Wewayakum Indian Band v. Wewayakai Indian Band, 1999 CanLII 8839 (FCA)

Date:	1999-10-12
Docket:	A-655-95
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Date: 19991012

Docket: A-655-95

OTTAWA, ONTARIO this 12th day of October 1999.

CORAM: THE CHIEF JUSTICE

LINDEN J.A.

McDONALD J.A.

No. T-2652-85

BETWEEN:

ROY ANTHONY ROBERTS, C. AUBREY ROBERTS and JOHN HENDERSON, suing on their own behalf and on behalf of all other members of the WEWAYKUM INDIAN BAND (also known as the CAMPBELL RIVER INDIAN BAND)

Plaintiffs

(Appellants)

- AND -

HER MAJESTY THE QUEEN

Defendant

(Respondent; Appellant by Cross-appeal)

- AND -

RALPH DICK, DANIEL BILLY, ELMER DICK, STEPHEN ASSU and JAMES D. WILSON, suing on their own behalf and on behalf of all other members of the WEWAYAKAI INDIAN BAND (also known as CAPE MUDGE INDIAN BAND)

Defendants; Plaintiffs on The Counterclaim

(Respondents; Appellants on The Counterclaim)

No. T-951-89

BETWEEN:

RALPH DICK, DANIEL BILLY, ELMER DICK, STEPHEN ASSU, GODFREY PRICE, ALLEN CHICKITE, and LLOYD CHICKITE, suing on their own behalf and on behalf of all other members of the WEWAIKAI INDIAN BAND (also known as the CAPE MUDGE INDIAN BAND)

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Defendant

(Respondent; Appellant by Cross-Appeal)

(Appellant by Cross-Appeal)

JUDGMENT

The appeal of the Cape Mudge Indian Band on the issue of solicitor-client costs is allowed; but, in all other respects it is dismissed with costs. The appeal of the Campbell River Indian Band is dismissed with costs. The cross-appeals are dismissed without costs.

There shall be no costs for or against the intervenor, the Attorney General of British Columbia.

"Julius A. Isaac"

C.J.

Date: 19991012

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(Appellant by Cross-Appeal)

Heard at Vancouver, British Columbia on Monday, December 7, 1998 through Friday, December 11, 1998,

inclusive.

Judgment delivered at Ottawa, Ontario on Tuesday, October 12, 1999.

REASONS FOR JUDGMENT BY:McDONALD J.A.

CONCURRED IN BY:LINDEN J.A.

CONCURRING REASONS BY:THE CHIEF JUSTICE

CONCURRED IN BY:LINDEN J.A.

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(Respondent; Appellant by Cross-Appeal)

(Appellant by Cross-Appeal)

REASONS FOR JUDGMENT

THE CHIEF JUSTICE

Introduction

I have had the benefit of reading the reasons for judgment of my colleague, McDonald J.A. Although I agree with the disposition that he has proposed, I, nevertheless, prefer to rest my own on a different footing, and must, therefore, give these separate reasons.

The learned Trial Judge concluded that the actions of the Campbell River Indian Band and the Cape Mudge Indian Band for declarations of ownership to Reserves No. 11 and 12, as well as their claims for equitable compensation are statute barred by the *British Columbia Limitation Act*,[1] as incorporated by subsection 39(1) *Federal Court Act*,[2] and by the equitable doctrines of laches and acquiesence. He, therefore, dismissed the actions.[3] The remainder of his reasons were given in the event that his initial conclusion was wrong. In my view, therefore, the principal issue which this Court must address is whether the Trial Judge erred in finding that the actions are barred by statute and by the equitable doctrines of laches and acquiesence.

Additional Facts

I agree with the facts as my colleague has stated them. However, because I propose to dispose of this appeal on a different ground, I find it useful to emphasize some additional facts, as context.

On 22 March 1907, the Cape Mudge Indian Band, in the presence of Indian Agent Halliday, unanimously passed a resolution stating that it had ceded to the Campbell River Indian Band all rights to the Campbell River Reserve [Reserve No. 11] save and except a right to fish in the Campbell River in common with the Campbell River Indian Band.[4]

After Reserve Commissioner Vowell had approved the resolution, a handwritten notation was made on a copy of the 1902 schedule of Indian Reserves. The schedule, published by the Department of Indian Affairs ("the

Department"), listed the tribal subgroups to which each reserve had been allocated.[5] A "ditto mark" was used to indicate that a particular band was allocated more than one reserve. This notation placed the name "*Wewayakay*" [the Cape Mudge Indian Band] opposite Reserve No. 11 [the Campbell River Reserve], even though by the 1907 resolution that reserve had been ceded to the Campbell River Indian Band. The "ditto mark" in the 1902 schedule also shows the name "*Wewayakay*" opposite Reserve No. 12 [the Quinsam Reserve]. But the schedule published in 1913 shows the name "*Wewayakum Band*" [the Campbell River Indian Band] opposite both reserves.[6]

In 1936, the Department obtained sworn declarations from the Chiefs and principal men of the Cape Mudge Indian Band and Campbell River Indian Band confirming a list of reserves belonging to both. In these declarations, the Cape Mudge Indian Band made no claim to the Campbell River Reserve and the Campbell River Indian Band made no claim to the Quinsam Reserve.[7] Based on these declarations, the Department prepared and published, in 1943, a new and revised schedule of Indian Reserves.[8] According to this schedule, the Campbell River Indian Band had been allocated the Campbell River Reserve [Reserve No. 11] and the Cape Mudge Indian Band had been allocated the Quinsam Reserve [Reserve No. 12].

In 1970 and 1971, over 60 years after the 1907 resolution and some 30 years after the publication of the 1943 schedule of Indian Reserves, the Campbell River Indian Band and the Cape Mudge Indian Band again questioned the allocation of Reserves No. 11 and No. 12. Acting upon a request by the Campbell River Indian Band, the Minister of Indian Affairs ("the Minister") ordered an inquiry into the matter. Subsequently, the Department advised both bands that the Quinsam Reserve [Reserve No. 12] was set apart for the use and benefit of the Cape Mudge Indian Band which, in 1907, had ceded to the Campbell River Indian Band all rights to the Campbell River Reserve [Reserve No. 11] except the right to fish in the Campbell River in common with the latter band. The Department also sent to them copies of the 1907 ceding resolution and copies of the 1936 declarations sworn by the Campbell River and the Cape Mudge Indian Bands, respectively.

In 1985, the Campbell River Indian Band commenced its action against the Crown, 15 years after obtaining legal advice on the very documents which are relevant to its claim and 49 years after the 1936 sworn declaration of its Chiefs and principal men. In this declaration they made no claim to the Quinsam Reserve.

For its part, the Cape Mudge Indian Band commenced its action against the Crown in 1989, 18 years after receiving the 1971 letter and relevant documents from the Department and 53 years after the 1936 declaration sworn by the Chiefs and principal men of the Cape Mudge Indian Band. In that declaration they made no claim to the Campbell River Reserve.

On 19 October 1989, Martin J. ordered that both actions be heard on common evidence at the same time and, on completion of the evidence, that there be common argument for both.

Each band appealed separately (A-635-95 and A-655-95) from the judgment of the learned Trial Judge and, in each case, the Crown cross-appealed.

On 28 August 1996, Stone J.A. ordered, on consent, that the appeals and cross-appeals should be consolidated and heard at the same time.

The Attorney General of British Columbia has intervened in response to a notice of constitutional question filed by the Cape Mudge Indian Band.

The questions stated in the notice are as follows:

... the Wewaikai Indian Band (Cape Mudge Indian Band) intends to question:

a) the constitutional effect of section 39 of the *Federal Court Act*, ... and to question the constitutional

applicability of the British Columbia *Statute of Limitations*, ... and subsequent enactments and amendments, and the British Columbia *Limitation Act*, ... when read together with section 39 of the *Federal Court Act*; and,

b) the constitutional effect of British Columbia Order-in-Council No. 1036 dated July 28, 1938, in these Appeals ...

Judgment Below

At trial, the Court was required to determine which of the Bands was entitled to a declaration of exclusive use and possession of either the Campbell River Reserve, or the Quinsam Reserve. Although each Band occupied the land claimed by the other, neither wished to dispossess the other. Instead, they chose to name the Crown as defendant in both their actions, claiming damages for breach of fiduciary duty towards them in the allocation of the Reserves. For this they sought declarations of their alleged existing usufructuary rights in the reserves of each other, and compensatory damages from the Crown for having denied them those alleged rights, in breach of its fiduciary duty toward them. For its part, the Crown has maintained that it did not breach its fiduciary duty to either Band, that the dispute is one solely between the two Bands and that it does not engage the Crown in any capacity.

The Trial Judge found that the appellants' actions were statute barred by the *B.C. Limitation Act*, as incorporated by section 39 of the *Federal Court Act*. His conclusion was based, in part, on jurisprudence of this Court, that provincial limitation legislation, once incorporated by section 39 of the *Federal Court Act*, applies as valid federal law to extinguish those causes of action.[9] Since the claims are grounded in events which transpired in or around 1907, the Trial Judge declared that both actions fell well outside the thirty year ultimate limitation period prescribed in section 8 of the *B.C. Limitation Act*. He also concluded that it would be inequitable for either Band to enforce its claim against the other and that the equitable defence of laches and acquiescence applied to bar any claim for relief not barred by statute.

In case he was mistaken on the limitations issue, the Trial Judge embarked upon an extensive analysis of the evidence before him. After assessing this evidence, he found that the facts could not sustain the claim of either Band to the Reserve of the other.

Relevant Legislative Provisions

Subsection 39(1) of the *Federal Court Act* reads:

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 relevant sections of the *B.C. Limitation Act* read:

Limitation periods

3 (1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action

(a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

(b) for trespass to property not included in paragraph (a);

...

(3) A person is not governed by a limitation period and may at any time bring an action

(a) for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass;

...

(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.

.....

Running of time postponed

6 ...

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

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

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

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

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

Ultimate limitation

8 (1) Subject to section 3(3) but notwithstanding a confirmation made under section 5, a postponement or suspension of the running of time under section 6, 7 or 11(2), ***no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose.***

[Emphasis added.]

Section 88 of the *Indian Act*, in force at the relevant times, read:

88 Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

Issue

The principal issues before us are whether the Trial Judge erred in determining that the actions of the Campbell River Indian Band and the Cape Mudge Indian Band for declarations of exclusive use and possession of Reserves No. 11 and 12, as well as their claims for equitable compensation are statute barred by the *B.C. Limitation Act* as incorporated by the *Federal Court Act*, and by the equitable doctrines of laches and acquiescence.

Analysis

The appellant, Cape Mudge Indian Band (Wewayakai Indian Band) contends that the conclusion of the Trial Judge on the limitations issue is wrong in law for reasons of: a) express provisions of the *Indian Act*; b) constitutional law; c) section 3(3)(a) of the *B.C. Limitation Act*; d) continuing breach of duty; e) intervening breaches; f) date of accrual of the causes of action; and g) fairness and the honour of the Crown.

For its part, the appellant Campbell River Indian Band raises similar, although not identical, objections to the conclusion of the Trial Judge on the limitations issue.

It is my respectful view that the memorandum of fact and law filed on behalf of the Crown and the cases therein cited which I have read and considered, contains, at paragraphs 200-255, a sufficient answer to the appellants' submissions on this issue. However, in deference to the arguments advanced by counsel for the appellants both in writing and orally, I make the following observations.

The appellants accept that subsection 39(1) of the *Federal Court Act* is engaged whenever the defence of prescriptions is pleaded, in this Court, in actions such as these, respecting Indian lands wholly situated within a province. However, focussing on the opening phrase in that subsection, "Except as expressly provided by any other Act", they contend that the relevant legislation to look at in order to discover whether or not a period of prescription exists to defeat their claims is not the *B.C. Limitation Act*, but the *Indian Act* as it stood at the relevant times. Subsection 39(1) of the *Federal Court Act*, properly construed, yields this result, so the argument ran.

I am unable to accept this contention. As the learned Trial Judge concluded, correctly, in my respectful view, the *Indian Act* contains no provisions which could conceivably be characterized as containing periods of prescription or periods of limitations respecting the commencement of actions. I have been unable to find any and counsel for the parties did not bring to our attention any other federal legislation that would bar the bringing of actions of the kind in issue here. It follows, then, as a matter of statutory construction, that any assessment of the validity of the defence of prescription in these appeals must consider the provisions of the *B.C. Limitation Act*. The reason is that the alleged causes of action in these appeals arise wholly within the province of British Columbia and subsection 39(1) of the *Federal Court Act* directs the application of the *B.C. Limitation Act* to circumstances such as these.

