Fairford First Nation v. Canada (Attorney General) (T.D.), 1998 CanLII 9112 (F.C.)

Date:	1998-11-12
Docket:	T-2243-93
Parallel citations:	(1998), [1999] 2 F.C. 48 • (1998), [1999] 2 C.N.L.R. 60 • (1998), 156 F.T.R. 1
URL:	http://www.canlii.org/en/ca/fct/doc/1998/1998canlii9112/1998canlii9112.html
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T-2243-93

Edward Anderson, Garnet Woodhouse, Marshall Woodhouse, Robert McLean, Patrick Anderson, Ormand Stagg and **George Traverse on their own behalf and on behalf of all members of the Fairford First Nation, a body of Indians described as the Fairford Band and declared to be a band for the purposes of the *Indian Act* by P.C. 1973-3571** (*Plaintiffs*)

v.

The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada (*Defendant*)

Indexed as: Fairford First Nationv. Canada (Attorney General) (T.D.)

Trial Division, Rothstein J."Edmonton, March 6, 7, 1997; Winnipeg, January 5, 6, 7, 8, 12, 13, 14, 15, 19, 21, 22, 26, 27, 28, 29, February 4, 17, 18, 19, March 2, 3, 4, 5, 23, 24, 25, 26, 27; Ottawa, November 12, 1998.

Native peoples " Lands " Indian Band suing Crown Federal for breach of fiduciary duty relating to construction of dam by Manitoba " Dam causing extensive flooding on Indian reserve " Manitoba accepting responsibility for flooding, providing Band with compensation land " Crown refusing to ratify compensation agreement, but accepting transfer of compensation lands " Band not satisfied with compensation land for losses suffered by members " Whether Crown liable for breach of fiduciary duty owed to Band " Plaintiffs' case based on Indian Act, s. 18(1) " Fiduciary duty arising only upon surrender of land to Crown " Defendant in breach of fiduciary duty to Band in failing to address deficiencies of compensation agreement in timely manner, to consult with Band.

Crown " Action for breach of fiduciary duty by Indian Band following contruction of dam by Manitoba on Indian Reserve " Band members allegedly suffering loss from breach of fiduciary duties owed to Band " Relying on Indian Act, s. 18(1) to argue defendant breached fiduciary duty in study, planning approval of dam " Case law on fiduciary duty reviewed " Dependency, vulnerability requirement indispensable to fiduciary duty " For fiduciary duty to arise, one party must have ceded power to other " No fiduciary duty herein under reasonable expectations, ceding of power-vulnerability approaches " Actions taken by defendant public law duties, not giving rise to fiduciary relationship " Defendant acting in conformity with Indian Act in permitting Manitoba to use Reserve for coffer dam, in obtaining Band Council resolution authorizing such use " Defendant having no discretion, power to control operation of dam " Not breaching fiduciary duty in failing to use provisions of Navigable Waters Protection Act as leverage to exact concessions from Manitoba respecting flooding of Reserve land " Duty of consultation on Crown in questions involving surrenders of reserve land, extending to dispositions of reserve land by defendant under Indian Act, s. 35 " Consultation conducted in 1971 between Indian Affairs, Band Council according with standard of consultation prescribed by S.C.C. " Defendant in breach of fiduciary duty to Band from 1978 to 1984 in failing to address deficiencies of compensation agreement in timely manner, in failing to consult with Band " From September 1984 to February 1986, defendant's actions, except for failure to consult, diligent, consistent with those expected of fiduciary.

Practice " Limitation of actions " Six-year limitation period on plaintiffs' claims under The Limitation of Actions Act, s. 2(1)(k) of Manitoba " Claims arising before September 15, 1987 statute-barred " Continuing breach of fiduciary duty argument without merit " Period of limitation to run in respect of each alleged breach " Time beginning to run upon discovery of cause of action " Delay, failures to consult occurring more than six years before statement of claim filed on September 15, 1993 " Issue when plaintiffs, with reasonable diligence, could have discovered causes of action against defendant " Plaintiffs' cause of action for delay between 1978 and September 1984 not statute-barred " Cause of action for failure to consult between September 1984 and February 1986 statute-barred in February 1992.

This was an action for breach of fiduciary duty brought by the members of the Fairford Indian Band against the Crown in Right of Canada. In 1960 and 1961, the Government of Manitoba, with the defendant's knowledge and financial assistance, constructed the Fairford River Water Control Structure, a dam, the purpose of which was to regulate the level of Lake Manitoba upstream from the Fairford Reserve. Commencing in 1967, there was extensive flooding of the Fairford Reserve as a result of the construction of the dam and for which Manitoba accepted full responsibility. The plaintiffs alleged that their Aboriginal rights to fish, hunt and trap, as well as their interest in agricultural production, were negatively impacted by the operation of the dam. Negotiations were entered into between Manitoba and the Band whereby Manitoba was to provide it with land (the compensation land) in compensation for the land that was being flooded. In 1974, the Band signed a compensation agreement whereby it agreed to accept 5771.91 acres of compensation land and to release Manitoba from any further liability regarding flooding. Canada, however, refused to ratify the agreement for a number of reasons. As of 1979, members of the Band were occupying the compensation land even though it had still not been transferred to Her Majesty and was not legally a part of the Reserve. Eventually, the latter accepted transfer of the compensation land and set apart the lands as an addition to the Fairford Indian Reserve No. 50. The Fairford Band was not satisfied with the compensation land as full compensation for the losses suffered by its members and filed a statement of claim on September 15, 1993. Even though the plaintiffs have conceded that Manitoba was the source of their problems, they took the position that the Crown in Right of Canada was liable for all losses they suffered over the entire period since the construction of the dam and that Canada had repeatedly breached its fiduciary duties to the Fairford First Nation. Thus, the plaintiffs' argument seemed to be that the Crown Federal has a general ongoing fiduciary obligation to protect Aboriginal interests. This action raised a number of issues, all directly related to the Crown's fiduciary duty to the Fairford Band, and a last issue pertaining to limitation of actions.

Held, the action should be allowed in part.

The first issue was whether the Crown had breached its fiduciary duty to the Fairford Band in the planning, approval and financing of the Water Control Structure. The latter was a provincial government project, owned, operated and controlled by Manitoba, even though the Crown Federal had provided financial assistance for its construction. The plaintiffs argued that the defendant had a duty under subsection 18(1) of the *Indian Act* not to act in any way that would impair the Band's use and benefit of the Reserve and that its involvement with the Structure breached that duty. In *Guerin et al. v. The Queen et al.*, the Supreme Court of Canada held that the effect of subsection 18(1) was to impose upon the Crown an obligation to protect Indians' interests in transactions with third parties. Once land was surrendered, the Crown was given a discretion to decide what was in the best interests of the Indians. This discretion on the part of the Crown has the effect of transforming its obligation into a fiduciary one. It was also recognized that both a discretion or power on the part of the fiduciary and vulnerability on the part of the beneficiary defined the fiduciary relationship. Vulnerability, which is an essential requirement to a fiduciary duty, means that the beneficiary, despite his best efforts, is unable to prevent the injurious exercise of discretion or power by the fiduciary and that other legal or practical remedies are inadequate or absent. In the Aboriginal context, it was held that, in order for a fiduciary duty to arise, one party must have ceded its power to the other. In order to determine whether a fiduciary obligation arose with respect to the Crown's involvement with the dam, it was necessary to determine whether by statute, agreement, particular course of conduct or unilateral undertaking, there was a mutual understanding that the Crown Federal would act on behalf of the Fairford Band in such way as to give rise to a reasonable expectation that it would act in the Band's best interests to the exclusion of other interests. The facts of this case did not demonstrate a contractual relationship between the Crown and the Fairford Band. Nor was there evidence of an undertaking on the part of the Crown to act in a fiduciary capacity on behalf of the Indians during the study, approval and financing stages of the dam. As to course of conduct, it should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Duties that arise from legislative or executive action are public law duties and do not give rise to a fiduciary relationship. Actions taken by the Indian Affairs Branch at the relevant time arose under the *Indian Act* and the *Department of Citizenship and Immigration Act* and were public law duties. There was no indication they would be in the nature

of private law duties such as when Indian land is surrendered. For these reasons, course of conduct by the Crown in its dealings with Indians under these Acts could not be relied upon as a basis for the creation of a fiduciary duty. The facts herein did not disclose ceding of any authority or power over any matter. Whether under the reasonable expectations approach or the ceding of power-vulnerability approach, the Crown was not a fiduciary with respect to its involvement in the study, approval or financing of the dam. The law of fiduciary duties, in the Aboriginal context, cannot be interpreted to place the Crown in the untenable position of having to forego its public law duties when such duties conflict with Indian interests.

The second issue was whether the Crown breached its fiduciary duty to the Fairford Band in securing authorization by way of Band Council Resolution for the coffer dam on the reserve. Erection of a coffer dam was necessary to limit the flow through the Fairford River channel temporarily. As use of the Reserve by Manitoba for purposes of the coffer dam was not to exceed a period of one year, the Minister may have authorized such use without obtaining consent of the Band Council. However, there was consultation and consent of the Band Council was obtained. There was no breach of the *Indian Act* in that consent having been obtained. The Minister was not bound to act without consent of the Band Council under subsection 28(2) of the Act, even if the temporary disposition was for less than one year. There was, therefore, no requirement under the *Indian Act* to treat use by Manitoba of the Reserve for the coffer dam as a surrender under section 37 of the Act and no necessity to obtain Band approval for such use. Canada acted in conformity with the *Indian Act* in permitting Manitoba to use the Reserve for the coffer dam and in obtaining a Band Council resolution authorizing such use.

