefit of Irene Cooper and I can find nothing in the Act that allows her heirs to receive that benefit after her death unless they are members of the Band. Read with the other sections of the Act, s. 50 makes that result clear. The lessees make the rental payments in accordance with the terms of the leases. The leases are a use of the land, just as the land might be used for agricultural purposes by the Band member entitled to possession. The right to receive the rent collected by Canada is tied to the right to possession. A person can acquire the right to receive the rent monies through inheriting (or purchasing) the right to possess the reserve land only if he or she is a member of the Band and thereby entitled to possess it.

[26] Although there are sections of the Act that permit band members to dispose of their estate as they see fit, there are limitations. Under s. 50(1) a person who is not a band member cannot obtain a right to occupy or possess any of the band's reserve land. Despite the opening words of s. 50(2), it follows that Irene Cooper could not bequeath her possessory rights to persons who were not Band members. She could only designate who is to receive the proceeds of a sale under s. 50(2), or the payment for improvements under s. 50(3) in the absence of a sale and an ensuing reversion to the Band. The section is specific as to the circumstances under which a person who is not a band member can benefit from reserve lands. There is no basis for inferring that Parliament intended that such a person could also benefit by receiving the revenue from the land pending a sale under s. 50(2) or a reversion to the band under s. 50(3).

[27] Section 18(1) contains a broad statement of policy and goes a long way to defining the scheme of the reserve provisions in the Act. It would require specific words in the statute to override the intent of the statute made clear in that section. Reserve lands are to be used for band purposes or for the benefit of individual members of the band. Any

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other use or benefit could come about only by specific words in the statute to that effect.

[28] I would dismiss the appeals.

“The Honourable Mr. Justice Low”

I AGREE:

“The Honourable Madam Justice Levine”

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Dissenting Reasons of the Honourable Mr. Justice Smith:

[29] I have had the privilege of reading Mr. Justice Low's reasons in draft form. I regret that I am unable to agree with his proposed disposition of this appeal. In my view, counsel have misconceived the issue and, unfortunately, have posed a question that cannot be answered on an objection in point of law under Rule 34(1). As a result, I would allow the appeal, set aside the order appealed from, and remit the action to the Supreme Court.

[30] Before explaining why I have reached that conclusion, I wish to say, by way of preliminary observation, that the question stated by counsel in this case, which is set out in paragraph 3 of Mr. Justice Low's reasons, is not a proper question for disposition pursuant to Rule 34(1) of the ***Supreme Court Rules***.

[31] Rule 34 provides as follows:

> **34** (1) A point of law arising from the pleadings may, by consent of the parties or by order of the court, be set down by praecipe for hearing and disposed of at any time before the trial.
>
> (2) Where, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off, counterclaim or reply, the court may dismiss the action or make any order it thinks just.
>
> [Emphasis added]

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[32] The purpose of the Rule is described in ***British Columbia Teachers Federation v. British Columbia (Attorney General)*** (1986), 7 B.C.L.R. (2d) 316 (C.A.) at 320, as follows:

> Rule 34(1) is sometimes called the "demurrer" rule. Its predecessor rules provided for demurrer in substance while abolishing it in name: *Harris v. Elliott* (1913) 28 O.L.R. 349. The facts on which it proceeds are not hypothetical; they are the facts alleged by the plaintiff. The essential purpose of Rule 34(1) is to provide a way to determine, without deciding the issues of fact raised by the pleadings, a question of law which goes to the root of the action. As Wilson, J.A. put it, on such an application every averment of fact in the statement of claim must be taken to be true.
>
> [Emphasis added]

The rule is available in any case where, assuming allegations in a pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or a defence in law: see ***Reichl v. Rutherford-McRae Ltd.*** (1964), 47 W.W.R. 227 (B.C.C.A.) at 231.

[33] The question asked of the Chambers judge in this case is posed in hypothetical form. In attempting to paraphrase the pleaded facts, counsel have postulated abstract facts. However, an answer to a question stated under Rule 34(1) should permit the Court to make an order in the action without requiring it to assume congruence between the facts in the

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question and the facts in the pleadings: the latter should be cited or quoted, not paraphrased. Examples of questions apt for determination under this Rule may be found in ***Dorset Yacht Co. Ltd. v. Home Office***, [1969] 2 Q.B. 412 at 414-15 and in ***Pacific Associates Inc. and another v. Baxter and others***, [1989] 2 All E.R. 159 (C.A.) at 161, which are referred to with approval by Southin J.A. in her concurring reasons in ***Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*** (1993), 77 B.C.L.R. (2d) 128 (C.A.) at para. 56. Also see ***Alcan Smelters & Chemicals Ltd. v. C.A.S.A.W., Local 1*** (1977), 3 B.C.L.R. 163 (S.C.).