Furthermore, I am unable to accept the ingenious submission, advanced by counsel for the Cape Mudge Indian Band, that there was in respect of either reserve a surrender or other alienation contrary to the provisions of the *Indian Act*, which would render the provisions of that Act controlling. In this respect, I am in respectful agreement with the Trial Judge that there was no surrender of or other alienation of either reserve.

More importantly, the submission overlooks a legal rule that is well settled in our jurisprudence, namely, that when Parliament incorporates the law of another legislative jurisdiction by reference in its own legislation, the law so incorporated becomes Federal law and is to be applied as such, provided that all the conditions precedent to incorporation have been satisfied[10]. Thus, in these actions, when subsection 39(1) directs that "the laws relating to prescription and the limitation 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 reference here must be to the relevant provisions of the *B.C. Limitation Act*. This Court is required to apply the *B.C. Limitation Act*, not as provincial law, but as federal law[11]. This must be so, because the land in respect of which the actions have been brought are situated wholly within the province of British Columbia and the cause of action in each case is alleged to have arisen in that province.

I turn now to the objections of the judgment based on several constitutional grounds. Firstly, noting that section 39 of the *Federal Court Act* provides that the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceeding in the Federal Court, the appellants contend that, on its proper construction, section 39 of the *Federal Court Act* is simply a direction to this Court to apply constitutionally valid provincial limitation provisions. They argue further that provincial limitations legislation cannot constitutionally apply to extinguish, erode, eliminate or limit the Indian title in reserve land or the fiduciary

obligation of the Federal government to administer that interest, as this would have a dismembering effect on an area of exclusive federal jurisdiction pursuant to head 24 of section 91 of the *Constitution Act, 1867*[12]. Thirdly, they argue that section 39 of the *Federal Court Act*, lacks the requisite plain and clear intention required to extinguish, erode, eliminate or limit their rights to the reserves and their related entitlement to compensation for breach of fiduciary duty concerning reserve lands. Fourthly, they argue that an interpretation of section 39 of the *Federal Court Act* that would extinguish any of their claims would be contrary to the recognition and affirmation of aboriginal rights in section 35 of the *Constitution Act, 1982*[13].

In so far as the judgment below rests on Order-in-Council 1036, the Cape Mudge Indian Band contends firstly that a Provincial Order-in-Council cannot constitutionally apply to extinguish, erode, eliminate or limit the Indian title in reserve land as this would have a dismembering effect on an area of exclusive Federal jurisdiction pursuant to head 24 of section 91 of the *Constitution Act, 1867*[14]; and, secondly that Order-in-Council 1036 did not, as a matter of statutory interpretation, purport to extinguish, erode, eliminate or limit the Wewaikai Band's Indian title to the reserves in question. If this legislation did so purport, then it should be read down so as to address only issues within the constitutional competence of the legislature of the Province of British Columbia.

I will deal with each of these arguments in turn, but briefly, because, as I have already said the respondent Crown, in its memorandum of fact and law has, in my view, provided sufficient answers to them.

I deal, firstly, with the third and fourth arguments based upon section 35 of the *Constitution Act, 1982*. That section of the 1982 constitution recognizes and affirms existing and treaty rights of the aboriginal people of Canada. Since, the appellants in this case do not allege that their claims are rooted in any aboriginal or treaty right or that any of those rights, as they relate to them or either of them, have been violated, it follows that section 35 can have no application. Similarly, the "clear and plain intention" test laid down by the Supreme Court of Canada, to determine whether aboriginal rights are adversely affected by legislation has no application here[15].

As regards the arguments based on Order-in-Council 1036 which the Cape Mudge Indian Band has advanced, I agree with the submissions of the Attorney General for British Columbia in paragraphs 13 to 34 of his memorandum of fact and law, that this Court should refrain from deciding those issues since the requisite evidentiary foundation is incomplete, and the facts alleged by the appellant, Campbell River Band and by the respondent Crown do not require us to do so.

I deal next with the first argument of the appellants, namely, that section 39 of the *Federal Court Act* is a direction to this Court to apply only those provincial limitation provisions that are constitutionally valid. Assuming, without deciding, that that is the direction which section 39 contains, it is my respectful view that the *B.C. Limitation Act* is constitutionally valid, whether viewed as legislation in relation to property and civil rights in the province of British Columbia or legislation in relation to procedure in civil matters to be followed in the courts of that province[16]. But in my respectful view, this submission does not advance the appellants' appeal, since the *B.C. Limitation Act*, whether viewed as a provincial law of general application or as a federal law incorporated by reference in subsection 39(1) of the *Federal Court Act*, may apply to Indians and lands reserved for Indians[17].

With respect to the final constitutional argument, namely, that a provincial court in British Columbia trying an Indian land claim action could not properly apply the *B.C. Limitation Act*, I make the following observations. Firstly, that issue is not before this Court and I need not decide it. Secondly, I agree with the submission of the Attorney General of British Columbia that, except in exceptional circumstances, Courts should refrain from pronouncing on questions of law which do not directly arise from the case before them and are therefore not integral to their proper disposition. This is especially so where the question is a constitutional one. In my view no exceptional circumstances have been shown here[18].

On this aspect of its appeal, the appellant Cape Mudge Indian Band has asked for a finding "that section 39 of the

Federal Court Act, cannot have the effect of making provincial limitation laws apply so as to eliminate a Band interest in its reserve in the absence of a surrender". This is so, it is argued, because of the express provision to the contrary in the *Indian Act*. For the reasons already given, I am unable to accede to this request, since the limitation laws in issue here are federal and not provincial laws.

Next, the appellant Cape Mudge Indian Band contends that its claim to a declaration of ownership of the Campbell River Reserve falls within paragraph 3(3)(a) of the *B.C. Limitation Act*, because, so it was argued, it was dispossessed of that reserve in circumstances amounting to trespass. Paragraph 3(3)(a) reads:

3. A person is not governed by a limitation period and may at any time bring an action

(a) for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass.

This contention cannot succeed. Assuming that Cape Mudge's actions for declaration of entitlement is an action for possession of land within the meaning of paragraph 3(3)(a), the finding of the Trial Judge respecting the Band's entitlement to the Campbell River Reserve presents a formidable obstacle. The Trial Judge found that the Cape Mudge Band was not entitled to possession of the Campbell River Reserve and this appellant has not persuaded me that that finding was wrong in fact or in law.

Having determined that the appellants' cause of action is indeed subject to the limitation periods set out in the *B.C. Limitation Act*, I will now turn to determine which of the limitation periods listed in the Act applies.

In its Statement of Claim, the Campbell River Indian Band claims:

As against the Crown

- A declaration that this defendant has acted in breach of Her fiduciary duties, Her duty of care and Her duties under the Indian Act as alleged in paragraphs 20 to 22 above;

- an accounting;

- a declaration of the amount of damages and compensation the plaintiffs are entitled to recover from this Defendant in respect of Her breaches of duty as alleged in paragraphs 20 to 22 above, including damages and compensation for losses of timber, mining, leasing, fishing and other revenues and losses of investment income on those revenues;

- interest; and

- costs on a solicitor-client or lump sum basis.

As against the defendant Cape Mudge Indian Band:

- a permanent injunction restraining these defendants from trespassing on Reserve No. 12; and,

- costs.

As against all defendants:

- a declaration that Reserve No. 11 and Reserve No. 12 are, and always have been since their establishment as reserves, reserves which are set aside for the exclusive use and benefit of the plaintiff Band;

- and such further and other relief as may be justified by the facts alleged and as may be allowed by this Honourable Court.

For its part, the Cape Mudge Indian Band claims against the Crown:

- A declaration that Reserve No. 11 and Reserve No. 12 were established and set aside for the exclusive use and benefit of the Wewaikai Band;

- A declaration that Reserve No. 11 and No. 12 have never been surrendered by the Wewaikai Band;

- A declaration that Reserve No. 11 and No. 12 continue to be set aside for the exclusive use and benefit of the Wewaikai Band and that the Wewaikai Band have the right to exclusive occupation of both Reserves;

- An injunction restraining the defendant from causing or permitting the surrender, transfer, alteration or alienation of or damage to the lands comprising Reserve No. 11 or the interests of the plaintiffs in these lands without first obtaining the consent of the Wewaikai Band;

- A declaration that the defendant has acted in breach of Her fiduciary duties, Her duty of care and Her duties under the Indian Act;

- Damages and compensation from the defendant in respect of Her breaches of duty as alleged including damages and compensation for losses of land, timber, mining, leasing, fishing and other revenue and losses of investment income on those revenues;

- An accounting;

- Interest;

- Costs on a solicitor/client or lump sum basis; and

- Such further and other relief as may be justified by the facts alleged and as may be allowed by this Honourable Court.

The *B.C. Limitation Act* prescribes three specific limitation periods of 2, 6 and 10 years, a "default" limitation period of six years, and an ultimate limitation period of 30 years. In these appeals, both the Cape Mudge and Campbell River Indian Bands have alleged breaches by the Crown of its statutory duty in its dealings in relation to Reserves No. 11 and 12. By virtue of paragraph 3(1)(a) of the *B.C. Limitation Act* , breaches of statutory duty are subject to a 2 year limitation period.

Both parties have also alleged that the Crown also breached its fiduciary duty towards them in other respects. I note that that claim does not fall within the ambit of the specific limitation periods set out in subsections 3(1), 3(2) or 3(5) of the *B.C. Limitation Act*. In *Apsassin*, this Court was required in similar circumstances to classify an alleged breach of the Crown's fiduciary duty for the purposes of the *B.C. Limitation Act*. In that case, Stone J.A. held that such a claim would come within the plain language of subsection 3(4) referring to "any other action", with the result that such causes must be brought within six years of the commencement of the running of time to be actionable.[19]

Subsection 8(1) of the *B.C. Limitation Act* reads:

no action to which the Act applies may be brought after the expiration of 30 years from the date on which the right to do so arose.The question then becomes when does time start to run for the thirty year ultimate limitation period. "The right to do so" in Subsection 8(1) has been interpreted to mean the date of accrual of the cause of

action without reference to the plaintiffs' knowledge of the material facts.[20] The result is that absent evidence of fraud, willful deceit or concealment of material facts, no action may be brought after the 30 year limitation period has expired.

In these appeals, the Campbell River Indian Band filed their statement of claim on 2 December 1985. The Cape Mudge Indian Band filed theirs on 5 May 1989. The 30 year ultimate limitation period, precludes any action for which the event giving rise to the right to bring the cause of action occurred prior to 2 December 1955 and 5 May 1959, respectively. The appellants' actions are grounded in events which occurred on or around 1907. Therefore, the actions of both appellants are statute-barred by subsection 8(1) of the *B.C. Limitation Act*, as incorporated by subsection 39(1) of the *Federal Court Act* and the Trial Judge was right in so concluding.

The appellants have argued that no limitation period may apply to declarations of existing rights. I understand that argument to mean that the appellants are not barred by statute from bringing their actions for declarations of their existing usufructuary rights, or, to use the words of the appellants', that Reserves No. 11 and 12, respectively, have been and always will be reserves set aside for their exclusive use and enjoyment. As I have already said, the Trial Judge found, and I agree, that neither Band has been able to establish that it ever had any right to the Reserves in question. In these circumstances the issue whether limitation periods may bar declarations of existing usufructuary rights does not arise for determination in these appeals. And even if it did, it is my view that the reference in subsection 3(4), to "any other action", would clearly be a bar. For convenience, I reproduce that subsection here:

(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 to do so arose.

[Emphasis added.]

The Trial Judge found that there had been no breach of fiduciary duty, as the appellants had alleged. In the circumstances of this case, this finding was open to him and the appellants have not persuaded me that he was wrong. In my view, it is a *fortiori* that there was no continuing breach which would extend the time for commencement of the limitation period.

Pari ratione, it is my view that there were no intervening breaches upon which the appellants could rely.

The decision of this Court in *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (F.C.A.), [1998] 1 F.C. 3 (C.A.) upon which the appellants rely is clearly distinguishable on its facts and has no application here.

In my respectful view the submissions of the appellants that the doctrine of fairness and the honour of the Crown are engaged in these appeals are wholly devoid of merit in the circumstances. The Trial Judge was therefore right to reject their claims on these and other grounds for the reasons that he gave.