The third issue was whether the Crown breached its fiduciary duty by failing to address the periodic flooding and related adverse impacts on the Fairford First Nation interests. The plaintiffs claimed that the Crown's knowledge of the adverse impacts they were experiencing by the operation of the dam imposed a fiduciary duty to do whatever was necessary to protect the Band's interests from the effects of that structure. They also suggested that the Crown had a duty to exercise leverage under the *Navigable Waters Protection Act* (NWPA) to control the way in which Manitoba operated the dam. Although the Fairford Band brought many of its concerns to the Indian Affairs Branch, it knew that it was Manitoba's operation of the dam which was causing it difficulties. There was no evidence that the Band was relying on the Crown to remedy the problems caused by the dam, and that the latter had any discretion or power to control its operation. The Crown's only direct involvement with the dam was with respect to its study, approval and financing. Manitoba owned the dam and operated it. Subsection 31(3) of the *Indian Act* preserves the right of the band and its members to bring an action for trespass themselves. The Band did not cede that power to the Crown nor was there any mutual understanding between them giving rise to a reasonable expectation that such an action would be commenced by the Crown. The Fairford Band was not in a vulnerable position *vis-à-vis* the Crown with respect to third parties who trespassed on its land or otherwise interfered with its interests. Actions taken by the Indian Affairs Branch were in the performance of public law duties under the *Indian Act* and could not give rise to a fiduciary duty. The plaintiffs' argument that the Crown breached its fiduciary duty in failing to use the provisions of the NWPA as leverage to exact concessions from Manitoba respecting the flooding of the Fairford Reserve land was also untenable.

The fourth issue was whether the Crown breached its fiduciary duty to the Band in the unconditional section 35 transfer of 23 acres of land for road purposes in 1962 without consulting the Band, prescribing terms and conditions in the transfer to ensure minimal infringement on the interests of the Fairford First Nation and ensuring just compensation. The construction of the dam required the realignment of a provincial highway through the Reserve to eliminate curves. To do so, Manitoba needed approximately 34 acres of Fairford Reserve land as highway right of way. Section 35 of the *Indian Act* is the relevant provision for the taking of land for provincial purposes. By Band Council resolution dated December 7, 1960, 11 acres closest to the dam were authorized to be transferred to Manitoba. By Band Council resolution dated June 12, 1962, a further 23 acres was agreed to be transferred to Manitoba. The Crown consented to the taking by Manitoba of the entire 34 acres for the highway right of way. The plaintiffs were consulted with respect to the transfer of land for highway purposes and as to the compensation therefor. The Crown's necessary involvement under section 35 of the Act in the taking of land from the Fairford Reserve for highway purposes by Manitoba gave rise to a fiduciary duty to ensure that the Band's best interests were protected in so far as the Crown's unilateral discretion with respect to the transaction was concerned. The Crown's failure to properly consent to the transfer of the northern 11 acres to Manitoba by order in council for over 12 years constituted a breach of fiduciary duty to the Band. Failure to collect the full purchase price from Manitoba in a timely manner also constituted a breach of fiduciary duty. However, payment in full was received by the Crown with interest and an order in council consenting to the transfer of the entire 34 acres to Manitoba was executed. The breaches of fiduciary duty were thus remedied. There was no further outstanding cause of action based upon breach of fiduciary duty in these circumstances.

The fifth issue was whether the Crown breached its fiduciary duty by encouraging the Fairford Band to engage in land exchange negotiations with Manitoba in 1969 when it knew that the construction and operation of the dam adversely impacted the Band's practical and legal interests far beyond merely land and that the Band had no authority to conclude such negotiations or agreements. The relationship between the Crown and Indian bands respecting their lands and rights is governed by the twin policies of autonomy and protection. Although Aboriginal peoples are protected by the *Indian Act*, they are to be treated as autonomous actors whose decisions must be respected and honoured. There was therefore no legal reason why the Fairford Band could not and should not have negotiated with Manitoba. Because the compensation land had to be transferred from Manitoba to the Crown in order for it to become part of the Reserve, a fiduciary duty arose at the time of transfer to ensure that the Band was not exploited. However, that duty arose only when the Crown was asked to ratify the agreement negotiated by the Band. No such duty existed at the negotiating stage. There is no reason in principle why an Indian band should not be able to determine its own requirements, conduct its own negotiations and conclude those negotiations.

The sixth issue was whether the Crown breached its fiduciary duty to the Fairford Band by failing to disclose to it and attempting unilaterally to correct the clear lack of authority for the province to be on Reserve land by purporting to transfer, in 1973, a 34-acre block of land for public road purposes without consulting the Band. In questions involving surrenders of reserve land, there is a duty of consultation on the Crown, which duty extends to dispositions of reserve land by the latter under section 35 of the Act. The minutes of a meeting held on September 16, 1971 between officials of Indians Affairs, the Fairford Band Council and a representative of the Manitoba Indian Brotherhood indicated that right-of-ways for roads had never been finalized, that total compensation had not been paid and that interest would be paid. They indicated a very complete disclosure of the circumstances to the Band Council. The consultation conducted between Indian Affairs and the Band Council accorded with the standard of consultation prescribed by the Supreme Court of Canada in *Delgamuukw v. British Columbia*.

The seventh issue was whether the Crown breached its fiduciary duty in failing between 1977 and 1984 to address the deficiencies in the purported 1974 compensation land transfer agreement in a timely fashion. The Fairford Band had been negotiating with Manitoba for compensation as a result of flooding from the operation of the dam since 1967. These negotiations culminated in 1974 in the preparation by Manitoba of an agreement between the Band, Manitoba and the Crown for the transfer of compensation land to the Fairford Band. During the period between 1977 and 1984, many events occurred, delaying considerably the transfer of the compensation land to the Fairford Band. The prime cause of the delay rested with the Crown and that delay was unjustified. What gave rise to the fiduciary duty was the discretion vested in the Crown to deal with surrendered land and the vulnerable position of the Indian band once it has surrendered the land. The Crown did not act in a timely manner after it received the compensation agreement from Manitoba in 1977. The 1974 compensation agreement was an improvident transaction from the Band's perspective since, in exchange for 5771.91 acres of land, the Band was prepared to release Manitoba from any further claims and restriction on the operation of the dam, irrespective of the extent of flooding that might result. However, in not ratifying an improvident transaction to which the Band was prepared to agree, the Crown was not free of a fiduciary liability because it delayed the ratification of the transaction due to confusion on its part as to how to proceed. The Crown was required to determine, in a timely manner, what was improvident in the compensation agreement and advise the Fairford Band. In not doing so, it breached its fiduciary duty to the Band. That breach started at the beginning of 1978 when the Crown failed to exercise its discretion with respect to the compensation agreement based upon a sound analysis of its deficiencies, to advise the Fairford Band and to seek its instructions. Between the beginning of 1978 and September 1984, there was no progress on these issues, little or no advice given to the Band as to the deficiencies of the agreement and no discussion with the Band as to how the matter should proceed. This period of over six and one half years constituted a period of unreasonable delay during which there was no adequate consultation with the Band.

The eighth issue was whether the Crown breached its fiduciary duty to the Fairford Band in actively negotiating with Manitoba from 1984 to 1991 in respect of compensation for the adverse effects of the dam without the Band's involvement or knowledge in the details of same. While up to September 1984, the Crown's understanding and progress with respect to the compensation land agreement was inadequate, the situation changed when Jim Gallo, an official from the Department of Indian and Northern Affairs, took over the file.The only period during which the plaintiffs' allegation of non-consultation was supported by the evidence was from September 1984 to February 1986. The Crown's failure to consult with the Band during that period gave rise to a breach of fiduciary duty to protect the Band in its dealings with Manitoba. There was no evidence of delay or, except for the failure to consult, any other malfeasance on Mr. Gallo's part. His actions were, except for the failure to consult, diligent and consistent with those expected of a fiduciary. When the Crown was unilaterally dealing with Manitoba, the duty to consult existed and the failure to consult during that period constituted a breach of fiduciary duty.

The last issue concerns the limitation of actions. Relying on clause 2(1)(k) of *The Limitation of Actions Act* of Manitoba, the defendant argued that the plaintiffs' claims are statute-barred. A six-year limitation period is imposed by that provision on the claims advanced by the plaintiffs. Since the plaintiffs' statement of claim was filed on September 15, 1993, claims arising prior to September 15, 1987 are statute-barred. The plaintiffs argued that the defendant continually breached its fiduciary duties to the Band ever since it approved and partly financed the dam. Any breach of fiduciary duty must, however, be located at a specific point in time. A continuing breach argument is without merit. A separate and distinct cause of action for breach of fiduciary duty arises against the Crown with respect to each distinct set of circumstances and a period of limitation will begin to run in respect of each alleged breach of fiduciary duty. Time does not begin to run for limitation purposes until "the discovery of the cause of action" within the meaning of clause 2(1)(k) of the Act. A cause of action is considered to be discoverable when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. The issue herein was at what point the plaintiffs could have discovered, through reasonable diligence, the causes of action which have been established against the Crown. The Fairford Band was aware of delay as early as March 8, 1979. However, it was not aware of whether the delay was for justifiable reasons or whether the Crown was failing to act with the diligence required of a fiduciary. The Band became aware that the delay was unjustified in 1992 after engaging the firm of E. E. Hobbs and Associates Ltd. to research events giving rise to the dam and the subsequent failure to conclude a satisfactory settlement, as well as to assess the damages suffered. Until 1990, the Fairford Band had no reason to believe that it had a cause of action against the Crown or that, when the latter was acting in a fiduciary capacity, it was not acting with reasonable diligence. Prior to delivery of the Hobbs Report in February 1992, the Band could not have reasonably discovered the material facts relating to the Crown's handling of the compensation agreement between the beginning of 1978 and September 1984. The plaintiffs' cause of action for delay over that period was not statute-barred. With respect to the Crown's failure to consult the Fairford Band between September 1984 and February 1986, the Band was made aware, in February 1986, of the efforts made by the Crown with Manitoba during that period. The plaintiffs' cause of action for failure to consult in that period became statute-barred in February 1992.

statutes and regulations judicially considered

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 2(1) "environmental effect", 16(1)(*a*).