[34] This case was pleaded and was argued before the Chambers judge and before this Court on the assumption that there is a juridical link between Canada's "obligat[ion] to pay the rent collected", as it is set out in the question, and the hypothetical Indian's devise of "his or her interest in that land". That assumption cannot be supported, in my view. It overlooks the nature of the various interests in the land in question and it ignores the role of the Crown in the chain of payment that began with the lessees and ended with Mrs. Cooper.

[35] This assumption led the Chambers judge to his major premise that the right to receive rent is "inextricably

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derived from a property interest in the land." He found that Mrs. Cooper had a property interest in the leased land and he concluded, therefore, that Mrs. Cooper had the right to receive the rent from the land. However, he reasoned, since Mrs. Cooper's interest was the possessory right in the lots that were allotted to her pursuant to s. 20 of the ***Act*** and since, in his opinion, her right of possession terminated on her death, neither it nor the rents derived from it passed under her will.

[36] In my view, the Chambers judge erred in reaching this conclusion because his deductive reasoning proceeded from a flawed major premise. The error becomes apparent when the premise is restated in this way: "rent is inextricably derived from the property interest in land out of which the tenancy or leasehold is created." Thus, the Chambers judge's premise was correct but incomplete. The omission is critical in this case.

[37] The Chambers judge should have begun his analysis by identifying the estate from which the leaseholds were created. He should have asked himself: Were these leases by Canada of Canada's interest in the land or were they leases by Mrs. Cooper (or by Canada as her representative) of her interest in the lots that were allotted to her by the Band? To state the

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question in another way, were the leases sub-interests of the Crown's interest or sub-interests of Mrs. Cooper's interest? The facts postulated in the question stated for the Chambers judge do not provide a clear answer. However, the answer is found in the Band's reply to the statement of defence delivered by the administrators of Mrs. Cooper's estate, which was overlooked by counsel when they paraphrased the facts. The Band pleaded that the leases were granted by Her Majesty the Queen "of her legal title to the land in accordance with s. 58(3) of the ***Indian Act***" (My emphasis).

[38] Thus, the leases are sub-interests of Canada's interest in the land. By virtue of the definition of "reserve" in s. 2(1) of the ***Act***, Canada has "legal title" to "the land of which the Indian is in lawful possession", albeit a title that is encumbered by its obligation to hold title "for the use and benefit" of the relevant band and, by extension, for individual band members to whom lots may be allotted pursuant to s. 20.

[39] This is an important fact. There are three ways in which an estate in land may exist at common law. They are identified in Megarry and Wade, ***The Law of Real Property***, 3rd ed. (Stevens & Sons Limited: London, 1966) at p. 47 as estates

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in possession, in remainder, and in reversion. As the learned authors state:

> A reversion will ... be found in every case where the owner has made a grant which does not exhaust the whole of his own interest.

As the grants by Canada to the lessees were for terms of years, they did not exhaust the whole of Canada's legal title in the underlying land. Accordingly, Canada holds the legal reversionary interest in the land.

[40] Since the common law regarded rent as issuing out of the land (see ***The Law of Real Property***, *supra*, at p. 693; ***Highway Properties Ltd. v. Kelly, Douglas and Co.***, [1971] S.C.R. 562 at 573), it follows that the right to receive the rental payments is the right of the Crown, as landlord and holder of the reversionary interest. As well, presumably, the Crown was entitled to receive the rents as the beneficiary of covenants to pay rent contained in the leases.

[41] I am aware that the Courts have been reluctant to apply common-law principles of real property law to aboriginal title. As Lamer C.J.C. said, in ***St. Mary's Indian Band v. Cranbrook***, [1997] 2 S.C.R. 657 at para. 15, quoting Gonthier J. in ***Blueberry River Indian Band v. Canada (Department of***

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Indian Affairs and Northern Development), [1995] 4 S.C.R. 344, at para. 7:

> ...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.

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However, the parties to the leases in this case are Canada and the lessees, and the leases were granted of Canada's legal title to the land. Consequently, the analysis of the interests arising by virtue of the leases is not affected by that principle. In the circumstances, the lessees have common-law leasehold estates in the leased land, since a lease of land for a term of years under which possession is taken creates an estate in the land: see ***Highway Properties Ltd. v. Kelly, Douglas and Co.***, *supra*, at 568.