The final contention of the appellants is that the Trial Judge was wrong to apply the equitable defences of acquiesence and laches to bar their claims.

The Trial Judge dealt with this aspect of the appellants' submissions at paragraphs 207-214 of his reasons. Despite their eloquent argument to the contrary, the appellants have not persuaded me that the Trial Judge reached the wrong conclusion on this issue.

For all these reasons, I would dispose of the appeals in the manner proposed by McDonald J.A.

A copy of these reasons should be filed in File A-635-95 and when filed shall be considered as the disposition of the appeal and cross-appeal in that file.

"Julius A. Isaac"

Date:19991012

Docket: A-655-95

CORAM: THE CHIEF JUSTICE

LINDEN J.A.

McDONALD J.A.

No. T-2652-85

BETWEEN:

ROY ANTHONY ROBERTS, C. AUBREY ROBERTS, and JOHN HENDERSON, suing on their own behalf and on behalf of all other members of the WEWAYKUM INDIAN BAND (also known as the CAMPBELL RIVER INDIAN BAND)

Plaintiffs

(Appellants)

- AND -

HER MAJESTY THE QUEEN

Defendant

(Respondent; Appellant by Cross-appeal)

- AND -

RALPH DICK, DANIEL BILLY, ELMER DICK, STEPHEN ASSU, and JAMES D. WILSON, suing on their own behalf and on behalf of all other members of the WEWAYAKAI INDIAN BAND (also known as the CAPE MUDGE INDIAN BAND)

Defendants; Plaintiffs on The Counterclaim

(Respondents; Appellants on The Counterclaim)

No. T-951-89

BETWEEN:

RALPH DICK, DANIEL BILLY, ELMER DICK, STEPHEN ASSU, GODFREY PRICE, ALLEN CHICKITE and LLOYD CHICKITE, suing on their own behalf and on behalf of all other members of the WEWAIKAI INDIAN BAND (also known as the CAPE MUDGE INDIAN BAND)

Plaintiffs

(Appellants)

- AND -

HER MAJESTY THE QUEEN

Defendant

(Respondent; Appellant by Cross-appeal)

(Appellant by Cross-Appeal)

REASONS FOR JUDGMENT

LINDEN J.A.

[1] While I am of the view that it was not necessary to deal with all of the issues considered by Chief Justice Isaac in his learned reasons, I agree completely with all that he has written concerning them.

"A.M. Linden"

J.A.

Date:19991012

Docket: A-655-95

CORAM: THE CHIEF JUSTICE

LINDEN J.A.

McDONALD J.A.

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REASONS FOR JUDGMENT

McDONALD J.A.

This proceeding involves two appeals and a cross-appeal from a decision of the Federal Court Trial Division dismissing an action of the Campbell River Indian Band (the "*Wewaikum*") against the Crown and the Cape Mudge Indian Band (the "*Wewaikai*") without costs, a counterclaim by the *Wewaikai* against the *Wewaikum* without costs, and an action by the *Wewaikai* against the Crown with costs to the Crown on a solicitor client basis.

At issue is which of the *Wewaikai* and *Wewaikum* Indian bands is entitled to the Campbell River and Quinsam Indian reserves on Vancouver Island in British Columbia. In essence, each of the appellant Indian Bands claims possession of the other's reserve. The claims of each Indian Band are based on allegations that the Crown has breached, and continues to breach, its fiduciary duty in respect of each of Band in respect of the allocation of the disputed reserves. In written submissions before this Court, each Aboriginal appellant sought a declaration that both reserves are held by the Crown for the use and benefit of their specific Band and equitable compensation for loss of such use and benefit. During the hearing, counsel admitted that neither Band wishes to dispossess the other Band from the land that they now possess. Accordingly, each of the appellant Bands is seeking only equitable

compensation.

The Crown responds that it did not breach its fiduciary duty in respect of either Indian Band during the allocation of the disputed reserves. Nor has there been a breach of duty in any subsequent year. In the alternative, the Crown asserts that the appellants' claims are barred by the B.C. *Limitation Act*[21] or by the equitable doctrines of laches and acquiescence. The Crown also cross-appeals on the issue of the interest calculated by the Trial Judge in respect of the equitable damage claims of the appellants. The Attorney General of British Columbia has intervened on the constitutional question of whether section 39 of the *Federal Court Act*,[22] which incorporates the B.C. *Limitation Act* into federal law by reference, can operate to extinguish an aboriginal interest in reserve lands.

Before beginning my analysis of this appeal, I must note that the nature of this case and indeed, the nature of many Aboriginal cases, requires that this Court engage in an extremely difficult exercise. Essentially, the parties have asked the Court to reconstruct specific events, some of which occurred more than one hundred years ago, to interpret them and to make legal findings based on an extensive, yet sometimes contradictory historical record. This is no easy task.

The Trial Judge summarized his approach to this task as follows:[23] After reviewing the extensive written submissions, oral submissions, expert reports and evidence, together with the countless documents, so eloquently described by one witness in the following terms: "there are many, many, many documents ....", *the one thing that the parties have in common is that all three parties have attempted to reconstruct events that took place over the past 100 years, based on numerous documents, which at times are contradictory, without the benefit of witnesses to the actual events which transpired. As such, the Court is in effect left to rely on the documentary evidence and is faced with the unenviable and daunting task of sifting through the thousands of documents and the expert reports to somehow ascertain and understand events which transpired over the past 100 years. At the same time, the Court must also avoid the tendency to look at one document, in isolation, to support one of the parties' submission, without examining the evidence as a whole. As well as not succumbing to the tendency of fastidious over analysis of a particular word or phrase in a particular document*. In the case before me, a simple sentence in a letter containing the phrase "these Indians" either referring to *Lekwiltach* or *Wewaikai* became the subject of extensive debate. I would add that I am in no way belittling the role or ability of any counsel, simply that the very nature of this case seemed to draw out a propensity for painstaking analysis. Matters were further complicated by the fact the there did not always appear to be consistency within the documents or by the author of the documents. For example, an individual may have written one thing in one letter and then five years later said the exact opposite in another letter. *Therefore, in order to attempt to somehow understand a contradiction or an inconsistency the Court must examine the document in the context of the year it was written, what was transpiring at that time and what occurred in the interval. For that reason, in a case such as the one before me, it is crucial and essential that the documents be viewed in their historical context*. Ultimately, the task of the Court will be to weigh all of the evidence and make findings of fact that are reasonable. In doing so, emphasis must also be placed on interpreting the evidence in the context of the entire historical record rather than to isolate a particular event or document as determinative of the issue in each action.

[emphasis added]

I am of the view that this is the correct approach and it is the approach that I have adopted in the reasons that follow.

Facts

The *Wewaikum* and the *Wewaikai* are two of the four Indian Bands or subgroups comprising the *Laick-kwil-tach* Indian Nation. Since the latter part of the 19th century, the *Wewaikum* have lived on Indian Reserve No. 11 (the "Campbell River reserve") on Vancouver Island. The main reserve of the *Wewaikai* is Indian Reserve No. 10 (the

"Cape Mudge reserve"), which is located on Quadra Island, a few kilometres from the Campbell River reserve. Since approximately 1950, some of the *Wewaikai* have lived on Indian Reserve No. 12 (the "Quinsam reserve"), which is located on Vancouver Island, a few kilometres to the west of the Campbell River reserve.

It is significant that the disputed areas are not part of the traditional territories of either Indian Band. Indeed, anthropological evidence established that the *Laich-kwil-tach* Indians migrated to the Campbell River area in the latter half of the 19th century, displacing the Comox Indians who lived in the area. Neither Indian Band raised any arguments at trial, or on appeal, regarding any aboriginal entitlement to these territories based on the Aboriginal title or the Aboriginal rights doctrines enshrined in section 35 of the *Constitution Act, 1982*.

The Reserve Allocation Process in British Columbia

By the early 1870's, the size and location of the reserves for many of the Indian Bands in British Columbia had not yet been determined. The increasing influx of non-Aboriginal settlers into the province was creating conflict and unnecessary encroachment upon Indian lands. A growing sense of urgency was developing throughout the province to settle the "Indian Land question". In response, the Federal and British Columbia governments agreed to establish the Indian Reserve Commission (the "Commission"). On November 10,1875, Federal Order in Council P.C. 1088 was passed creating the Commission. It described the mandate of the Reserve Commissioners in the following manner:[24] ... Commissioners shall, as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient speed in such order as may be found desirable, *each Indian Nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia* and after full enquiry on the spot, into all matters affecting the question, to *fix and determine for each Nation separately the number, extent and a locality of the reserve or reserves to be allowed to it*.

[emphasis added]

In 1876, the governments recognized that there were conflicts between the surrender provisions of the *Indian Act* and several of the powers of the new Reserve Commissioners. To avoid potential problems in the allocation of reserve lands, the Federal Government issued a proclamation excluding and exempting all Indian lands in British Columbia from the operation of these provisions, namely sections 25-28 of the *Indian Act*, S.C. 1876, c.18 (the "1876 Proclamation"). The relevant portions of this proclamation read as follows:[25] ... Whereas we deem it advisable that all the reserves and Indian lands in the Province of British Columbia should be exempt from the operation of sections twenty-five, twenty-six, twenty-seven and twenty-eight of the said Act, --

... We do by virtue of the authority vested in Us by [section 97 of the *Indian Act*], proclaim, order and declare that all the Reserves and Indian lands in the Province of British Columbia are, by this Our Royal Proclamation, exempted from the operation of sections twenty-five, twenty-six, twenty-seven and twenty-eight of the [*Indian Act*]; and *we do hereby exempt all Reserves and Indian lands in the Province of British Columbia from the operation of sections twenty-five, twenty-six, twenty-seven and twenty-eight of the said Act accordingly*.

[emphasis added]

In the following years, the Reserve Commissioners travelled around the province, consulting with Indian groups, surveying lands and recommending that certain areas be set aside as reserves. It is important to note that the recommendations of the Reserve Commissioners were merely provisional in nature. They were subject to review by both the Federal and provincial governments and required the approval of both governments before achieving legal status.

In 1878, Gilbert Sproat, the only acting Reserve Commissioner in the province at the time, visited the Campbell River area. He set aside 20 reserves for the *Laich-kwil-tach*, including lands corresponding to the current Quinsam and Campbell River reserves. However, Sproat's recommendations for these reserves were subsequently

disallowed by the provincial government. Shortly thereafter, Sproat resigned and Peter O'Reilly was commissioned to replace him.

O'Reilly visited Vancouver Island in 1886 and while there he allocated ten reserves to the *Laich-kwil-tach*. When he arrived at the current locations of the Campbell River and Quinsam reserves he found no Indians present. Accordingly, he chose to defer the allocation of reserves in the area until such time as he could consult with the Indians living there to ascertain their wishes. Shortly thereafter, he fell ill and returned to England for an extended period of time.

In 1887, a boundary dispute broke out between the Nunns, a family of white settlers in the Campbell River area, and Captain John Quacksister, the first *Laich-kwil-tach* Indian to establish a residence in the area. The dispute arose when the Nunns noticed that Captain John and others were cutting trees on what the Nunns believed to be their property. Captain John claimed that he had been granted ownership of all of the lands that had been set aside by Sproat in the area, i.e. the present day sites of the Quinsam and Campbell River reserves. The documentary evidence establishes that Captain John had been living in the area as early as 1875.

I t is worth noting that the subject of Captain John's subtribal affiliation was a matter of considerable dispute before the Trial Judge with both the *Wewaikai* and the *Wewaikum* claiming that he was a member of their particular Band. While this issue was not conclusively determined,[26] a review of the documents clearly reveals that Captain John's father was a *Wewaikum* and his mother was a member of the Comox Tribe. Furthermore, he eventually became a chief of the *Wewaikum*. Furthermore, it is clear that Captain John and his family were the only Indian residents in the Campbell River area in the late 1880s. As noted by Indian Agent Halliday in a letter to A.W. Vowell, superintendent of Indian Affairs, dated November 10, 1906:[27]

For many years, the only family [at Campbell River] was that of "Captain" John Quacksista who afterwards became Chief of the *Wewaikum* as his mother was a Comox and his father a *Wewaikum*... [When] it was surveyed, the Quacksista family were the only ones living there.