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

Department of Citizenship and Immigration Act, R.S.C. 1952, c. 67 , s. 5.

Expropriation Act, R.S.C., 1985, c. E-21 , s. 26(11).

Expropriation Act, S.C. 1969-70, c. 41, s. 24.

Fisheries Act, R.S.C. 1970, c. F-14 , s. 34.

Indian Act, R.S.C., 1985, c. I-5 , ss. 2(1) "reserve" (as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 1), 18(1),(2), 31 (1),(3), 28(2), 35, 37(1) (as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 2), 39(1)(*b*) (as am. *idem*, s. 3), 64 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 10).

Limitation of Actions Act (The), R.S.M. 1987, c. L150, s. 2(1)(k).

Natural Resources Transfer Agreement (Manitoba) (confirmed by the *Constitution Act, 1930*, 20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) [R.S.C., 1985, Appendix II, No. 26], Sch. (1.)), para. 13.

Navigable Waters' Protection Act, R.S.C. 1927, c. 140 , s. 4.

Navigable Waters Protection Act, R.S.C. 1952, c. 193 , ss. 4, 5, 10.

Treaty No. 2 (1871).

cases judicially considered

followed:

Guerin et al. v. The Queen et al., 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120; 20 E.T.R. 6; 55 N.R. 161; 36 R.P.R. 1; *Frame v. Smith*, 1987 CanLII 74 (S.C.C.), [1987] 2 S.C.R. 99; (1987), 42 D.L.R. (4th) 81; 42 C.C.L.T. 1; [1988] 1 C.N.L.R. 152; 78 N.R. 40; 23 O.A.C. 84; 9 R.F.L. (3d) 225; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (S.C.C.), [1989] 2 S.C.R. 574; (1989), 69 O.R. (2d) 287; 61 D.L.R. (4th) 14; 26 C.P.R. (3d) 97.

applied:

Opetchesaht Indian Band v. Canada, 1997 CanLII 344 (S.C.C.), [1997] 2 S.C.R. 119; (1997), 147 D.L.R. (4th) 1; [1997] 7 W.W.R. 253; 90 B.C.A.C. 1; [1998] 1 C.N.L.R. 134; 9 R.P.R. (3d) 115; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010; (1997), 153 D.L.R. (4th) 193; 99 B.C.A.C. 161; [1998] 1 C.N.L.R. 14; 220 N.R. 161; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344; (1995), 130 D.L.R. (4th) 193; [1996] 2 C.N.L.R. 25; 190 N.R. 89; *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (F.C.A.), [1998] 1 F.C. 3; (1997) 148 D.L.R. (4th) 523; [1998] 1 C.N.L.R. 250; 215 N.R. 241 (C.A.).

distinguished:

Sandvik, A.B. v. Windsor Machine Co. reflex, (1986), 8 C.P.R. (3d) 433; 7 C.I.P.R. 232; 2 F.T.R. 81 (F.C.T.D.).

considered:

R. v. Sparrow, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385; [1990] 4 W.W.R. 410; 46 B.C.L.R. (2d) 1; 56 C.C.C. (3d) 263; [1990] 3 C.N.L.R. 160; 111 N.R. 241; *Union of Nova Scotia Indians v. Canada (Attorney General)*, 1996 CanLII 3847 (F.C.), [1997] 1 F.C. 325; (1996), 22 C.E.L.R. (N.S.) 293; reflex, [1997] 4 C.N.L.R. 280; 122 F.T.R. 81 (T.D.); *Hodgkinson v. Simms*, 1994 CanLII 70 (S.C.C.), [1994] 3 S.C.R. 377; (1994), 117 D.L.R. (4th) 161; [1994] 9 W.W.R. 609; 49 B.C.A.C. 1; 97 B.C.L.R. (2d) 1; 16 B.L.R. (2d) 1; 6 C.C.L.S. 1; 22 C.C.L.T. (2d) 1; 57 C.P.R. (3d) 1; 95 DTC 5135; 5 E.T.R. (2d) 1; 171 N.R. 245; 80 W.A.C. 1; *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, reflex, [1988] 3 F.C. 20; [1988] 1 C.N.L.R. 73; (1987), 14 F.T.R. 161 (T.D.); *Wewayakum Indian Band v. Canada and Wewayakai Indian Band* reflex, (1995), 99 F.T.R. 1 (F.C.T.D.).

referred to:

R. v. Van der Peet, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507; (1996), 137 D.L.R. (4th) 289; [1996] 9 W.W.R. 1; 80 B.C.A.C. 81; 23 B.C.L.R. (3d) 1; 109 C.C.C. (3d) 1; [1996] 4 C.N.L.R. 177; 50 C.R. (4th) 1; 200 N.R. 1; 130 W.A.C. 81; *Roberts v. Canada*, 1989 CanLII 122 (S.C.C.), [1989] 1 S.C.R. 322; [1989] 3 W.W.R. 117; (1989), 35 B.C.L.R. (2d) 1; 25 F.T.R. 161; 92 N.R. 241; *Chippewas of Nawash First Nation v. Canada (Minister of Indian & Northern Affairs)* reflex, (1996), 11 Admin. L.R. (2d) 232; [1997] 1 C.N.L.R. 1; 116 F.T.R. 37 (F.C.T.D.); *Custer v. Hudson's Bay Co. Dev. Ltd.*, [1983] 1 W.W.R. 566 (Sask. C.A.); *R. v. Badger*, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771; (1996), 181 A.R. 321; 133 D.L.R. (4th) 324; [1996] 4 W.W.R. 457; 37 Alta. L.R. (3d) 153; 105 C.C.C. (3d) 289; [1996] 2 C.N.L.R. 77; 195 N.R. 1; 116 W.A.C. 321; *Diggon-Hibben Ltd. v. The King*, 1949 CanLII 50 (S.C.C.), [1949] S.C.R. 712; [1949] 4 D.L.R. 785; *Woods v. The King*, 1951 CanLII 36 (S.C.C.), [1951] S.C.R. 504; [1951] 2 D.L.R. 465; (1951), 67 C.R.T.C. 87; *Kruger v. The Queen*, reflex, [1986] 1 F.C. 3; (1985), 17 D.L.R. (4th) 591; [1985] 3 C.N.L.R. 15; 32 L.C.R. 65; 58 N.R. 241 (C.A.); *Alexander Band No. 134 v. Canada (Minister of Indian Affairs and Northern Development)*, reflex, [1991] 2 F.C. 3; [1991] 2 C.N.L.R. 22; (1990), 39 F.T.R. 142 (T.D.); *C. (C.D.) v. Starzecki*, reflex, [1996] 2 W.W.R. 317; (1995), 44 C.P.C. (3d) 319 (Man. Q.B.); *Lower Kootenay Indian Band v. Canada*, reflex, [1992] 2 C.N.L.R. 54; (1991), 42 F.T.R. 241 (F.C.T.D.); *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (S.C.C.), [1986] 2 S.C.R. 147; (1986), 75 N.S.R. (2d) 109; 31 D.L.R. (4th) 481; 186 A.P.R. 109; 34 B.L.R. 187; 37 C.C.L.T. 117; 42 R.P.C. 161; *M. (K.) v. M. (H.)*, 1992 CanLII 31 (S.C.C.), [1992] 3 S.C.R. 6; (1992), 96 D.L.R. (4th) 289; 14 C.C.L.T. (2d) 1; 142 N.R. 321; 57 O.A.C. 321.

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ACTION for breach of fiduciary duty brought by the members of the Fairford Indian Band as a result of extensive flooding caused by the construction of a dam on the Fairford Indian Reserve in Manitoba. Action allowed in part.

appearances:

E. Anthony Ross and *Kevin J. Scullion* for plaintiffs.

Craig J. Henderson, Sidney R. Restall and *Brian H. Hay* for defendant.

solicitors of record:

Harris & Harris, Etobicoke, Ontario, for plaintiffs.

Deputy Attorney General of Canada for defendant.

The following are the reasons for judgment rendered in English by

EDITOR'S NOTE

The Executive Editor has decided that the decision herein should be published in the Federal Court Reports *as it provides an exhaustive review of the Crown's fiduciary duty to Indian bands, in this case the Fairford First Nation living on the Fairford Indian Reserve in Manitoba. His Lordship made numerous references to important Supreme Court of Canada decisions relating to the fiduciary duty of the Crown in the Aboriginal context. It was, however, determined that part only of the decision should be published and that portions of His Lordship's 154 page reasons for judgment, which gave a detailed review of facts and documentary evidence, would be deleted and replaced by Editor's notes.*

Rothstein, J.:

1. OVERVIEW

This is an action for breach of fiduciary duty brought by the members of the Fairford Indian Band[1] against the Government of Canada. In 1960 and 1961 the Government of Manitoba, with the knowledge and financial assistance of Canada, constructed the Fairford River Water Control Structure (the Water Control Structure or Structure, a dam) and deepened the channel on the Fairford River which runs adjacent to the Fairford Indian Reserve and into Lake St. Martin in central Manitoba. The purpose of the Water Control Structure was to regulate the level of Lake Manitoba upstream from the Fairford Reserve.

Commencing in 1967 and in many following years, there was extensive flooding of the Fairford Reserve from the Fairford River and Lake St. Martin.[2] Manitoba accepted responsibility for this flooding. Initially, Manitoba compensated the Fairford Band on an annual basis for the loss of hay from the flooding of hay lands. Negotiations were then entered into between Manitoba and the Band whereby Manitoba was to provide the Band with land (the compensation land) in compensation for the land that was being flooded.

In 1974, the Band signed a three party agreement (the 1974 compensation agreement, compensation agreement, 1974 agreement or agreement) whereby it agreed to accept 5771.91 acres of compensation land and to release Manitoba from any further liability regarding flooding.[3] By Order in Council 1398/76, Manitoba authorized the transfer of the compensation land in accordance with the agreement. In 1977, it was sent to Canada as legal owner of the Fairford Reserve for its ratification. Canada refused to ratify the agreement for a number of reasons. Initially, Canada's only objection was that the Fairford Band could not be a party to the agreement and that the transfer of land had to be to Her Majesty the Queen in right of Canada. Later, other objections to the substance of the agreement were raised.