[42] The provisions of s. 58(3) of the ***Act*** lend support to this analysis, in my view. For convenience, I reproduce it:

> (3) The Minister may lease <u>for the benefit of any Indian</u>, on an application of that Indian for that purpose, <u>the land of which the Indian is in lawful possession</u> without the land being designated.
>
> [Emphasis added]

[43] Notably, the legislation does not say that the Minister may lease the land "on behalf of any Indian" who should apply. That is understandable since, in my view, a lease granted by or on behalf of a holder of a Certificate of Possession would be a curious instrument that would likely be unattractive to potential lessees. The possessory interests allotted pursuant to s. 20 of the ***Act*** are derived from the Band's interest in the reserve lands and, therefore, possess the same characteristics. The Band's interest is *sui generis*. Its nature was described by Major J. in ***Opetchesaht Indian Band v. Canada***, [1997] 2 S.C.R. 119 (at paras. 37-38). It is "an incorporeal, personal right of perpetual usufruct." It is not a fee in the lands; it is a legal right to occupy and possess the lands, the ultimate title to which is in the Crown. The interest does not amount to beneficial ownership, but "its nature [is not] completely exhausted by the concept of a personal right." The interest is personal in the sense that it is inalienable without the approval of the Minister and it is this inalienability that "is the most salient feature of the *sui generis* interest".

[44] Given the *sui generis* nature of the interest created by an allotment pursuant to s. 20, any grant by the allottee of a sub-interest would create an interest fraught with uncertainty

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as to its terms. Accordingly, the certainty inherent in a common-law leasehold is better calculated to achieve the obvious purpose of s. 58(3). Parliament recognized this fact by providing that the Minister may lease the land underlying the possessory interest, to which the Crown holds title, for the benefit of the Indian to whom possession was allotted.

[45] Since the essence of a lease is the right to exclusive possession of the leased premises (see ***The Law of Real Property***, *supra*, at 624), the right to exclusive possession of the leased land was conveyed by Canada to the lessees. Accordingly, Mrs. Cooper's right of actual possession of her lots was suspended during the terms of the leases. It seems likely, as was pleaded, that Mrs. Cooper's interest included a reversionary right to resume actual possession of the lands had she survived beyond the expiry of the leases. Section 50 of the ***Act*** does not deal expressly with this contingent interest in the event of her death during the currency of the leases. However, it is not necessary in this case to construe s. 50 for the purpose of determining whether Mrs. Cooper's "rights and interests to the lots" were effectively conveyed by her will to her heirs, since those rights and interests do not include the right to receive rents under leases granted by Canada of its legal title to the underlying land. Mrs. Cooper

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had no right to the rent *per se*, either by contract or as an incident of a landlord/tenant relationship. Rather, the right to receive the rent was vested in the Crown.

[46] It follows that, with respect, I disagree with Mr. Justice Low's treatment of the right to receive the rents as an incident of Mrs. Cooper's possessory interest in the lands and with his conclusion that the answer to the stated question of law turns on a construction of s. 50 of the ***Act***.

[47] It may be that the question of who is entitled to the moneys in issue should be answered by a consideration of other provisions of the ***Act***. For example, s. 2(1) of the ***Act*** defines "Indian moneys":

> "Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands.

Section 61(1) provides, in part:

> **61** (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held ....

As well, Section 63 provides:

> **63** Notwithstanding the *Financial Administration Act*, where moneys to which an Indian is entitled are paid to a superintendent under any lease or agreement made under this Act, the superintendent may pay the moneys to the Indian.

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Section 2(1) of the ***Act*** defines “superintendent” as a delegate of the Minister with duties and responsibilities relating, among other things, to particular bands and particular reserves. The moneys received by the Crown from the leases in this case would seem to fall within the definition of “Indian moneys”. Perhaps a construction of these provisions of the ***Act*** would resolve the dispute between the parties. However, regrettably, no material facts have been pleaded that would engage them.

[48] In particular, there is no pleading that Mrs. Cooper bequeathed to her heirs by her will the right to the benefit conferred upon her by s. 58(3). This right is not “a right and interest to the lots”, which is the description of the bequest contained in the pleadings. In short, no material fact is pleaded in defence that, if true, would confer on Mrs. Cooper’s heirs the right to the moneys collected by Canada under the leases entered into for Mrs. Cooper’s benefit. This may be an omission from the pleading or it may be that Mrs. Cooper devised only her interest in the lots. If it is the former, it is unfortunate because the question of whether the heirs would be entitled to the moneys if they were bequeathed

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to them by Mrs. Cooper cannot be determined on the pleadings as they stand.

[49] The Band's claim to the moneys suffers from similar difficulties. It is framed on the foundation that the Band became the beneficial owner of the lots on Mrs. Cooper's death and that its beneficial ownership entitles it to the rents. As I have explained, that is not the issue. It may be that the Band's claim is to be determined on a construction of the other provisions of the statute that I have mentioned. However, that is not before us either on the pleadings or in the question stated for the Chambers judge under Rule 34(1).

[50] For these reasons, the question stated cannot be answered and the Chambers judge erred in answering it. Accordingly, I would allow the appeal, set aside the order appealed from, and remit the action to the Supreme Court so that the parties may, should they be so advised, amend their pleadings to raise the true issue.

The Honourable Mr. Justice Smith

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