By 1888, the dispute between Captain John and the Nunns had escalated. In response, the provincial and federal governments commissioned Ashdown Green, O'Reilly's surveyor, to go to Campbell River and determine the extent and boundaries of the Indian Reserves there. The provincial Order in Council commissioning Green was passed on April 6, 1888 and provided:[28]

And recommending that the Dominion Government be requested to sanction the appointment of Ashdown H. Green Esq. C.E., to proceed without delay to Campbell River *with authority to determine the extent and boundaries of the Indian Reserves at that place*.

[emphasis added]

The corresponding Dominion Order in Council was passed on May 29, 1888 and provided that:[29]

the Superintendent General of Indian Affairs concurred in the proposed appointment of Mr. Ashdown Green *to determine the extent and boundaries of the Indian Reserve at Campbell River, ...*

Green met with Captain John and the Nunns in May 1888. In his Minutes of Decision and accompanying letter, he recommended the allocation of the Campbell River and Quinsam reserves to the *Laick-kwil-tach* tribe. The Minutes do not mention an allocation to any particular subgroup. Certain copies of the sketch maps accompanying his Minutes describe the reserves at Campbell River and Cape Mudge as *Laich-kwil-tach* reserves with no indication of allotment to any particular Band. One of the copies of the sketch maps indicates that both reserves were allocated to the *Laich-kwil-tach - Wewaikai* Band. The legal effect of this map was the subject of considerable dispute at trial, an issue that is addressed below.

In 1889, the Federal and Provincial governments approved an *Official Plan* depicting twelve "*Laick-kwil-tach* Indian Reserves". There was no indication of how these reserves were to be distributed amongst the various Bands belonging to the *Laich-kwil-tach* Indian Nation.

In 1896, a number of families from the *Wewaikum* Band asked Indian Agent Pidcock for permission to move from their reserve at Green Point to the Campbell River reserve. The Crown encouraged these families to settle the reserve.

Beginning in 1892, the Department of Indian Affairs published a Schedule of Reserves which contained, *inter alia*, a summary of the location and size of the various reserves in British Columbia. In later years, these schedules indicated the Indian Band to which each reserve had been allocated. The compilation of such a summary was not mandated by statute nor was it a conclusive record of any Indian Band's entitlement or interest in a particular reserve. The evidence revealed that these schedules were intended for use as an administrative document within the Department and the local offices. These schedules were published on a periodic basis and often contained errors which required correction.

The 1892 and 1898 Schedules of Reserves only listed the *Laick-kwil-tach* Indians and did not identify any individual subgroup of the *Laick-kwil-tach* tribe. The 1901 Annual Report of the Department of Indian Affairs contained the first schedule which listed the tribal subgroups to which each reserve had been allocated. After 1901, for reasons of convenience, employees of the Department of Indian Affairs frequently referred to the reserve schedules for band designations rather than the *Official Plan*.

Both the 1901 and 1902 Schedules indicated that the Campbell River reserve and the Cape Mudge reserve had been allocated to the *Wewaikai*. The *Wewayakum* allege that this designation was in error. The 1902 Schedule of Reserves listed reserves No. 7 to 12 as follows:[30]7 Village Bay We-way-akay [*Wewaikai*] Band

8 Open Bay " "

9 Drew Harbour " "

10 Cape Mudge " "

11 Campbell River " "

12 Quinsam " "

In 1905, following a prolonged fishing dispute between the Cape Mudge and Campbell River Bands, Edward Rendle, a missionary stationed on the Cape Mudge reserve, wrote to Indian Affairs seeking the resolution of the ownership question surrounding the Campbell River reserve. The *Wewaikai* were asserting fishing rights in the Campbell River on the ground that the Campbell River reserve belonged to them, exclusively. The *Wewaikum* sought to prevent the *Wewaikai* from fishing, arguing that the reserve belonged to them. Indian Agent DeBeck wrote to Superintendent Vowell, describing the fishing dispute in the following terms:[31]

... considerable friction exists between the We-wai-a-kai, Indians of Cape Mudge & the We-wai-ai-kum Indians now living on the Indian Reserve at the mouth of the Campbell River; it seems that the trouble began by the We-wai-ai-kum people trying to prevent the others from fishing for salmon in the Campbell river, and the We-wai-ai-kai people retaliate by ordering them to leave that reserve, claiming that it belongs to themselves.

In 1906, William Halliday was appointed Indian Agent for the area. In 1907, the International Timber Company advised Agent Halliday that it wished to commence logging operations on the Campbell River reserve. Halliday called a meeting at the Cape Mudge reserve to resolve the dispute between the *Wewaikai* and the *Wewaikum*. On

March 22, 1907, the *Wewaikai* unanimously passed a band resolution (the "1907 Resolution") stating that they ceded all rights to the Campbell River reserve to the *Wewaikum* save and except a right to fish the Campbell River in common with the *Wewaikum* Band. Members of the *Wewaikum* Band were also in attendance. The 1907 Resolution states:Resolved that whereas there is a difference of opinion as to the ownership of the reserve known as the Campbell River Reserve, this reserve being claimed by both the *Wewaiaikai* and *Wewaiaikum* Bands, and as the reserve is gazetted in the office of the Indian Department as belonging to the *Wewaiaikai* Band, as the reserve is at present occupied by the *Wewaikum* Band, as it would entail hardship on the members of the *Wewaiaikum* Band to be obliged to move, and as the first Indians to live on this reserve were of the *Wewaiaikum* Band, and as the object of the *Wewaiaikai* Band in asking for this land for a reserve was to have the use of the river for fishing purposes, therefore, *the members of the Wewaiaikai Band in council here assembled, do cede all right to the Campbell River Reserve to the Wewaiaikum Band forever, with the proviso that at any and all times the Wewaiaikai Band shall have the undisputed right to catch any and all fish in the waters of Campbell River, this right to be in common with the Wewaiaikai Band.*

Resolved further that the Indian Agent who is presiding at this meeting is hereby authorized to take what steps are necessary to have this resolution made official and properly carried out.[32]

[emphasis added]

The resolution was approved by the Superintendent of Indian Affairs and a handwritten notation was made on a copy of the 1902 schedule, placing the name "*Wewaikum*" opposite the Campbell River reserve. However, the "ditto mark" on the schedule opposite the Quinsam reserve was not changed. This error was not remedied when an updated schedule of reserves was published in 1913. The 1913 Schedule listed reserves 7 to 12 as follows:[33] 7 Village Bay We-way-akay [*Wewaikai*] Band

8 Open Bay " "

9 Drew Harbour " "

10 Cape Mudge " "

11 Campbell River Wewayakum [*Wewaikum*] Band

12 Quinsam " "

It now appeared that the Quinsam reserve was allocated to the *Wewaikum*. On no fewer than two subsequent occasions, Agent Halliday brought this error to the attention of the Reserve Commission but unfortunately it was not corrected until 1943. The existence of this "ditto mark error" in the reserve schedules between 1913 and 1943 has created a great deal of confusion over the years and ultimately led, at least in part, to this action.

In 1912, the Federal and B.C. governments established the McKenna-McBride Commission (the "Commission") to resolve all of the outstanding issues related to reserve lands in the province. Under the terms of a 1913 Order-in-Council, the McKenna-McBride Commission was to review all reserve lands in British Columbia and to fix and confirm the size and allocation of these reserves. All decisions of the Commission were subject to governmental approval.

Both the Campbell River and the Cape Mudge Bands appeared before the Commission in 1914. During these hearings, the *Wewaikum* claimed the Campbell River reserve and made no claim to the Quinsam reserve. Similarly, the *Wewaikai* claimed the Quinsam reserve but made no claim to the Campbell River reserve.

When the Commission issued its Final Report in 1916, it did not correct the "ditto mark" error in the 1913 Schedule. In fact, its recommendations seem to indicate that both the Campbell River and Quinsam reserves belonged to the *Wewaikum* .

The provincial government was not satisfied with the McKenna-McBride report and sought further adjustments to the size of reserves in the province. As a result, the Ditchburn-Clark Commission was convened in 1916 to review the findings of the McKenna-McBride Commission before any of the recommendations would be implemented. The Ditchburn-Clark Commission issued its report in 1923. This report also failed to correct the "ditto-mark" error. Consequently, the "ditto mark error" remained in the reserve schedules which were annexed to Orders-in-Council Nos. 911, 1265 and 1036. These Orders adopted the recommendations of the McKenna McBride Commission, as amended by the Ditchburn-Clark Commission, and authorized the transfer of the lands comprising Indian reserves in the province to the federal Crown pursuant to the B.C. *Indian Affairs Settlement Act*[34] and the federal *British Columbia Indian Lands Settlement Act*.[35]

In 1932, the *Wewaikum* retained C.R. Bates, the local Magistrate, to investigate any possible claim they may have to the Quinsam reserve. Bates wrote to Commissioner Ditchburn, who replied with a comprehensive letter setting out, in considerable detail, the history of the survey and allocation of the Quinsam and Campbell River reserves. Ditchburn included the full text of the 1907 Resolution and explained the circumstances which led to the "ditto mark error" in the 1913 Schedule and the apparent confirmation of this error by the McKenna McBride Commission. Shortly thereafter, Bates accompanied William Roberts and James Smith, two members of the *Wewaikum* Indian Band, to Victoria to meet with Ditchburn on this issue.

Around this time, the *Wewaikai* retained Thomas McLelan, a Vancouver lawyer, to ascertain who held title to the Quinsam and Campbell River reserves. The *Wewaikai* were concerned about the possible claim by the *Wewaikum* to the Quinsam reserve. In January, 1932, Chief Billy Assu of the *Wewaikai* sent the following telegram to Commissioner Ditchburn:[36]

Two men going to interview you in regards to Quinsam Reserve. They think it belongs to *Wewaykums*. Please explain to them the original lay that it belongs to *Wewaykay* tribe. I gave them the right to settle at Campbell River only not including Quinsam. Mr. Halliday was here recently and explained to them but they do not believe him. Please note that the majority of *Wewaykum* do not agree with these men who are making trouble. The Chief does not agree with them and I would advise you to write him explaining the situation so he can tell his tribe, perhaps they think the reserve is small, they must remember they also have Greenpoint, Haydenbay, also Grassybay. They were surveyed for *Wewaykum*. I have the road to Quinsam near completed.

Over the next few months a considerable amount of correspondence passed between Commissioner Ditchburn, Indian Agent Halliday, Bates, McLelan, the *Wewaikum* and the *Wewaikai*. These documents and letters repeatedly and consistently recount the terms and conditions of the 1907 Resolution, the subsequent "ditto mark error" and the facts that the Quinsam reserve belonged to the *Wewaikai* and the Campbell River reserve belonged to the *Wewaikum*.

In 1934, Indian Agent Todd was appointed to replace Halliday. In 1936, he was contacted by Assistant Indian Commissioner Perry, who had been instructed to correct any and all of the inaccuracies in the Department's records regarding the allocation of reserves in British Columbia. Agent Todd was asked to review the Department's records relating to the *Laich-kwil-tach* reserves and to contact the Indians in the area to ensure that these records denoted the proper sub-tribal allocation for each reserve.

In November of that year, Agent Todd obtained sworn declarations from the Chiefs and principal men of the *Wewaikai* as to which of the *Laich-kwil-tach* reserves belonged to them. The *Wewaikai* claimed five reserves, including the Quinsam reserve, but made no claim to the Campbell River reserve. In early 1937, the Chiefs and principal men of the *Wewaikum* Indian Band signed a similar declaration, claiming four *Laich-kwil-tach* reserves,

including the Campbell River reserve. The *Wewaikum* did not claim the Quinsam reserve.

In 1943, the Department published an amended schedule of reserves which corrected the "ditto mark" error. The amended schedule stated that the Campbell River reserve belonged to the *Wewaikum* and the Quinsam reserve belonged to the *Wewaikai* in accordance with the sworn declarations of the Bands.

Recent Events

In 1970, the *Wewaikum* again questioned the allocation status of the Quinsam and Campbell River reserves. Through their solicitors, they had contacted their local member of Parliament, who in turn wrote the Honourable Jean Chretien, the then Minister of Indian Affairs, requesting that a thorough inquiry be made as to the proper allocation of the Quinsam reserve. Chief William Roberts also visited the office of a senior liaison officer of the Department of Indian Affairs in Victoria to make a similar inquiry.