There is an indication in the evidence that the Band members had use of some of the compensation land from 1975 onward. As of 1979, members of the Band were occupying the compensation land even though this land had still not been transferred to Her Majesty and was not legally a part of the Reserve.

In 1984, Canada began to focus on further deficiencies in the 1974 agreement. An important deficiency was that the agreement did not provide for a maximum flood limit. There were then further discussions between Manitoba and Canada, of which the Fairford Band was from time to time informed. Initially, Manitoba refused to consider any changes to the agreement. Eventually, however, Manitoba agreed to some changes. One was that Manitoba acknowledged the need for a maximum flood limit. Eventually, Manitoba agreed that the compensation land was to be considered only partial compensation to the Band. This was reflected in a memorandum of understanding between Canada and Manitoba dated December 13, 1990. Finally, by federal Order in Council 1992/430, Canada accepted transfer of the compensation lands and set apart the lands as an addition to the Fairford Indian Reserve No. 50. The 1974 agreement has never been signed by Canada.

The Fairford Band was not satisfied with the compensation land as full compensation for the losses suffered by its members. The Band therefore decided to bring this action against Her Majesty in right of Canada and filed its statement of claim on September 15, 1993. Even though the plaintiffs have conceded that Manitoba is the source of their problems, they take the position that because Canada had a fiduciary duty to the Fairford Band, Canada is liable for the loss and damage suffered. No action has been taken by the Band against Manitoba.[4]

2. THE PLAINTIFFS' CLAIM

The plaintiffs say that the members of the Fairford Band have suffered loss as a result of the breach of the fiduciary duties which the plaintiffs say Canada owed to the Band relating to the Water Control Structure (and other matters). The specific duties and breaches will be elaborated upon later. The alleged losses suffered by members of the Band included the loss of hay lands negatively impacting farming on the Reserve and destruction of the natural habitat negatively impacting the opportunity for Band members to engage in hunting, fishing and trapping, both on and off the Reserve. They also say there have been occurrences of disease such as dysentery and contamination of water. In addition to the direct economic loss which they say they have incurred, the plaintiffs say that Canada's breach of fiduciary duties has resulted in a loss of self-sufficiency by Band members including an increase in alcoholism, drug addiction, mental illness or distress, community strife and an increase in unemployment and dependency on government welfare. As a result of the losses suffered, the plaintiffs have claimed general and special damages, including damages for economic loss and future damages and punitive and exemplary damages.

The parties agreed, and the Court ordered that the plaintiffs need not strictly prove the *quantum* of damages at the liability stage of the proceedings. This decision deals only with the question of liability.[5]

3. THE EVIDENCE

The plaintiffs' oral evidence consisted of testimony by a number of Band members, a former Indian agent involved with the Fairford Band in the early 1960s, as well as two witnesses called as experts. The plaintiffs' evidence was essentially directed to adverse changes which Band members attributed to the Water Control Structure, the relationship between Canada and the Band, and some Band members' recollections of various events over the relevant time. The expert evidence of L. G. Chambers of Wardrop Engineering Inc. consisted of a preliminary hydrological investigation of the Reserve and a cursory review of the Reserve infrastructure before and after construction of the Water Control Structure. The expert evidence of A. Brian Ransom consisted of an investigation of the impact of flooding on the Reserve in 1995. This report reviewed the history of the Water Control Structure and flooding on the Reserve, with particular reference to negotiations between the Fairford Band and the Province

of Manitoba in the 1970s for the compensation land.

The defendant's oral evidence provided Canada's explanation of some of the events that occurred, particularly those relating to Canada's attempt to have Manitoba agree to amend the 1974 compensation agreement. Two expert witnesses were also called with respect to the question of the boundary of the Fairford Reserve in relation to the Fairford River and whether the Water Control Structure was partially constructed on Reserve land or entirely on provincial Crown land.

The plaintiffs called a rebuttal witness as to the issue of the boundary of the Fairford Reserve with the Fairford River and Lake St. Martin.

In addition to the oral evidence, the parties submitted an agreed statement of facts together with some twelve volumes of over 800 documents dating from 1871 to the early 1990s. It is largely these documents that outline the facts relating to the planning and construction of the Water Control Structure, negotiations between the Band and Manitoba after the 1967 flooding, the 1974 agreement and the discussions and negotiations relating to changes sought to the agreement by Canada.

The case commenced in Edmonton on March 6, 1997 for two days of evidence. It then continued in Winnipeg, from January 5, 1998 until February 4, 1998 for 16 more days of evidence. Argument has taken 12 days commencing on February 17 and concluding March 27, 1998, with final written argument by the defendant respecting the issue of limitation of actions being submitted on April 20, 1998.

4. FIDUCIARY DUTIES AND BREACHES ALLEGED BY THE PLAINTIFFS

The approach to the law adopted by the plaintiffs in this case was general. The plaintiffs' argument seemed to be that the Crown has a general ongoing fiduciary obligation to protect Aboriginal interests. Having regard to well-known Supreme Court of Canada jurisprudence, *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335 and *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, as well as other cases, they aggregate references to fiduciary duties which, taken together, they allege, support the existence of fiduciary obligations owed by the Crown to the Fairford Band in this case. The plaintiffs interweave various facts over the 34-year period from 1958 when active planning for the Water Control Structure was underway through to 1993. They say the Crown is liable for all losses the plaintiffs suffered over the entire period since construction of the Water Control Structure and that "Canada repeatedly breached its fiduciary duties to the Fairford First Nation. Not only have breaches occurred in numerous specific instances, but many of these breaches are of a `continuing nature'". The plaintiffs then enumerate specific duties and instances of breach. It will be convenient to analyse each in the order set out by the plaintiffs. The alleged duties and breaches are, for the most part, quoted exactly as set out by the plaintiffs in their material.

4.A. Did the Crown breach its fiduciary duty to the Fairford Band "in the planning and approval stages of the 1960 Water Control Structure in light of the 1948 report, Canada's involvement in the 1958 study which failed to consider the legal and practical interests of the Fairford First Nation, and in committing financing to the project without addressing the interests of the Fairford First Nation"?

4.A.1. Plaintiffs' position

The plaintiffs argue that Canada had a fiduciary duty to the Fairford Band with respect to Canada's involvement in the planning, approval and financing of the Water Control Structure. The plaintiffs characterize Canada's decisions with respect to the planning, approval and financing of the Water Control Structure as if Canada had exercised discretion which adversely affected a vulnerable Indian band. They say the circumstances gave rise to a fiduciary obligation on the part of Canada to consider the effects of the Water Control Structure on the Fairford Band's interest, to ascertain that flooding and other adverse effects would not take place and therefore to refuse to permit construction of the Water Control Structure. In their memorandum of fact and law, the plaintiffs state:

When Canada agreed to fund 50% of the Water Control Structure, it assured that the Water Control Structure would be constructed. This approval was made prior to any discussions were considered [*sic*] with the Fairford First Nation and prior to any notice being given to the Fairford First Nation. Tacitly at least, Canada accepted that the Water Control Structure would be constructed without required provisions to respect and protect Fairford First

Nation interests, and in fact this is what occurred.

Canada then knew, or ought to have known, that the construction and operation of the Water Control Structure had the known potential to interfere with the use and enjoyment of the Fairford reserve by the First Nation, including the aboriginal, treaty and/or constitutional rights to hunt, trap, fish and pursue other traditional customs and practices on Reserve lands and on neighbouring unoccupied Crown lands.

4.A.2. Facts

In the early and mid-1950s, Manitoba had experienced severe spring flooding. In 1955, then Premier Douglas L. Campbell asked the Government of Canada to undertake a survey of Manitoba's main rivers and lakes as a preliminary to a comprehensive flood control program. Canada had an interest in such work as it had been called upon to provide flood relief in Manitoba in the past.

By an agreement between Manitoba and Canada dated July 5, 1956, the Lakes Winnipeg and Manitoba Board was established and its terms of reference set out. The Board was to consist of representatives of both governments. Paragraphs 4, 5 and 6 of the Terms of Reference provided:

4. . . . The Board shall plan, supervise and carry out a survey of Lakes Winnipeg and Manitoba and the resources of waters within Manitoba flowing into and from those lakes and shall determine and report what further developments and controls of these water resources in its judgment would appear to be physically practicable with particular reference to (a) flood control and (b) hydro-electric power.

5. If the Board finds that certain works, projects or controls are feasible for one or both of the purposes designated above, it shall indicate in what respects other interests (whether public or private) would be affected either adversely or advantageously.

6. The Board may submit interim reports to the two governments but, at all events, shall render a final report on its findings not later than July 1, 1958. The reports shall be limited to engineering facts and opinions but shall contain estimates of the cost of measures found to be feasible and may contain estimates of the cost of and periods of time considered necessary to complete specific detailed studies with respect to various projects or control works covered by the reports and which, following review, may be selected and determined by Manitoba as advisable to be carried out. The survey and reports shall be limited to the matters mentioned above and shall not contain cost-benefit estimates.[6]

The report of the Lakes Winnipeg and Manitoba Board on Measures for the Control of Water of Lakes Winnipeg and Manitoba was issued in June 1958. The recommended measure to alleviate flooding of lands bordering Lake Manitoba was the construction of the Water Control Structure on the Fairford River and a deepening of the channel in the Fairford River. The intent was to regulate the level of water in Lake Manitoba between 811 and 813 feet above sea level.

Canada also provided Manitoba with financial assistance for construction of the Structure. Canada was to contribute one half of the cost up to a maximum of $300,000.