In response to these inquiries, the Department of Indian Affairs advised that:[37] The 1902 Schedule of Reserves shows [the Campbell River and Quinsam Reserves] as belonging to the *Wewayakay* Band not the *Wewayakum* ... However, on March 22nd, 1907, the *Wewayakay* Indians of Cape Mudge passed the resolution stating that they ceded "all right to the Campbell River Indian Reserve to the *Wewayakum* Band" while reserving the right to fish the Campbell River in common with the *Wewayakum* Band...

In the 1902 Schedule, the word "*Wewayakay*" was deleted opposite Reserve No.11 and the word "*Wewayakum*" substituted. However, the "ditto" opposite Reserve No.12 was not amended. As a result, when the 1913 Schedule of Reserves was printed, Reserve No.12 was shown as belonging to the *Wewayakum* Band, and this is the way it was confirmed by the 1913 Royal Commission on Indian Affairs.

On November 23rd, 1936, the Chief and principal men of Cape Mudge, (*Wewayakay*) Band signed a sworn statement declaring that Reserves Nos. 7,8,9,10 and 12 belonged to them and on November 24, 1936, [sic] the Chief and principal men of the Campbell River (*Wewayakum*) Band [sic] a similar declaration listing Reserves Nos. 2,3,4 and 11...

In view of the evidence available in our records, we have to state that the Quinsam Indian Reserve No. 12 is set apart for the use and benefit of the Cape Mudge Band [Wewaikai] *of Indians*.

[emphasis added]

Later that same year, the Department sent a similar letter to Chief Laurence Lewis of the *Wewaikai*.

In 1985, the *Wewaikum* brought an action against both the Crown and the *Wewaikai*, claiming exclusive entitlement to both the Campbell River and the Quinsam reserves (T-2652-85). The *Wewaikai* counterclaimed against the *Wewaikum*, claiming that they were entitled to both reserves. In 1989, the *Wewaikai* commenced a separate action against the Crown (T-951-89). These actions were consolidated in October 1989. In 1995, after hearing more than 80 days of submissions and evidence the Trial Judge dismissed each of these actions on several grounds. Both Indian Bands appeal to this Court.

Analysis

The fundamental claims of the *Wewaikai* and the *Wewaikum* may be summarized as follows: 1. The *Wewaikai* claim that the Campbell River and Quinsam reserves were allocated to the *Wewaikai* by Ashdown Green in 1888;

2. The *Wewaikai* claim that the 1907 Resolution was *void ab initio* because it failed to comply with the surrender provisions of the *Indian Act*; and

3. The *Wewaikum* claim that both reserves were allocated to them by B.C. Order-in Council, P.C. No. 911 and Federal Orders-in Council 1265 and 1036, which adopted the findings of the McKenna-McBride Commission (as modified by the Ditchburn-Clark Commission).

The allegations that the Crown has breached its fiduciary duty in respect of the allocation of the Campbell River and Quinsam reserves flow from these three assertions. Each of these issues is addressed below.

1. *Allocation of the Campbell River and Quinsam Reserves*

Counsel for the *Wewaikai* argued that under the terms of federal *Order-in Council* P.C. No.1318 Ashdown Green had the requisite jurisdiction to allocate the Campbell River and Quinsam reserves. Furthermore, counsel argues that the evidence demonstrates that these reserves were not allocated to the *Laich-kwil-tach* tribe as a whole, but rather to the *Wewaikai* exclusively. The Trial Judge made the following findings on this issue:[38] *I am satisfied that Green's authority was limited by the Orders in Council appointing him to "determining the extent and boundaries of the Indian Reserve at Campbell River"*. As noted earlier, Green's purpose in going to Campbell River was to settle the "boundary dispute" between the Laichkwiltach Indians and the Nunns, per Green's own words. Moreover, in his letter to the Commissioner of Lands and Works Green reported that the dispute between the Nunns and the Indians was settled, which lends support that one of the reasons for Green's appointment was to settle this dispute. *I can see nothing in Green's appointment indicating that Green was to determine sub-tribal allocation of the Laichkwiltach Reserves at Campbell River. In my view, Green's authority only extended to determining the size of the Reserves and the location of its boundaries and to recommend such reserves to the Provincial and Dominion Governments for their approval*. Further, in his report to the Superintendent General of Indian Affairs, as well as in the letter to the Commissioner of Lands and Works, Green himself stated that: "I proceeded to Campbell River on the 25th ultimo to determine the extent and boundaries of the Indian reserves at that place." Clearly, Green saw himself as going to the Campbell River area to determine the extent and boundaries of the reserves, and not to allocate reserves to any one subgroup or band.

Further, all the documentary evidence, with the exception of the notation on the sketch map, support a finding or the inference that if anything, the intention was to recommend Reserves No.11 and 12 for the Laichkwiltach. The Minutes of Decision refer only to the *Laichkwiltach (Euclataw)* and make no mention of an allocation to a subgroup of the *Laichkwiltach*, even though Green was aware that four bands or subgroups belonged to the *Laichkwiltach*. Green's letter of transmittal refer to the bands belonging to the *Laickwiltach* and that every place the Indians had mentioned to him (Green) had already been "reserved" for them by O'Reilly. In 1886, when Green accompanied O'Reilly to the Campbell River area, the Indians had been absent, and O'Reilly deemed it advisable to delay in making reserves. *It would seem that if O'Reilly had wished to allocate to a subgroup, such as the Cape Mudge, he would have consulted with the Indians at Cape Mudge for that purpose*.

[references omitted; emphasis added]

He continues:[39]

I am therefore satisfied that the documentary and opinion evidence establishes that the approval was limited to confirming the allocation of Reserves no.11 and 12 to the Laickwiltach. I am not convinced that these reserves were "finally and irrevocably allotted" to the Cape Mudge Band in 1888 [by Ashdown Green], as alleged by the *Wewaikai*.

And finally states:[40]

I am satisfied Reserves No.11 and No.12 were not created at law in 1888 and that *these reserves were not allotted*

by Green at that time to the Wewaikai Band as Wewaikai Reserves. I agree that Green surveyed Reserves No.11 and No.12 in 1888, but he had no authority to allot reserves to any Indian Band. His authority was limited to determining the extent and boundaries of the reserves.

After reviewing the evidence, and in particular the Orders-in-Council appointing Ashdown Green, I can find no reason to interfere with these findings.

Under the terms and conditions of his appointment, Green lacked the authority to allocate reserves to any particular sub-group or Indian Band. Indeed, his authority was limited to the determination of the extent and boundaries of the Campbell River and Quinsam reserves. This is evident from the language of federal Order-in Council P.C. 1318:[41] ... the Superintendent General of Indian Affairs concurred in the proposed *appointment of Mr. Ashdown Green to determine the extent and boundaries of the Indian Reserve at Campbell River*, and the Indian Superintendent at Victoria having stated that he would instruct Mr. Green on receipt of a telegram to the above effect to attend to the duty at once.

[emphasis added]

In accordance with these instructions, Green went to Campbell River, met with Captain John, his family and the Nunns and determined the extent and boundaries of the Campbell River reserve. His report and the accompanying Minutes of Decision detailed the boundaries of the Campbell River and Quinsam reserves and designated that these lands were to be allocated to the *Laich-kwil-tach* Indian Tribe. This finding is consistent with the original mandate given to the Reserve Commissioners under Federal Order in Council P.C. 1088 and is further supported by Survey Plan 184, the official map outlining the twelve reserves which had been allocated to the *Laich-kwil-tach*. This map was signed and approved by the federal and provincial commissioners on May 18,1889 and contains the heading "*LAICH-KWIL-TACH INDIANS*". There is no compelling evidence that Ashdown Green had the necessary authority to allocate these reserves to any particular sub-group or Band of the *Laich-kwil-tach* Tribe.

In any event, even if the *Wewaikai* were correct in asserting that the reserves were originally allocated to them, it does not assist their current claim of ownership over both reserves. As will be demonstrated in the following section, the 1907 Resolution had the legal effect of allocating or transferring the Campbell River reserve to the *Wewaikum*.

2. The 1907 Resolution

On March 23, 1907, Agent Halliday wrote to Indian Commissioner Vowell and described the 1907 Resolution of the *Wewaikai* in the following terms:[42]I have the honour to inform you that in addition to the resolution passed at a general meeting of the Cape Mudge or We-waiaikai Band of Indians as contained in my letter to you of even date No. 375/5, the following resolution was unanimously passed:

Resolved - that *whereas there is a difference of opinion as to the Campbell River Reserve*, this reserve being claimed by both the Wewaikai and Wewaiaikum Bands, and as the reserve is gazetted in the office of the Indian Department as belonging to the Wewaiaikai Band, and as the reserve is at present occupied by the Wewaiaikum Band, and as the object of the Wewaiaikai Band in asking for this land for a reserve was to have the use of the river for fishing purposes, therefore *the members of the Wewaiaikai Band in council here assembled, do cede all right to the Campbell River Reserve to the Wewaiaikum Band forever with the proviso that at any and all times the Wewaiaikai Band shall have the undisputed right to catch any and all fish in the waters of the Campbell River, this right to be in common with the Wewaiaikum Band.*

Resolved further that the Indian Agent who is presiding at this meeting is hereby authorized to take what steps are necessary to have this resolution made official and properly carried out.

In view of the fact that very shortly a proposition from the International Lumber Company [sic] will be submitted to the Department in which they will ask for permission to build a railroad for logging purposes across the Campbell River Reserve.

I deemed it necessary to get an expression of opinion from the Indians regarding the ownership of this reserve. In my letter of Nov.10, No. 208/5 the merits of the rival claims are dealt with.

At the meeting at Cape Mudge held on the evening of the 20 inst. most of the male members of the tribe were present and there was not one dissenting voice to the resolution. My correspondence with regard to this matter with the Department was told to them fully and they fully understand the exact position of affairs.

I would suggest therefore that on the strength of the resolution that the reserve at Campbell River be gazetted as belonging to the Wewaiaikum Band otherwise known as the Campbell River Band. They have been in possession of this reserve for upwards of ten years.

[emphasis added]

It is clear that the purpose of the 1907 Resolution was to resolve the dispute between the *Wewaikai* and *Wewaikum* as to which Band was entitled to occupy and use the Campbell River reserve.

Counsel for the *Wewaikai* argue that the 1907 Resolution was *void ab initio* because the ceding of their interest in the Campbell River reserve constituted an alienation of their rights under the surrender provisions of the *Indian Act*. Accordingly, these provisions should have been triggered by the 1907 Resolution and the Crown should have obtained a formal surrender of the *Wewaikai* interest in the Campbell River reserve lands. As the resolution did not comply with the surrender provisions it was invalid. Counsel for the *Wewaikai* further argues that the Crown was in breach of its fiduciary duty in allowing this "improvident transaction" to occur. I am of the opinion that neither of these arguments can succeed.

(a) The Applicability of the Surrender Provisions

The surrender provisions of the *Indian Act* find their origins in the *Royal Proclamation,1763* which stated that no private person could purchase lands reserved for the Indians:[43] And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council, *strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement;* but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose...

[emphasis added]

The imposition of this restriction on the alienation of reserve lands was motivated by the fear that, as settlement increased throughout Canada, the increasing numbers of non-Aboriginal settlers may encroach upon on Indian reserve lands, or purchase reserve lands on terms which were unfavourable to the Indians. Similarly, the federal government sought to deter, if not prevent, white settlers from bargaining with Indians over the use of their reserve lands and, accordingly, added the surrender provisions to the *Indian Act* in the latter quarter of the 19th Century.

These provisions granted supervisory authority to the Crown over any transfers between Aboriginals and third

parties. The surrender provisions require that reserve lands must be surrendered to the Crown prior to the transfer of any interest therein to a third party. This allows the Crown to monitor the terms of or, ultimately, to prevent such transfers.[44] When the surrender provisions are examined together with the terms of the *Royal Proclamation*, it is clear that Indian reserve lands were rendered inalienable, except by surrender to the Crown, in order to protect Indian Bands from entering into improvident or exploitative transactions with non-Aboriginal parties.

In essence, the surrender provisions codified the early practices of the colonial and federal governments which had been influenced by the strong, paternalistic policy concerns in favour of protecting Aboriginal peoples. It has been noted that the surrender provisions and this protectionist policy has effectively created a common law rule that aboriginal title can only be transferred to the Crown.[45] However, this rule does not appear to affect the capacity of Aboriginal peoples to transfer lands among themselves.[46] Therefore, it seems that the surrender provisions of the *Indian Act* were not intended to restrict the capacity of Indians to resolve land disputes among themselves. As found by the Trial Judge:[47] *... restraints on the alienability of reserve land contained in the Indian Act were never intended to restrict the resolution of reserve allocation issues among Indians of the same band or tribe*. As such, the surrender provisions applied only to transactions between natives and non-natives. This would also be consistent with the policy considerations of protecting Indians from exploitation by non-native settlers. Therefore, in my view, *the surrender provisions of the Indian Act would have no application to a transaction between natives, especially of the same group*, such as the *Laichkwiltach*, in order to resolve a dispute.