For purposes of financial assistance, Canada had to approve matters such as the location, engineering feasibility of the route, and method of construction which Manitoba proposed to follow. This is outlined in a federal government memorandum dated January 22, 1960:

In any case where the Federal Government makes a contribution to the cost of a project, it is essential that there be an engineering review of all the project data to determine as far as it is possible that the project is feasible and acceptable. Such a review is necessary regardless of the proportion of the cost to be paid by Canada. Under the Canada Water Conservation Assistance Act such a review of project data is carried out by engineers of the Water Resources Branch prior to approval of the project by this Department.

It would appear that Canada provided such approval.

However, Manitoba owned, operated and controlled the Structure. The Water Control Structure was a provincial

government project, a fact confirmed by a letter dated January 3, 1961, from G. L. MacKenzie, Director, Prairie Farm Rehabilitation, Department of Agriculture, Canada, to J. A. Griffiths, Director of Water Control and Conservation, Department of Agriculture and Conservation, Manitoba. Mr. MacKenzie states:

With respect to Section 3 of your second paragraph, I do not think that Canada should assume any responsibility for maintenance or third party liability. This is your Government's project and we are merely contributing part of the cost as set out in our authority, P.C. 1960-1/1461. There is no similarity with the South Saskatchewan River Dam Project which is a national project being constructed by the Federal Government under special Agreement. The matter of controlling the project should determine liability.

There is no evidence, apart from Canada's participation in the study, engineering approval and financing, leading to its construction, of any other involvement or control by Canada over the Water Control Structure.

4.A.3. Fiduciary Duty Analysis

4.A.3.a. Subsection 18(1) of the *Indian Act*

To support their argument that Canada acted in a fiduciary capacity with respect to its involvement in the study, planning and approval of the Water Control Structure, the plaintiffs rely on subsection 18(1) of the *Indian Act*, R.S.C., 1985, c. I-5, which provides:

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

The plaintiffs' argument is that Canada had a duty arising from subsection 18(1) not to act in any way that would impair the Band's use and benefit of the Reserve and that Canada's involvement with the Water Control Structure breached that duty.

The plaintiffs' argument raises the question of whether a fiduciary duty arises when Her Majesty holds the Fairford Reserve for the use and benefit of the Band, to protect the Band and Reserve from the adverse effects of the operation of the Water Control Structure.

The plaintiffs rely heavily on the *dicta* of Wilson J. in *Guerin, supra,* at pages 349-350:

I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgement of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. That is not to say that the Crown either historically or by s. 18 holds the land in trust for the Bands. The Bands do not have the fee in the land; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 is a statutory acknowledgement of that obligation. It is my view, therefore, that while the Crown does not hold reserve land under s.18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction. [Emphasis added.]

Relying on this statement, the plaintiffs argue that subsection 18(1) imposed a duty on Canada not to permit the Water Control Structure to be constructed.

In *Guerin, supra*, Wilson J. wrote for three judges. Dickson J. (as he then was) wrote for four. Dickson J.'s approach was to associate the Crown's fiduciary duty to the Indians' unique interest in their lands and the inalienability of those lands except upon surrender to the Crown. At page 376 he states:

The fiduciary relationship between the Crown and the Indians has its roots in the concept of the aboriginal, native

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

An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. [Emphasis added.]

That a fiduciary duty arose only upon surrender was further reinforced at page 382:

It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. . . . The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading. [Emphasis added.]

According to Dickson J., the effect of subsection 18(1) was to confer upon the Crown an obligation to protect Indians' interests in transactions with third parties. For that purpose, the Crown, once land was surrendered, was given a discretion to decide what was in the best interests of the Indians. He states at pages 383-384:

The 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. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "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 . . . ." Through the confirmation of the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. [Emphasis added.]

It is Dickson J.'s approach to the fiduciary relationship between the Crown and the Aboriginals that is authoritative and that has been adopted in subsequent cases. See *Opetchesaht Indian Band v. Canada*, 1997 CanLII 344 (S.C.C.), [1997] 2 S.C.R. 119; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344; *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507; *Roberts v. Canada*, 1989 CanLII 122 (S.C.C.), [1989] 1 S.C.R. 322; *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (F.C.A.), [1998] 1 F.C. 3 (C.A.); *Chippewas of Nawash First Nation v. Canada (Minister of Indian & Northern Affairs)* (1996), 11 Admin. L.R. (2d) 232 (F.C.T.D.).

For example, in *Blueberry*, *supra*, the bands argued that because the Crown holds title to reserve lands, it possesses power with respect to those lands and must exercise that power as a fiduciary on behalf of the band. They argued that such a fiduciary duty was consistent with the paternalistic tone of the *Indian Act*. In rejecting this notion, McLachlin J.[7] stated at page 370:

. . . the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.

. . .

In short, the Crown's obligation was limited to preventing exploitative bargains.

There is no indication in the authorities that a fiduciary duty arises simply by reason of Her Majesty holding reserve land for the use and benefit of an Indian band pursuant to subsection 18(1).

That is not to say there is no academic comment criticizing the consistent practice of the courts following *Guerin* to adhere to the approach of Dickson J. See for example Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), at pages 104-110. However, there is no indication that the courts have deviated from Dickson J.'s approach.

4.A.3.b. *R. v. Sparrow*

In light of the Supreme Court of Canada's decision in *R. v. Sparrow*, *supra*, it has also been argued that fiduciary obligations are triggered whenever, by government action, Aboriginal rights are extinguished, i.e. that surrender is not a necessary condition. In Patrick Macklem, "Aboriginal Rights and State Obligations" (1997), 36 *Alta. L.R.* 97, the author states at page 112 that:

First, *Sparrow* is an indication that the conservative view that fiduciary obligations are triggered only upon the voluntary surrender of Aboriginal land is to be supplemented with a more expansive view that fiduciary obligations are also triggered upon unilateral extinguishments of Aboriginal rights. If the Crown owes fiduciary obligations to Aboriginal people when it unilaterally interferes with the exercise of Aboriginal rights, then *a fortiori* the Crown, at least after 1982, owes certain fiduciary obligations when it unilaterally extinguishes Aboriginal rights.

Sparrow was a challenge to the *Fisheries Act*, R.S.C. 1970, c. F-14, section 34 on the grounds that section 34 of the Act conflicted with Aboriginal rights recognized and affirmed under subsection 35(1) of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].[8] In *Sparrow*, the Supreme Court held that when such legislation is enacted, the Crown is under a duty to justify any negative effect on Aboriginal rights protected under subsection 35(1). The Court held that this justification requirement acknowledges the concept of "holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*" (see page 1109). Other than recognizing a duty upon the Crown to justify legislative infringement on Aboriginal rights recognized and affirmed under subsection 35(1), I do not read the Supreme Court in *Sparrow* to have added or derogated from the findings of Dickson J. in *Guerin* respecting the law of fiduciary duties in the Aboriginal context.

4.A.3.c. *Union of Nova Scotia Indians v. Canada (Attorney General)*

The plaintiffs also refer to the *dicta* of MacKay J. in *Union of Nova Scotia Indians v. Canada (Attorney General)*, 1996 CanLII 3847 (F.C.), [1997] 1 F.C. 325 (T.D.). The plaintiffs say that *Union* stands for the proposition that Canada has a general fiduciary duty not to permit unjustified adverse effects upon Aboriginal interests.

Union was a judicial review of an environmental assessment process. At one point, the Mi'kmaq Indians alleged procedural unfairness because the respondents did not request that the applicants sign off on an environmental screening document before undertaking to commence with a channel improvement project. The applicants alleged this was a failure to discharge the Crown's fiduciary duty owed to the Mi'kmaq Indians in light of the provisions set out in the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA).

At page 339, MacKay J. observed that while the nature of the relevant fiduciary duty was not spelled out in argument:

. . . it would at least include the duty not to permit unjustified adverse effects upon continuing Aboriginal interests.

At pages 349-350 he concludes:

As earlier stated, I find that those acting on behalf of the Ministers concerned failed to assess potential adverse

effects of the project upon the use of fishery resources within the Bras d'Or Lakes by the Mi'kmaq people for traditional purposes, that is, for food. As earlier noted, that use has clearly been affirmed by the Nova Scotia Court of Appeal. It is an Aboriginal interest which those acting on behalf of Her Majesty have a fiduciary duty to protect from unwarranted adverse effects of the project, and I have found that those acting on behalf of the Ministers concerned failed to consider the fiduciary duty here owed. Those failures constituted unfairness in the process and errors in law. [Emphasis added.]

It is these statements on which the plaintiffs in this case rely to support their claim that Canada had a similar duty not to allow the Water Control Structure to negatively affect the interests of the Fairford Band.

Paragraph 16(1)(*a*) of the CEAA sets out one of the requirements for an environmental screening report as consideration of the "environmental effects of a project". Subsection 2(1) defines "environmental effect" as:

2. (1) In this Act,

. . .

"environmental effect" means, in respect of a project,

(*a*) any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. [Emphasis added.]

In describing the duty of the government, MacKay J. states at page 342:

It was urged for the applicants that under the CEAA, they, as representatives of Aboriginal peoples, have a special role in the environmental assessment process, as a result of the Act itself and the fiduciary duty owed to them. I am not persuaded of this. Nevertheless, it is clear that the CEAA requires assessment of many effect of environmental change on the current use of their interests in the fisheries in the Bras d'Or Lakes for traditional purposes. [Emphasis added.]

In my opinion, the plaintiffs have carried the *dicta* of MacKay J. in *Union* beyond its context and purpose. I think that the basis for MacKay J.'s reference to the fiduciary duty, "not to permit unjustified adverse effects upon continuing Aboriginal interests" was the statutory requirement that an environmental report consider the effect of any project on the use of the lands and resources for traditional purposes by Aboriginal persons. I do not read MacKay J. to have identified a general and pervasive obligation on the Crown in the manner argued by the plaintiffs in this case.

4.A.3.d. *Frame v. Smith*

While I do not suggest that the Crown's fiduciary duty is limited to the surrendering of Indian land, there must be circumstances present which give rise to a fiduciary duty on the Crown which arise from the facts. In *Semiahmoo, supra*, at page 22, Isaac C.J. states:

The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty.

This raises the question as to whether, apart from subsection 18(1) of the *Indian Act*, the facts relating to the Crown's involvement in the study, approval and financing of the Water Control Structure gave rise to a fiduciary duty upon the Crown.

Outside of the traditionally recognized categories of fiduciary, i.e. trustee, agent, etc., Wilson J. in *Frame v. Smith*, 1987 CanLII 74 (S.C.C.), [1987] 2 S.C.R. 99, at page 136, proposed a "rough and ready guide" to determining whether the imposition of a fiduciary obligation on a relationship would be appropriate:

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

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

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

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

Although Wilson J. wrote in dissent in *Frame v. Smith,* her "rough and ready" guide has been widely adopted in subsequent jurisprudence.

4.A.3.e. *Lac Minerals Ltd. v. International Corona Resources Ltd.*

In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (S.C.C.), [1989] 2 S.C.R. 574, Sopinka J., writing for the majority of the Court (dissenting in part with respect to the appropriate remedy but speaking for three of five judges relative to the issue of fiduciary relationship), adopted Wilson J.'s approach. At pages 599-600 he added:

It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

He went on to note, however, that the one requirement indispensable to a fiduciary duty was dependency or vulnerability:

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

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

At page 607, Sopinka J. quoted Wilson J. in *Frame*, in describing vulnerability:

This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power.

With Sopinka J.'s majority reasons in *Lac Minerals,* Wilson J.'s "rough and ready" guide became authoritative. In essence, it recognized that both a discretion or power on the part of the fiduciary and vulnerability on the part of the beneficiary, defined the fiduciary relationship. Vulnerability was an essential requirement and vulnerability meant that the beneficiary, despite his or her best efforts, was unable to prevent the injurious exercise of discretion or power by the fiduciary and that other legal or practical remedies were inadequate or absent.

4.A.3.f. *Hodgkinson v. Simms*"majority"reasonable expectations

The question of fiduciary duty outside of the recognized categories was again addressed by the Supreme Court in *Hodgkinson v. Simms*, 1994 CanLII 70 (S.C.C.), [1994] 3 S.C.R. 377. This case is a notable departure from Wilson J.'s guide in *Frame,* and the definition of vulnerability adopted in *Lac Minerals.*

La Forest J., who wrote for the majority in that case[9] held that "Wilson J.'s guidelines constitute *indicia* that help recognize a fiduciary relationship rather than ingredients that define it." Moreover, for the first time, a majority of the Supreme Court found that the existence of a fiduciary duty depended, not on the existence and/or type of vulnerability defined by the majority in *Lac Minerals,* but on the reasonable expectations of the parties. At page 409, La Forest J. says that the question to ask is whether:

. . . given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

La Forest J. also noted the necessity for a mutual understanding on behalf of both parties of this reasonable expectation. At pages 409-410, he states:

. . . outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

La Forest J. found that a "reasonable expectations approach" defined a fiduciary relationship in "advisory cases" where one party held himself out to have particular expertise and agreed to act in the other's best interests in using that expertise. However, at page 410, he cautioned that "there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary". Elements "such as trust, confidentiality, and the complexity and importance of the subject matter" were all necessary to make it "reasonable for the advisee to expect that the advisor [wa]s in fact exercising his or her special skills in that other party's best interests, unless the contrary [wa]s disclosed".

4.A.3.g. *Hodgkinson v. Simms*"the dissent"one party in the power of the other

The dissenting opinion of Sopinka and McLachlin JJ. in *Hodgkinson* also requires consideration in light of the reasons given by Iacobucci J. While he supported La Forest J. in finding a fiduciary duty, he continued to recognize the law in *Lac Minerals* by saying at page 480 that he preferred "to treat *Lac Minerals* . . . by simply distinguishing that case from the present one". The implication is that *Lac Minerals* is still authoritative although it is not entirely clear to what type of cases. It is therefore still necessary to have regard for *Lac Minerals*.

The role of vulnerability in a fiduciary analysis was a key issue on which La Forest J. on the one hand, and Sopinka and McLachlin JJ. differed in *Hodgkinson*. La Forest J. was of the opinion that the concept of vulnerability was not the "hallmark of a fiduciary relationship" although it was an important *indicium* of its existence (see *Hodgkinson, supra*, at page 405). Sopinka and McLachlin JJ., consistent with the majority on the issue of vulnerability in *Lac Minerals*, continued to be of the opinion that vulnerability meant that the beneficiary had to be in the power of the fiduciary. They state at page 466:

Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in *Frame v. Smith*. It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other.

They explain further at pages 467 and 468:

Phrases like "unilateral exercise of power", "at the mercy of the other's discretion" and "has given over that power" suggest a total reliance and dependence on the fiduciary by the beneficiary. In our view, these phrases are not empty verbiage. The courts and writers have used them advisedly, concerned for the need for clarity and aware of the draconian consequences of the imposition of a fiduciary obligation. Reliance is not a simple thing.

. . .

This is in accordance with the concepts of trust and loyalty which lie at the heart of the fiduciary obligation. The word "trust" connotes a state of complete reliance, of putting oneself or one's affairs in the power of the other. The correlative duty of loyalty arises from this level of trust and the complete reliance which it evidences. Where a party retains the power and ability to make his or her own decisions, the other person may be under a duty of care not to misrepresent the true state of affairs or face liability in tort or negligence. But he or she is not under a duty of loyalty. That higher duty arises only when the person has unilateral power over the other person's affairs placing the latter at the mercy of the former's discretion.

At page 470, of their reasons, they confine the scope of vulnerability saying that the ability to retain some decision-making power does not leave a party vulnerable for the purposes of finding any fiduciary obligation

present in a given case:

But neither of these rationales would appear to justify imposing a fiduciary obligation on the purveyor of investment advice where the client retains the power and ability to make the decisions of which he later complains.

4.A.3.h. *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*"ceding of power to the fiduciary

In the Aboriginal context, requirements for a fiduciary relationship were revisited by McLachlin J. in *Blueberry, supra*. In her decision, she observed that generally, in order for a fiduciary duty to arise, one party must have ceded its power to the other. At pages 371-372 she states:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith* , 1987 CanLII 74 (S.C.C.), [1987] 2 S.C.R. 99*; Norberg v. Wynrib*, 1992 CanLII 65 (S.C.C.), [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, 1994 CanLII 70 (S.C.C.), [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation. [Underlining mine.]

McLachlin J.'s reference in *Blueberry* to a ceding of power is consistent with her reasons (with Sopinka J.) in *Hodgkinson*.[10] This is an indication, although not conclusive, that in the Aboriginal context, one party ceding power to the other may still be a requirement in order for a fiduciary duty to arise.

4.A.3.i The framework to determine whether reasonable expectations arise or a ceding of power takes place.

Because both the reasonable expectations and the ceding of power-vulnerability approaches appear to be authoritative for different factual situations, and because the plaintiffs put forward arguments based on the Fairford Band's reasonable expectations, I test the facts of the present case against both approaches to determine whether a fiduciary duty upon the Crown may have arisen under either. I conclude that no fiduciary duty arose under either approach.

4.A.3.j. Reasonable expectations approach

In *Hodgkinson*, La Forest J. established that what was required to determine whether a fiduciary duty existed was a mutual understanding that one party had relinquished his own self-interest and had agreed to act solely on behalf of the other party. In the context of advisory opinions, La Forest J. found that when one party undertakes[11] to perform duties when elements such as trust, confidentiality, complexity and importance of the subject-matter are present, a fiduciary obligation may arise (page 410). More generally, however, he refers to a statute, agreement, particular course of conduct, or unilateral undertaking whereby one party gains a position of overriding power or influence over the other as giving rise to a fiduciary duty (at page 411).

In order to determine whether a fiduciary obligation arose with respect to the Crown's involvement with the Water Control Structure, it is necessary to determine whether by statute, agreement, particular course of conduct or unilateral undertaking, the Fairford Band and the Crown had a mutual understanding that the Crown would act on behalf of the Fairford Band such as to give rise to a reasonable expectation that the Crown would act in the Band's best interests to the exclusion of other interests.

In the absence of surrender, subsection 18(1) of the *Indian Act* does not give rise to a fiduciary duty on the part of the Crown: *Guerin.* No other statutory provision was referred to by the plaintiffs in the context of the Crown's involvement with the Water Control Structure. The facts of this case do not demonstrate a contractual relationship between the Crown and the Fairford Band. Nor is there evidence of an undertaking on the part of the Crown to act in a fiduciary capacity on behalf of the Indians during the study, approval and financing stages of the Water Control Structure.

I turn to course of conduct. The plaintiffs did not couch their argument by reference to La Forest J.'s reasonable expectations approach in *Hodgkinson.* However, they did refer to prior actions by Canada which they said justified the Band expecting Canada to take similar action with respect to the 1961 Water Control Structure. Specifically, the plaintiffs refer to Canada's approval of a 1934 water control structure on the Fairford River and Canada's concern at the time for the welfare of the Fairford Band.

The plaintiffs rely on a series of undertakings provided by the Minister of Public Works for Manitoba to the Department of Public Works for Canada as conditions for Canada's approval of the construction of the 1934 water control structure. The undertakings provided by Manitoba to Canada upon which the plaintiffs rely were:

1."The Minister hereby agrees that in any question which may arise from the approval of the application the settlement thereof shall be governed by full recognition of the dominant interest of navigation and the necessity of reserving therefor all or any requisite part of the natural flow of the Fairford River.

. . .

9."The Minister further agrees to indemnify and save harmless His Majesty in the right of the Dominion from all claims and demands of every kind arising from or by reason of the approval of the said works, the said approval in no way to be deemed to add or to take away from the proprietary rights of any riparian owner or lessee above or below the said works.