[emphasis added]

This interpretation of the surrender provisions is consistent with the goal of protecting Aboriginal peoples from exploitation by third parties. Furthermore, it is supported by the notion that the Indian interest in reserve lands, as with aboriginal title lands, is held communally by all members of an aboriginal nation.[48] Therefore, it seems intuitive that where two bands belonging to the same nation are seeking to resolve a dispute over the usage of lands held by the nation as a whole, the surrender provisions should not apply.

As noted, the 1907 Resolution simply sought to resolve a dispute between the *Wewaikai* and the *Wewaikum*, two Indian Bands belonging to the same Indian nation i.e. the *Laich-kwil-tach*, as to the ownership of the Campbell River reserve. The Crown simply acted as a facilitator in this process. To the effect that the resolution effected the transfer of any interests held by the *Wewaikai* in the Campbell River reserve, which would only arise by virtue of their membership in the *Laich-kwil-tach* Indian tribe, the surrender provisions had no application.

This conclusion is further supported by the express language of the provisions of the *Indian Act* in force at the time of the resolution. Section 2 of the *Indian Act*[49] defines "person" as meaning "an individual other than an Indian." The surrender provisions, namely sections 48 and 49, read as follows:48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purpose of this Part: Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

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

Section 50 of the 1906 *Indian Act* states: 50. Nothing in this part shall confirm any release or surrender which, but

for this Part, would have been invalid; and *no release or surrender of any reserve or portion of a reserve, to any person other than His Majesty, shall be valid*.

[emphasis added]

The fact that Parliament chose to use the word "person" in section 50 is significant. It indicates that the surrender provisions in sections 48 and 49 of the Act were only intended to apply to transactions involving parties "other than an Indian." In other words, the surrender provisions did not apply to lands transfers, such as the one effected in the 1907 Resolution, between Indian groups.

The distinction between "Indian" and "person" is evidenced in other provisions of the Act. For example, section 67 states: 67. The Superintendent General, his deputy, or other person specially authorized by the Governor in Council, shall have power by subpeona issued by him, to require any *person or Indian* to appear before him...

[emphasis added]

Under a strict reading of the legislation in force at the time, the 1907 Resolution could not have triggered the surrender provisions as it involved a transaction between two Indian Bands. Accordingly, no surrender to the Crown was required.

Finally, I would also note that this conclusion is further supported by the 1876 Proclamation. As indicated earlier, the 1876 Proclamation exempted all Indian reserves in British Columbia from the operation of the surrender provisions. Counsel for the Crown and the appellant Indian Bands were unable to provide any conclusive evidence as to when the 1876 Proclamation was repealed. Nonetheless, I am prepared to accept that it remained in force in 1907.

Until the publication of the Ditchburn-Clark Report and the subsequent passage of Orders-in-Council P.C. 911 (1923) and P.C. 1265 (1924), the reserve commissioners were still actively engaged in making adjustments to the size and number of reserves in British Columbia. If the 1876 Proclamation was not in force during this period, any adjustment which reduced the size of a reserve would have effectively triggered the surrender provisions and required a formal surrender to the Crown. Avoiding such a result was the sole purpose and intent of the proclamation, i.e. to facilitate the efforts of the reserve commissioners by allowing them to create and adjust reserves according to the needs of the Indians, without being subject to the strict formal requirements of the surrender provisions. Accordingly, in the absence of evidence to the contrary, it is reasonable to assume that the 1876 Proclamation remained in force until the reserve creation and allocation process was complete.

(b) Breach of Fiduciary Duty

While I have held that the surrender provisions have no application to the 1907 Resolution, counsel for the *Wewaikai* argue that the Crown breached its fiduciary duty when it approved the 1907 Resolution, by failing to protect the *Wewaikai* from an improvident transaction. In particular, the *Wewaikai* claim that the Crown failed to provide full disclosure of the interest of the International Timber Company in the reserve, prior to the 1907 Resolution. They argue that this lack of disclosure resulted in an exploitative bargain to the detriment of the *Wewaikai*.

In *Semiahmoo Indian Band v. Canada*,[50] this Court discussed the law of fiduciary duties in the context of the Crown-Native relationship, wherein the Chief Justice stated:[51] The authorities indicate that the surrender requirement in the *Indian Act* is the source of the Crown's fiduciary obligation. In *Guerin v. The Queen*, 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.

In *Apsassin*, Mclachlin J. expanded on Dickson J.'s use of the word "exploited" in *Guerin* in order to refine the scope of the Crown's fiduciary obligation. The learned Judge stated:

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.*

[references omitted; emphasis added]

The fiduciary nature of the relationship between the Crown and Aboriginal peoples is well-established in Canadian law. That being said, a fiduciary duty does not arise in every facet of Crown-Native relations nor is the content of the fiduciary responsibilities of the Crown identical in every transaction. As noted by the late Justice Sopinka in *Lac Minerals Ltd. v. International Corona Resources Ltd.*:[52]

When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice.

In other words, not every obligation that exists in a well established fiduciary relationship will amount to a "fiduciary duty". Accordingly, the circumstances of the 1907 Resolution must be examined to determine if a fiduciary duty arises. If a duty does arise, the nature and scope of that duty must be ascertained.

The nature and scope of the Crown's duty in the context of the 1907 Resolution was aptly summarized by the Trial Judge. He states:[53] The dispute in the case before me is in essence between two Indian Bands, each claiming possession of each other's reserve. It would seem to me that *the Crown has a duty to balance and reconcile the interests of both the Cape Mudge Indians and the Campbell River Indians and to resolve their conflict regarding the use and occupation of the* [*Laich-kwil-tach*] *reserves. In resolving this conflict, the Crown's duty would be not to favour the interests of one Band over the interest of the other*. In my view, the Crown owes a duty to both bands.

[emphasis added]

Furthermore, in fulfilling this duty, the Crown should act in good faith by affording the disputing parties full disclosure and ensuring their comprehension of the terms and effect of the 1907 Resolution. Finally, the fact that the Crown may also be required to balance the interests of the two Indian Bands with the interests of third parties to effectively settle the conflict between the Indian Bands is not necessarily a breach of the Crown's fiduciary duty.[54]

The evidence clearly establishes that the Crown provided full disclosure to the *Wewaikai* regarding the nature of the 1907 Resolution. As held by the learned Trial Judge:[55] *... the 1907 Resolution was unanimously passed by [the Wewaikai] with a full understanding of its terms and effect*. In my view, the best evidence of the terms of the resolution is contained in Halliday's letter of March 23, 1907, quoting the actual text of the resolution, and therefore more weight should be given to the terms of the resolution as recorded in Halliday's letter because Halliday was an observer and recorded contemporaneously the terms of the Resolution in course of his duty as an Indian Agent.

... I am satisfied that from the documents prepared by Halliday, a strong inference can be drawn that *the Indians were provided with sufficient notice of the meeting and that they were fully informed by Halliday of all his*

correspondence on the Campbell river issue (this is in response to Cape Mudge's allegation that the Crown failed to make full disclosure of all relevant facts prior to the passage of the Resolution). After being so informed, Cape Mudge passed the 1907 Resolution to effect a settlement of the fishery dispute and confirm the allocation of Reserve No.11 to the Campbell River Indians.

In regard to the allegation of non-disclosure by Halliday, there are a number of documents from which this Court can draw an inference that *Halliday fairly appraised and advised the Cape Mudge Indians of their position prior to the passage of the resolution...*

...I am also satisfied that an inference can be drawn that Halliday disclosed and read to the Cape Mudge Indians, at a minimum, the correspondence which he exchanged with the Department on the subject of Reserve No.11 since his appointment in June 1906. ... The authority for finding such an inference can be found in *Lower Kootenay Indian Band v. Canada* reflex, (1991), 42 F.T.R. 241 and *Kruger, supra*.

[emphasis added]

I can find no compelling reason to interfere with these findings.

It is also significant that the fishing dispute between the *Wewaikai* and the *Wewaikum* and the confusion surrounding the ownership of the Campbell River reserve predated the appointment of Agent Halliday. The peaceful resolution of these issues was one of the initial tasks undertaken by Halliday as evidenced by the fact that, within six months of his appointment, he had written two reports[56] to the Department of Indian Affairs detailing occupation of the Campbell River reserve by the *Wewaikum* and the position of the *Wewaikai*. Accordingly, it is clear that Halliday's primary motivation in seeking the 1907 Resolution was to achieve resolution of the fishing dispute and to clear up the continuing confusion regarding entitlement to the Campbell River reserve. Contrary to the arguments of the *Wewaikai*, the evidence does not support a finding that the interest of the International Lumber Company in gaining access to the timber on the Campbell River reserve was of more than limited significance in the passage of the 1907 Resolution.

Furthermore, the Courts have expressly rejected the proposition that an onus rests on the Crown, in such circumstances, to prove that all facts were disclosed or explained to an Indian Band prior to the passage of a Band Resolution. In *Blueberry River Indian Band*, Addy J. stated:[57]

I totally reject the argument that all these matters had to be explained. Many of them are redundant or irrelevant, others would obviously be known to the Indians...[I]t would be manifestly ludicrous to require now, 40 years after the event, when all the persons who might have given the advice are either deceased or too senile to testify, that the defendant established positively that advice was given on all these matters.

These comments were relied upon by the Supreme Court in *Apsassin v. The Queen*,[58] and are equally applicable to the case at bar. The *Wewaikai* cannot expect, more than 90 years after the fact, that the Crown can establish that every element of the transaction was explained and disclosed to the Band. It is sufficient that, as found by the Trial Judge, it can be reasonably inferred from the evidence that full disclosure took place.

Finally, the Supreme Court of Canada has indicated that an "intent-based approach" should be adopted in order to give effect to the true nature and purpose of dealings involving Aboriginal peoples and Aboriginal lands.[59] The Trial Judge correctly found that the central purpose of the 1907 Resolution was two-fold.[60] First, the resolution was to resolve the dispute between the *Wewaikai* and *Wewaikum* regarding which band had beneficial entitlement to the Campbell River and Quinsam reserves. Second, the resolution secured a continuing right to fish in the waters of the Campbell River for the *Wewaikai*, to be held in common with the *Wewaikum*.

The 1907 Resolution was an attempt by the Crown to facilitate an agreement between the *Wewaikai* and the *Wewaikum* that would alleviate their territorial concerns, uphold their historical interests and maintain peace in the area. This required a balancing of the interests of both Indian bands, as well as the public interest. There is nothing in the evidence to suggest that the resolution of the reserve allocation and fishing issues as embodied by the 1907 Resolution favoured the interests of one Band over that of another. Simply stated, there is no evidence that the Crown was in breach of its fiduciary obligations to either Band. The 1907 Resolution was a *bona fide* and good faith attempt to resolve the outstanding dispute between the Indian Bands. There is no indication of favouritism, concealment of material facts, or improvidence.

3. The Authority of the McKenna-McBride and Ditchburn-Clark Commissions

Counsel for the *Wewaikum* Band argue that the confirmation of the 1912 Schedule of Reserves as an attachment to Orders in Council P.C. 911 and P.C. 1265 has the legal effect of confirming that the Campbell River and the Quinsam reserves both belong to the *Wewaikum*. For the reasons below, this contention must fail.

Following the approval of the 1907 Resolution a hand written notation was made on a copy of the 1902 Schedule of Reserves in Victoria indicating that the Campbell River reserve belonged to the *Wewaikum*. The existing ditto marks beside the entry for the Quinsam reserve made it appear that this reserve had also been allocated to the *Wewaikum*. The handwritten notation was incorporated into the 1913 Schedule, with the result that it appeared that both the Campbell River and the Quinsam reserves were held by the *Wewaikum*.

This was not the intended effect of the 1907 Resolution, nor was it the understanding or intention of the Indian Bands. As noted by the learned Trial Judge:[61] ... Halliday states that:

... the reserve at Quinsam is not included in the transfer as the matter was specifically brought up at the meeting and it was decided only to allow the Wewaiaikum band to have the one Reserve at Campbell River.

It would seem at this point in time that the allocation of Reserves No.11 and No.12 was resolved at the 1907 meeting.

...

As noted earlier, upon receipt and approval of the 1907 Resolution by Vowell, a handwritten notation was made to a copy of the schedule of reserves in Victoria. Unfortunately, the notation and the ditto marks below made it appear that Reserve No.12 was allocated to the Campbell River Indians. I am satisfied that this listing occurred as a result of a clerical error or "ditto mark" and was never intended to have any legal effect and that there never was an intention to confirm the allocation of Reserve No.12 to the Campbell River Indians. *Further, the documents show that the schedule did not accord with the opinion of the Indians as to the allocation ...*

[emphasis added]

Furthermore, in a telegram to the Indian Commissioner in 1932, Chief Billy Assu of the *Wewaikai* stated that:[62]

I gave them [the *Wewaikum*] the right to settle at Campbell River only not including Quinsam.

Similarly, Charlie Peters, a *Wewaikai* elder, provided the following account of the meeting which produced the 1907 Resolution:[63]

Indian Agent Halliday called a meeting, regarding the C. R. [Campbell River] Reserve. Only four persons from Campbell River were present. Namely, George Quacksister, Frank Dixon, Dan Quatell, Happy Jack.

Billy Assu spoke. you can have Campbell River Reserve but not Quinsam.

Then old Jim Chickite spoke. To give the Cape Mudge Indians [*Wewaikai*] freedom to catch & cure salmon at Campbell River. They reply, It's O.K. with Campbell River Indians as we are brothers, we are one & always were friends.

I am satisfied that the listing of the Quinsam reserve as belonging to the *Wewaikum* in the 1913 Schedule constituted a clerical error. However, the question remains whether the adoption of the McKenna McBride Report (as amended by the Ditchburn-Clark Commission), which included the 1913 Schedule, by Orders-in Council 911 and 1265 could give binding legal effect to this clerical error. In other words, did the McKenna McBride Commission have the authority to reallocate the Quinsam reserve to the *Wewaikum*?

The mandate and authority of the Commission was set out in the McKenna McBride Agreement which reads as follows:[64] Whereas it is desirable to settle all differences between the Government of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia, therefore the parties above named have, subject to the approval of the Government of the Dominion and of the Province agreed upon the following proposals *as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia*.

...

2. The Commission so appointed shall have power *to adjust the acreage of Indian Reserves in British Columbia in the following manner: --*

(a) At such places as the Commissioners are *satisfied that more land is included in any particular reserve as now defined, than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, ... be reduced to such acreage as the Commissioners think reasonably sufficient ...*

(b) At any place at which the Commissioners shall *determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.*

...

7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians ... subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial boundaries of the Province which have been conveyed to the Dominion as aforesaid for such tribe or band ... shall be conveyed or repaid to the Province.

[emphasis added]

Of further significance is federal Order-in Council P.C. 1401 which was enacted in 1913, in response to a request from the Commission for clarification of its jurisdiction. The relevant passages read:[65] The Minister observes that it is clear that the agreement between the representatives of the Province of British Columbia and the Dominion *does not contemplate an investigation and settlement of matters appertaining to general Indian policy in British Columbia*. It is confined in matters affecting Indian lands which require adjustment between the parties.

The Minister is of the opinion that *it would be inadvisable to burden the Commission with the investigation of all*

matters that might be brought to their attention by Indians, many of which would be slight importance not affecting the relations of the two Governments. Unless great care were taken misconception might arise in the minds of the Indians as to the action of the Commission if authorized to make a general investigation; the Commission having power to deal finally with all matters mentioned in the agreement subject to the approval of the two governments, but having only instructions to report and make suggestions as to other matters.

The Minister submits that the Commission would, however, during its sitting in different districts of the Province obtain valuable information as to Indian conditions and progress and would probably form distinct opinions on these points and on the future policy which should be adopted by the Dominion Government towards the Indians of British Columbia.

The Minister, therefore recommends that *the Commission be restricted in action to the terms of the agreement but that the Commission be informed that this Government would be prepared to receive a general report on the condition of the Indians with suggestions as to the future policy and administration of Indian Affairs in the Province of British Columbia*, the Indians being distinctly advised concerning the scope of the inquiry under the agreement and that the Commission will merely convey to the Government the views of the Indians respecting any matters extraneous to the agreement brought to their attention.

[emphasis added]

In light of the foregoing, it is clear that the authority of the Commission was restricted to the confirmation of the acreage and number of reserves in British Columbia. Indeed, the purpose of the Commission was not to allocate or reallocate reserves amongst the various Indian Bands in the province. The Commission was set up to resolve the long standing dispute between the federal and provincial governments over the amount of land which was to be transferred to the Federal Crown for the use and benefit of the Indians as required under the Terms of Union for British Columbia. The allocation of reserves amongst tribal or sub-tribal groups (i.e. bands) living on or near a reserve was a matter that was left to the Department of Indian Affairs to deal with as an administrative manner. As noted by Commissioner MacDowall in the transcript of the Commission:[66] Several tribes having their villages on this Reserve won't interfere with what we are doing in this way. *We have to take these reserves as they appear in the government list and we are dealing with the land and not with the distribution of the Tribe at all - That is a matter for the Department to settle*.

[emphasis added]

Accordingly, the Commission did not attempt to determine the correct allocation of reserves amongst the Indian bands within a tribe nor did they attempt to address any errors in the schedule of reserves. Such actions were not within its jurisdiction nor its mandate. The Commission was empowered to finalize the amount of land that was to be transferred to the federal Crown to be held in trust for the benefit of the Indians. Any additional information that was received was included in the final report of the Commission, but the recommendations of the Commission only addressed the issue of what amounts of land were to be transferred from the provincial to the federal Crown.

The Commissioners made the following comments regarding the Quinsam and Campbell River reserves: This Band [the *Wewaikai*] claims also the Quinsam or Quinsam reserve No.12, assigned in the Schedule to the *Wewayakum* Band and this claim is endorsed by Agent Halliday.

...

This reserve [Quinsam] appears in the Schedule as one of the Wewayakum Band. It is not so regarded by that Band and is claimed by the Wewayakay Band with right according to Agent Halliday. It has been counted *as in Schedule in estimating their per capita acreage*.[67]

[emphasis added]

Therefore, it is clear that the "ditto mark error" contained in the 1913 Schedule was brought to the attention of the Commission. Nevertheless, the Commission was bound to treat the reserves as being allocated in the manner indicated in the schedule of reserves. Accordingly, the Commission noted the error, but had no jurisdiction to correct it.

The allocation of reserves as described in the 1913 schedule of reserves was adopted in Orders-in Council P.C. 911, 1265 and 1036. These Orders-in Council had the legal effects of: (1) finally and conclusively creating reserve lands in British Columbia for the benefit of the Indian bands as described in the 1913 Schedule; and, (2) vesting the underlying title to these reserve lands in the federal Crown to be held in trust for said Indians. Consequently, these Orders-in-Council had the effect of confirming that both the Campbell River and the Quinsam reserves were allocated to the *Wewaikum*. Nonetheless, this does not change the fact that the apparent allocation of the Quinsam reserve to the *Wewaikum* was the result of a clerical error which occurred following the adoption of the 1907 Resolution.

The evidence demonstrates that the allocation of the Quinsam reserve to the *Wewaikum* did not accord with the understanding nor the intention of the *Wewaikai* and the *Wewaikum*. Furthermore, this error was ultimately corrected in 1943. This correction represented the culmination of years of effort by the Crown to finally and correctly give effect to the intentions and desires of both the *Wewaikum* and the *Wewaikai*. As found by the Trial Judge:[68] Errors in the subtribal allocation of reserves for the Kwaklweth Agency were discovered after publication of the 1913 Schedule. Unfortunately, a revised schedule of Indian Reserves for British Columbia was not published between 1913 and 1943. Halliday reported errors as early as 1918. Two years later Halliday wrote a comprehensive letter to the Department in Ottawa noting a number of errors in the 1913 Schedule. He indicated in this letter that:

With the exceptions as noted the reserves are correct, according to the Indians own ideas of the same and there is no dispute amongst them if located as mentioned above in my letter.

I consider it very essential that these reserves should be properly classified amongst the various sub-bands so that when the time comes for the reserves to be sub-divided and given to the Indians individually instead of collectively it will avoid any friction or hard feeling.

Generally the errors noted by Halliday related to the individual allocation of reserves to subgroups of a larger tribe such as the Gilford Indians, the Knights Inlet Indians and the Laichkwiltach Indians. *Halliday then set out the amendments required for the schedule to conform to the opinion of the Indians as to correct subtribal allocation of their reserves*. Halliday continued to draw the Department's attention to errors in the Schedule and in 1925 wrote Ottawa to request instructions on how to deal with the problem:

I would be very glad if you would advise me what is best to do with regard to the allocation of the Reserves in the Kwawkewlth Agency, as made by the Royal Commission on Indian Affairs, which in several instances is absolutely wrong and not in accordance with the desires expressed by the Indians at the various meetings which were held. ...

The Indians themselves have brought to my attention the fact that I am getting on in years and while they know that their rights will be well protected as long as I remain Indian Agent but I might be transferred or retired in which case someone else who probably knew nothing of these matters would be in office and it might make more trouble for them while if this was settled now it would be more satisfactory. I would be glad if you would advise me what steps should be taken to have these changes put on the Department's files so that the minds of the Indians might be set at rest.

Halliday's letter was passed on to the B.C. Indian Commissioner Ditchburn, who filed a report on March 3, 1927. *Ditchburn's report recommended that where the opinions of the Indians appeared to conflict, the issue of the correct subtribal allocation of their reserves should be put before the bands at a meeting and the matter straightened out by way of resolutions passed by the bands and signed by the chiefs in order for the Department to be able "to rearrange the Schedule of Reserves to suit the Indians concerned*". If on the other hand, there was no disagreement, Ditchburn was of the opinion that the "matter can be straightened out easily without any vote being taken".

It appears Ditchburn's procedure for effecting amendments to the schedule was put into practice with the appointment of Indian Agent Todd to the Kwawkewkth Agency in 1934. Todd was instructed to resolve the outstanding reserve allocation issues in anticipation of the publication of a revised schedule of reserves for British Columbia. Over the next eight years Todd held band meetings, conducted inquiries, took evidence from band elders and obtained declarations of the Chief and Principal Men of a number of bands in the Kwawkewlth Agency in an effort to place before the Department an accurate record of the Indians' own opinion as to the correct sub-tribal allocation of reserves in the Agency. ...

... Based on the [evidence], I believe it can be inferred that Todd's practice in obtaining the Declarations of the Cape Mudge and Campbell River Indians would have been to:

1) call a separate meeting of the Campbell River and Cape Mudge Indians;

2) explain to each band at the meeting the allocation of reserves as shown on the 1913 schedule;

determine whether the schedule was "complete and correct", or whether any dispute existed between sub-groups as to the allocation of the reserves;

3) where there was a dispute between the sub-groups, to prepare a Declaration in accordance with the opinion of the Indians which was sworn by the Chief and Principal Men of each sub-group.

It would seem to me that if there had been any dispute between the Campbell River and Cape Mudge Indians as to the allocation of their reserves in 1936, they would not have sworn the Declarations as prepared by Todd. ... Further, there is no evidence to suggest that the majority of the Campbell River and Cape Mudge Indians were dissatisfied with the allocation of their reserves as set out in the 1936 Declarations.

The collection of information for the purpose of preparing the 1943 schedule of reserves in British Columbia continued over the period from 1939 to 1943. Copies of the schedule were circulated to the Indian Agents between 1940 and 1943 and the revisions were then made by the Agents. With respect to the *Kwawkewlth* Agency, Todd enclosed a list of reserves showing the correct sub-tribal allocation of each reserve and recommended changes to conform to his list. Todd's revisions were noted by the Director of Indian Affairs and approved by the Department in July of 1943. *The final published draft of the new 1943 schedule incorporated these revisions, including what I feel was the "correct" listing of Reserves No.11 and No.12.*

[references omitted; emphasis added]

I agree with these findings. Furthermore, I agree that the Trial Judge had the jurisdiction to correct the clerical error contained in the schedule of reserves appended to Orders-in-Council 911, 1265 and 1036. The authorities are clear that while the legislature and Parliament are presumed not to make mistakes, this Court has the jurisdiction to correct typographical or other clerical errors where the error is obvious and the context is clear that the effect of the error is not what was intended by the drafters.[69]

I have found that the allotment of the Quinsam reserve to the *Wewaikum* was the result of an obvious clerical

error. Furthermore, an examination of the circumstances surrounding the error reveals that there was no intention to allocate the Quinsam reserve to the *Wewaikum*. Accordingly, the Trial Judge was correct in finding that he had the jurisdiction to amend the 1913 Schedule, as adopted by Orders-in-Council 911, 1265 and 1036, in order to correct the error.