The plaintiffs claim that these undertakings amounted to guarantees, obtained by Canada from Manitoba, that the Fairford Band and its members' riparian rights and other interests with respect to the natural flow of the Fairford River would be protected from adverse consequences resulting from the construction and operation of the 1934 water control structure.

The undertakings sought and obtained by Canada in respect of the 1934 water control structure were pursuant to section 4 of the *Navigable Waters' Protection Act*, R.S.C. 1927, c. 140, which required that construction of works on navigable waters such as the Fairford River be approved by the Governor in Council and be built, placed and maintained in accordance with regulations made or approved by the Governor in Council. Undertaking number 1 makes explicit reference to navigation. Undertaking number 9 is an indemnity provision protecting Canada from claims made against it. These undertakings from Manitoba to Canada are not relevant to the Band's interest and do not evidence mutual understanding between the Band and the Crown which could give rise to subsequent expectations by the Band.

Plaintiffs' counsel also referred to a letter sent by the federal Indian Affairs Branch of the Department of Citizenship and Immigration to the Manitoba Department of Mines and Natural Resources dated November 10, 1933 seeking compensation if the dam was operated in such manner as to interfere with the fish supply in Lake St. Martin. There is no reply to this request in the evidence and no reference to protecting fish supply in the undertakings given by Manitoba to Canada. Nor is there evidence that the Fairford Band knew of the November 10, 1933 letter either in 1933 or in the 1950s when the Water Control Structure was being considered by Canada. It is therefore difficult to construe this letter as a course of conduct that could give rise to reasonable expectations by the Fairford Band that Canada would protect its interest when Canada approved and committed financing to the 1961 Water Control Structure.

Nonetheless, the plaintiffs have made much of the paternalistic relationship between the Crown and Indians and the reliance which the Indians have had on the government. While there is evidence that the Indians trusted and communicated with the Indian Affairs Branch, it cannot be said that in performing its duties under the *Indian Act*, the Crown demonstrated a course of conduct which gave rise to reasonable expectations on the part of the Fairford Band that the Crown would, to the exclusion of other interests, act in the best interests of the Band with respect to the Water Control Structure, i.e. in a fiduciary capacity.

In *Guerin*, Dickson J. points out the distinction, for fiduciary duty purposes, between private law and public law duties. At page 385:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise

to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function.

Dickson J. finds, that in dealing with Indian land upon surrender, the Crown assumes a fiduciary obligation. However, that is because of the Indians' "independent legal interest" in their land that predates any "executive order or legislative provision." (*Guerin , supra*, at page 379). It is not a creation of either the legislative or executive branches of government. As a result, he says [at page 385] the duty is "in the nature of a private law duty".

By contrast, duties that arise from legislative or executive action are public law duties. Such duties, as Dickson J. has said, typically do not give rise to a fiduciary relationship. Actions taken by the Indian Affairs Branch at the relevant time arose under and by reason of the *Indian Act* and section 5 of the *Department of Citizenship and Immigration Act*, R.S.C. 1952, c. 67. The *Indian Act* is replete with references to government involvement in virtually every aspect of the administration of Indian interests and the welfare of Indians. Section 5 of the *Department of Citizenship and Immigration Act* provided that the "duties, powers and functions of the Minister extend to and include all matters over which the Parliament of Canada has jurisdiction, relating to . . . Indian Affairs . . . and not by law assigned to any other Department of the Government of Canada". There is no doubt that under these Acts, the Crown, through its Indian Affairs Branch, and later, its Department of Indian Affairs and Northern Development, over many years was active in its dealings with the Fairford Band. However, the actions taken by the Indian Affairs Branch arose under and by reason of the *Indian Act* and the *Department of Citizenship and Immigration Act* and were public law duties. There is no indication they would be in the nature of private law duties such as when Indian land is surrendered. Nor is there any suggestion the Crown was exercising a discretion or power for or on behalf of the Indians. For these reasons, course of conduct by the Crown in its dealings with and for Indians under these Acts generally, may not be relied upon as a basis for the creation of a fiduciary duty upon the Crown and, in particular, with respect to its involvement with the Water Control Structure in this case.

4.A.3.k. Ceding of Power"Vulnerability Approach

I turn to the question of whether power over "any matter" was ceded by the Fairford Band to the Crown with respect to the Water Control Structure such that the Band was left "vulnerable" or at the "mercy of the Crown's discretion". The facts do not disclose ceding of any authority or power over any matter. Again, it is necessary to look for the existence of any relevant statute, contract or unilateral undertaking.[12] There is simply no evidence of any statute, contract or unilateral undertaking leading to a ceding of the Band's power over any matter to the Crown. Indeed, there was no communication between the Crown and the Band at the time the Crown was studying, approving and financing the Water Control Structure. The type of vulnerability contemplated by *Lac Minerals* and *Blueberry*, is not present here.

4.A.3.l. Conclusion

For these reasons, I conclude that, whether under the reasonable expectations approach or the ceding of power-vulnerability approach, the Crown was not a fiduciary with respect to its involvement in the study, approval or financing of the Water Control Structure.

That is not to say that the Fairford Band is without recourse or that, generally speaking, where a government's action interferes with the use and benefit of a reserve by an Indian band, a responsible government would not address questions of compensation. Subsection 31(3) of the *Indian Act* preserves for an Indian or Indian band the opportunity to bring an action against anyone interfering with their rights. See *Custer v. Hudson's Bay Co. Dev. Ltd.*, [1983] 1 W.W.R. 566 (Sask. C.A.). Section 31 states in part:

31. (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(*a*) unlawfully in occupation or possession of,

(*b*) claiming adversely the right to occupation or possession of, or

(*c*) trespassing on

a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court claiming, on behalf of the Indian or band, the relief or remedy sought.

. . .

(3) Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.

Except where the *Indian Act* imposes restrictions, Indians may sue for negligence, trespass, or I think, any other interference with their interest in their land or any other rights recognized by statute, common law or, indeed, the Constitution. It is this statutory acknowledgment that indicates the Indians are not, in the absence of surrender, vulnerable, at the mercy of the Crown's discretion[13] or without rights and remedies so that it is necessary for them to resort to fiduciary duty as a cause of action. In *Apsassin v. Canada (Department of Indian Affairs and Northern Development),* reflex, [1988] 3 F.C. 3 (T.D.), (reversed on appeal in [*sub nom.*] *Blueberry, supra*) Addy J. expressed this view in the following words. Nothing in the appeal decisions detract from his statement. At pages 46-47 he stated:

The *Indian Act* does impose certain restrictions on the actions and on the rights of status Indians. Except insofar as those specific restrictions might prevent them from acting freely, the Indians are not to be treated at law somehow as if they were not *sui juris* such as infants or persons incapable of managing their own affairs, which would cause some legally enforceable fiduciary duty to arise on the part of the Crown to protect them or to take action on their behalf. They are fully entitled to avail themselves of federal and provincial laws and of our judicial system as a whole to enforce their rights, as they are indeed doing in the case at bar.

Finally, to find a fiduciary duty with respect to Canada's involvement with the Water Control Structure, would, I think, place a far broader scope on the obligation of the Crown than implied by subsection 18(1) or the relevant fiduciary duty and Aboriginal jurisprudence. It would place the government in a conflict between its responsibility to act in the public interest and its fiduciary duty of loyalty to the Indian band to the exclusion of other interests. In the absence of legislative or constitutional provisions to the contrary, the law of fiduciary duties, in the Aboriginal context, cannot be interpreted to place the Crown in the untenable position of having to forego its public law duties when such duties conflict with Indian interests.

Having said this, as will be subsequently described, Canada clearly had regard for the interests of the Fairford Band with respect to the Water Control Structure. However, it did not do so pursuant to any fiduciary obligation but rather, in the performance of its public law functions under the *Indian Act* and the *Department of Citizenship and Immigration Act.*

No other cause of action against Canada than breach of fiduciary duty was pleaded or argued in this case. Therefore, whether by reason of its involvement in the study, approval or financing of the Water Control Structure, Canada could be found liable in trespass, nuisance, negligence or any other cause of action was not before me. Nor, of course, was any action against Manitoba or any other person. I can only reiterate that merely because the plaintiffs do not have a valid action against Canada for breach of fiduciary duty with respect to its involvement with the Water Control Structure are they necessarily without recourse.[14]

Editor's Note (replacing

paras. 70-100)

That portion of the decision refers to the Crown's participation in the Lakes Winnipeg and Manitoba Board which issued a report in June 1958. The report considered the impact of the Water Control Structure on downstream interests and concluded that high water levels would be slightly reduced and low water levels could be controlled by adjustment to the Lake Manitoba operation rule. As to the Crown's consultation with the Fairford Band with respect to the construction of the dam, it was found as a fact that the Crown had no fiduciary duty by reason of its involvement in the study, approval and financing of the dam, and that even absent such duty, it had considerable regard for the interests of the Band either specifically or in conjunction with all downstream interests. But there was a duty to consult the Fairford Band regarding use of their reserve land for the construction of a coffer dam. In that respect, His Lordship found that the Indian Affairs Branch has consulted the Fairford Band Council and has

neither misrepresented any fact nor withheld any information.

With respect to the use of Reserve land for the coffer dam, the plaintiffs say that it was the consent of a majority of electors of the Band as opposed to a majority of the members of the Band Council that was required. The October 18, 1960 meeting was a meeting of both the Band and the Band Council. In addition to the Band Council, approximately forty-five other Band members attended. It would thus appear that the Band members present were aware of and agreed to the use of Reserve land for purposes of the coffer dam. Nonetheless, the minutes of the meeting are not explicit on this point and I do not have evidence as to whether the number of Band members present constituted "a majority of electors of the band". Therefore, it is necessary to deal with the issue as if only the Band Council and not a majority of electors of the Band agreed to the use of Reserve land for the purpose of the coffer dam.