4. Costs

In dismissing the action of the *Wewaikai* against the Crown, the Trial Judge assessed costs against the *Wewaikai* on a solicitor-client basis. In so doing, he made the following comments:

... I am satisfied, after a review of the procedure in the case at bar, that the Cape Mudge action was brought as an afterthought in preparing to defend the action commenced by the Campbell River Band. I am of the view that the decision to commence the action may have been unduly influenced by the advice of experts and not based on the documents that the Band had or should have had before the action was instituted. I am also satisfied that the trial was unduly extended because of the very weak nature of Cape Mudge's claim. Cape Mudge's presentation of evidence and submissions were unduly lengthy. Therefore, the action commenced by the Cape Mudge or Wewaikai Indian Band, T-951-89, is dismissed with costs on a solicitor client basis.[70]

I am of the opinion that this costs award was unjustified.

An award of costs on a solicitor and client basis is exceptional. Such awards are "generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."[71] Furthermore, the fact that one parties claim has little merit or was "very weak" is no basis for awarding solicitor-client costs. It is true that this trial was very lengthy, but there is no evidence that this was attributable exclusively to the behaviour of the *Wewaikai* or their solicitors. Accordingly, the costs award made by the Trial Judge was not appropriate.

In addition to appealing the solicitor-client costs award, counsel for the *Wewaikai* has sought increased costs in this appeal. In my view, this is not a case where increased costs are warranted.

5. Other Issues

In light of my conclusions above, I find it unnecessary to deal with the equitable and statutory defences advanced by the Crown.

Although I also find that it is not unnecessary to deal with the cross-appeal advanced by the Crown in order to dispose of this appeal, I am compelled to briefly address the issue raised therein in the event that the parties seek and obtain further leave to appeal.

The Crown contests, by way of cross-appeal, that portion of the reasons of the Trial Judge where he included a compound interest award to account for "unrealized investment income" should the *Wewaikai* and *Wewaikum* be entitled to damages for loss of use of the disputed lands.

In my respectful view the cross appeals on this issue are misconceived. Rule 341(1)(a) of the *Federal Court Rules 1998* provides that a cross appeal is indicated where the respondent seeks a different disposition from the judgment from which the appeal is taken. In these appeals the judgment of the Trial Judge was that the appeals should be dismissed. The respondent Crown does not by its cross appeal seek any different disposition, they only seek to challenge a portion of the reasons of the Trial Judge. This is contrary to Rule 341(1)(a) of the *Federal Court Rules 1998*. Accordingly, I would dismiss the cross appeal, but in the circumstances without costs.

Conclusions

The status quo with respect to the ownership of the Quinsam and Campbell River reserves is to be maintained. The *Wewaikai* hold beneficial title, i.e. usufructory and occupation rights, to the Quinsam reserve and the *Wewaikum* hold beneficial title to the Campbell River reserve.

I am satisfied that the Trial Judge was correct in finding that Ashdown Green lacked the authority to definitively allocate these reserves to the *Wewaikai*, or any specific band of the *Laich-kwil-tach* Indian tribe. Nonetheless, it is clear that, following a prolonged fishing dispute, the reserve at Campbell River was definitively granted to the *Wewaikum* with the consent of the *Wewaikai* under the terms of the 1907 Resolution. The *Wewaikai* retained fishing rights, in common with the *Wewaikum*, in respect of the Campbell River fishery. Unfortunately, when the 1907 Resolution was approved a clerical error was made to the effect that the 1913 Schedule of Indian Reserves indicated that both the Quinsam and Campbell River reserves were allocated to the *Wewaikum*. In the intervening years, this error was brought to the attention of the Department of Indian Affairs but remained uncorrected until 1943. The McKenna McBride Commission did not have the jurisdiction to correct this error, nor did they have the jurisdiction to reallocate the Quinsam reserve to the *Wewaikum* as was argued before this Court.

The clerical error in the 1913 Schedule was incorporated into Orders-in-Council 911 and 1265 which conclusively created Indian reserves in British Columbia and Order-in-Council 1036 which transferred all reserve lands to the Federal Crown. The Trial Judge was correct in holding that he had the jurisdiction to correct this obvious error without rendering the Orders-in-Council invalid.

The Crown behaved in an appropriate manner and acted in good faith throughout the disputed events in this case. The evidence fails to reveal any breach of the fiduciary obligations owed by the Crown in respect of either of the Indian Bands in the allocation of these reserves.

Finally, the Trial Judge's award of costs against the *Wewaikai* on a solicitor-client basis was unjustified.

Disposition

I would allow the appeal of *Wewaikai* with respect to the solicitor-client costs award issued by the Trial Judge. I would dismiss all other elements of the appeals by the *Wewaikai* and the *Wewaikum* Indian Bands, with costs. There will be no costs award for or against the intervener, the Attorney General of British Columbia.

The cross appeals by the Crown are dismissed without costs.

A copy of these reasons should be filed in File A-635-95 and when filed shall be considered as the disposition of the appeal and cross-appeal in that file.

J.A.

FEDERAL COURT OF CANADA

APPEAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

DOCKET: A-655-95

APPEAL FROM THE JUDGMENT OF THE TRIAL DIVISION OF THE FEDERAL COURT OF CANADA, DELIVERED SEPTEMBER 19, 1995 IN DOCKET T-2652-85 & T-951-89.

STYLE OF CAUSE: Roy Anthony Roberts and others v. Her Majesty the Queen and others

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: December 7,8,9,10,11, 1998

REASONS FOR JUDGMENT BY: McDonald J.A.

CONCURRED IN BY: Linden J.A.

CONCURRING REASONS BY: The Chief Justice

CONCURRED IN BY: Linden J.A.

APPEARANCES:

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1 R.S.B.C. 1979, c.236 ("*B.C. Limitation Act*").

2 R.S.C. 1985, c.F-7.

3 Judgment, Appeal Book, Volume XXXI, p. 5415.

4 Appeal Book, Volume X, p. 1711.

5 Appeal Book, Volume IX, p. 1550, at 1618.

6 Appeal Book, Volume XI, p. 1857, at 1877.

7 Appeal Book, Volume XVI, p. 2897 and 2900; Volume XXXI, p. 5472.

8 Appeal Book, Volume XVII, p. 2947.

9 *Blueberry Indian Band et al. v. Canada,* [1993] 3. F.C. 28 (CA) [hereinafter *Blueberry*], rev'd 1995 CanLII 60 (S.C.C.), [1995] 3 S.C.R. 3, but not on this point; *Sterritt et al. v. The Queen* reflex, (1989), 27 FTR 47 (FCTD), *Luke v. The Queen* (1991), 42 FTR (FCTD), *Kruger et al v. The Queen* reflex, (1985) 17 DLR (4th) 591 (FCA).

10 See footnote 7, *supra*. See also *Attorney General for Ontario v. Scott* 1955 CanLII 16 (S.C.C.), [1956] S.C.R. 137; *Coughlin v. Ontario Highway Transport Board et al.* 1968 CanLII 2 (S.C.C.), [1968] S.C.R. 569.

11 *Ibid*.

12 R.S.C. 1985, Volume XII, Appendix 2.

13 *Ibid*.

14 *Ibid*.

15 *Delgamuukw v. British Columbia* 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010.

16 See note 12, *supra*.

17 See *Four B Manufacturing Limited v. United Garment Workers of America et al.* 1979 CanLII 11 (S.C.C.),

[1980] 1 S.C.R. 1031.

18 *R. v. Francis* 1988 CanLII 31 (S.C.C.), [1988] 1 S.C.R. 1025 at 1030-1031. *Attorney General of Quebec v. Cumming* 1978 CanLII 192 (S.C.C.), [1978] 2 S.C.R. 605 at 611.

19 *Blueberry, supra*, note 9, at p. 141.

20 *Bera v. Marr* 1986 CanLII 173 (BC C.A.), (1986) 1 B.C.L.R. (2d) 1.

21R.S.B.C. 1979, c. 236.

22R.S.C. 1985, c. F-7, as amended.

23*Wewayakum Indian Band v. Canada and Wewayakai Indian Band* reflex, (1996) 99 F.T.R. 1 (F.C.T.D.) at 16-17 [hereinafter, the "Trial Judgment" cited to F.T.R.].

24Appeal Book, Vol. II at 167.

25Appeal Book, Vol. III at 415.

26Trial Judgment at 23.

27Appeal Book, Vol. X at 1695.

28Appeal Book, Volume VII at 1105.

29*Ibid*. at 1195.

30Appeal Book, Vol. IX at 1618.

31Appeal Book, Vol. X at 1681.

32Appeal Book, Vol. X at 1711.

33Appeal Book, Vol. XI at 1877.

34S.B.C. 1919, c. 32.

35S.C. 1920, c.31.

36Appeal Book, Volume XVIII at 3184.

37Appeal Book, Vol. XVI at 2788.

38Trial Judgment, *supra* note 1 at 29.

39*Ibid*. at 33.

40*Ibid*. at 205.

41Appeal Book, Vol. VII at 1195.

42Appeal Book, Vol. X at 1711-12.

43R.S.C., 1985, App. II, No.1.

44*Guerin v. The Queen* 1984 CanLII 25 (S.C.C.), (1984), 13 D.L.R. (4th) 321 (S.C.C.) at 340.

45See Brian Slattery, "Understanding Aboriginal Rights"(1987) 66 Canadian Bar Review 727 at 742. See also: *Delgamuukw v. British Columbia* , 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010 at 1081-82.

46*Ibid*. at 763. See also: *Mitchell v. Peguis Indian Band* 1990 CanLII 117 (S.C.C.), (1990) 71 D.L.R. (4th) 193 (S.C.C.) at 228-29 per Justice LaForest.

47Trial Judgment, *supra* note 1 at 145.

48*Delgamuukw, supra* at 1082-85.

49R.S.C. 1906, c.43.

501997 CanLII 6347 (F.C.A.), (1997), 148 D.L.R. (4th) 523 (F.C.A.).

51*Ibid*. at 536.

52*Lac Minerals Ltd. v. International Corona Resources Ltd*. 1989 CanLII 34 (S.C.C.), (1989), 61 D.L.R. (4th) 14 (S.C.C.) at 61.

53Trial Judgment, *supra* note 1 at 162.

54See *Kruger v. Canada* reflex, (1985), 17 D.L.R. (4th) 591 (F.C.A.) at 654.

55Trial Judgment, *supra* note 1 at 137-38.

56Appeal Book, Volume X at 1689-90 and 1695-99.

57*Blueberry River Indian Band v. The Queen*, reflex, [1988] 3 F.C. 20 (F.C.T.D.) at 65.

581995 CanLII 50 (S.C.C.), (1995), 130 D.L.R. (4th) 193 (S.C.C.) at 200-201.

59See *Apsassin, supra* at 200, per Gonthier J.

60Trial Judgment, *supra* note 1 at 136.

61*Ibid*. at 153.

62*Supra* note 16.

63Appeal Book, Volume XVIII at 3127-28.

64Appeal Book, Vol. XI at 1847-48.

65Appeal Book, Vol. X at 1843-44.

66Appeal Book, Vol. XI at 2019-20.

67Appeal Book, Vol. XII at 2243-44.

68Trial Judgment, *supra* note 1 at 176-78

69See E.A. Dreidger, *The Construction of Statutes, Second Edition* (Toronto: Butterworths, 1983) at 128-9; *Dunstan v. Hell"s Gate Enterprises Ltd.*, 1985 CanLII 776 (BC S.C.), [1986] 3 C.N.L.R. 47 (B.C.S.C.) at 64-5; and *R. v. Eaton*, reflex, [1973] 4 W.W.R. 101 (B.C.S.C.) at 104.

70Trial Judgment, *supra* note 1 at 204.

71*Young v. Young*, 1993 CanLII 34 (S.C.C.), [1993] 4 S.C.R. 3 at 134.