It appears Canada thought it was proceeding under subsection 18(2) of the *Indian Act* and that what was required was a Band Council resolution and not a vote of the electors of the Band. In his November 21, 1960 letter to Mr. Leslie, Mr. Jones states:

The Band Council having approved the application, you may inform the Water Control and Conservation Branch that permission to enter on the Reserve and construct the temporary works is given pursuant to Section 18(2) of the Indian Act, subject to the Branch's undertaking to observe conditions imposed by the Band Council.

Subsection 18(2) provides:

18. . . .

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for such purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

Notwithstanding that Mr. Jones referred to subsection 18(2) in his letter, I think that must have been an error as his actions were consistent with subsection 28(2). Subsection 28(2) provides:

28. . . .

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve to reside or otherwise exercise rights on a reserve.

Subsection 18(2) appears to authorize the use of reserve lands for purposes of the band. This can be seen by the types of uses authorized"Indian schools, administration of Indian affairs, Indian burial grounds, Indian health projects. Application of the *ejusdem generis* rule suggests that "any other purpose for the general welfare of the band" would be a purpose such as schools, administration, cemeteries, etc. It would not be a disposition, even temporary, to a non-member of the band.

It is section 28 that deals with occupancy or use of the reserve by persons other than members of the band. Subsection 28(2) provides that the Minister may authorize a person who is not a member of the band to use or occupy the reserve. That, I think, was the situation with respect to the use of the Reserve for purposes of the coffer dam by Manitoba and Mr. Jones' letter should have referred to subsection 28(2) rather than subsection 18(2).[15]

While the Band Council Resolution does not refer to any specific time period for use of the Reserve for the coffer dam, it clearly refers to the land being necessary for "the purpose of constructing a coffer dam" and states, "all materials deposited on the reserve will be removed and the site left in the same, or better than its original, condition". The correspondence at the time refers to the coffer dam being removed on completion of construction of the Water Control Structure. The use of the Reserve for the coffer dam was clearly for a short, temporary period.

The plaintiffs were not precise as to which provision of the *Indian Act* they thought was applicable with respect to the approval required for use of Reserve land for the coffer dam. However, it would appear that by plaintiffs' counsel's reference to *Guerin et al. v. The Queen et al., supra,* the plaintiffs consider the use of the Reserve land for the coffer dam as a form of surrender under subsection 37(1) [as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 2] of the *Indian Act*. Subsection 37(1) provides:

37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

There is no doubt that a surrender requires the assent of a majority of the electors of the band. Paragraph 39(1)(*b*) [as am. *idem*, s. 3] of the *Indian Act* provides:

39. (1) An absolute surrender or designation is void unless

. . .

(*b*) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or

(iii) by a referendum as provided in the regulations.

Section 37, dealing with surrenders, and other provisions of the *Indian Act* dealing with temporary dispositions, overlap. See *Opetchesaht*, at pages 141-142. That subsection 28(2) refers to dispositions of a temporary nature is made clear in *Opetchesaht*, in which Major J. says, at page 145:

. . . under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary.

The use of Reserve land for the coffer dam was a temporary use and not a permanent disposition. In *Opetchesaht,* Major J. held that such temporary use requires permission of the band council and not the band. He states at page 145:

In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.

As the evidence suggests that use of the Reserve by Manitoba for purposes of the coffer dam was not to be for a period exceeding one year, the Minister may have authorized such use without obtaining consent of the Band Council. However, as previously explained, there was consultation, and consent of the Band Council was obtained. I can see no breach of the *Indian Act* in that consent having been obtained. The Minister was not bound to act without consent of the Band Council under subsection 28(2), even if the temporary disposition was for less than one year. There was, therefore, no requirement under the *Indian Act* to treat use by Manitoba of the Reserve for the coffer dam as a surrender under section 37 and no necessity to obtain Band approval for such use. Canada acted in conformity with the *Indian Act* in permitting Manitoba to use the Reserve for the coffer dam and in obtaining a Band Council resolution authorizing such use.

Editor's Note (replacing

paras. 112-141)

This deleted portion covered a number of issues, namely the plaintiffs' argument that the typed version of the Band Council Resolution was not presented to a meeting of the Band Council, the compensation for use of Reserve land for purposes of the coffer dam and the effect of low water in 1961. However, the main issue was whether the

Crown breached its fiduciary duty to the Fairford Band in permitting construction of the south section of the dam on Fairford First Nation lands. There were discussions on what constitutes the Water Control Structure and whether a dyke which formed part of the Structure was in the Fairford River bed or on the Reserve. The conclusion was that an embankment, when it also served as a dyke, was not located on Reserve land but was within the bed of the Fairford River on land belonging to the Province of Manitoba. The allegation that the Crown permitted construction of the Water Control Structure on Fairford Reserve land was unfounded.

4.D. Did Canada breach its fiduciary duty by "failing to address the periodic flooding and related adverse impacts on the Fairford First Nation interests"?

4.D.1. Plaintiffs' position

The plaintiffs argue that Canada failed to address the periodic flooding and related adverse impacts on the Fairford Band's interests from 1961 to the present day. They allege that their Aboriginal rights to fish, hunt and trap, as well as their interest in agricultural production, were negatively impacted by the operation of the Water Control Structure. They claim that although the Structure was operated by Manitoba and that Manitoba was the direct cause of the problems, Canada had a fiduciary duty to put a stop to the adverse effects being experienced by the Band and its members.

4.D.2. Facts

The alleged infringement of the plaintiffs' fishing, hunting and trapping rights arose from the flooding of lands on which the plaintiffs hunted and trapped and from the impact of the operation of the Water Control Structure on water quality and fish stocks in the water bodies adjacent or nearby the Fairford Reserve. The negative impact on agricultural production arose from the flooding of hay lands.

As early as 1961, the Fairford Band members experienced problems with fishing and trapping around Pineimuta Marsh. The flooding that began in 1963 had further negative impact on waterfowl and muskrat reproduction as well as commercial fishing. The severe flooding that was experienced in 1967 caused loss of hay production[16].

When water quality problems arose in 1961 and thereafter, Canada communicated with Manitoba to ask that the problems being suffered by the Fairford and other Indian bands be addressed. In 1964, representatives from the Indian Affairs Branch met with representatives of Manitoba and members of the Fairford Band and other bands to discuss a number of concerns relating to Indian fishermen. The subject of decreased fish stocks due to the reduced water level on Lake St. Martin was raised and arrangements were made to allow some fishermen on Lake St. Martin to fish on the Dauphin River. As well, representatives of the Indian Affairs Branch attended a public meeting on June 22, 1965, convened by the Province to acquaint Fairford-Lake St. Martin residents with the operation of the Water Control Structure. At that meeting a committee was established whose function would be to keep in touch with the Provincial Water Control and Conservation Branch concerning lake levels and to inform local residents of impending dam operations. Two members of the Fairford Band were appointed to the committee.

Once severe flooding took place in 1967 and 1968, there were direct negotiations between Manitoba and the Band, and Manitoba agreed to compensate the Band for hay losses. Once it became apparent that flooding would be periodic thereafter, there were negotiations between the Band and Manitoba respecting the transfer of land from Manitoba to the Fairford Reserve in compensation for the flooded land.

4.D.3. Fiduciary Duty Analysis

On the basis of *Guerin, supra*, and *Union of Nova Scotia Indians, supra*,[17] the plaintiffs claim that Canada's knowledge of the adverse impacts they were experiencing by the operation of the Water Control Structure, imposed a fiduciary duty upon Canada to alleviate and put a stop to such effects. The plaintiffs suggest that Canada had a duty to do "whatever was necessary" to protect the Band's interests from the effects of the Structure. This included a duty to recognize that the flooding on Reserve land gave rise to a cause of action in trespass and then to bring an action for trespass against Manitoba on behalf of the Fairford Indians.

They also suggest Canada had a duty to exercise leverage under the *Navigable Waters Protection Act*, R.S.C. 1952, c. 193 (NWPA) to control the way in which Manitoba operated the Water Control Structure.

4.D.2.a. *Guerin, Union* and Other Bases for Fiduciary Duties

I have earlier noted that the majority in *Guerin*, *supra*, found that a fiduciary obligation arose from the surrender of land by an Indian band to the Crown, imposing an obligation on the Crown to act in the band's best interests in dealing with that land. I also observed that in *Union*, what gave rise to an obligation on the government "not to permit adverse effects on continuing Aboriginal interests" was a requirement to consider any environmental effects of a project on Aboriginal interests as prescribed by subsection 2(1) of the CEAA. The duty arose from a particular statutory scheme. Neither *Guerin* nor *Union* prescribe a general fiduciary duty upon the Crown to Indians or Indian bands as proposed by the plaintiffs.

As I found in section 4.A. above, a statute, agreement, particular course of conduct, or unilateral undertaking must be present which either gives rise to a reasonable expectation on the part of the Indians that the Crown would act in a fiduciary capacity or under which power over a matter was ceded by the Indians to the Crown such that the Indians were left vulnerable or at the mercy of the Crown's discretion. The facts are to the contrary.

The evidence indicates that Band members brought their complaints to the attention of Canada through its Indian Affairs Branch. There is also evidence that employees of the Indian Affairs Branch wrote to Manitoba informing them of the negative effects the Water Control Structure was having on the Reserve and other interests of the Band. Public meetings were held which members of the Fairford Band attended. Members of the Fairford Band were appointed to a liaison committee to keep Manitoba informed of lake levels and to inform local residents of impending dam operations. Later, negotiations commenced between the Fairford Band and Manitoba with respect to compensation for flooded lands. The evidence indicates that even though the Fairford Band brought many of its concerns to Indian Affairs, the Band was aware that it was Manitoba's operation of the Structure which was causing it difficulties. There is no evidence, at the time these public meetings and negotiations were taking place, that the Band was relying on Canada to remedy the problems caused by the Water Control Structure.

Furthermore, there is no evidence that Canada had any discretion or power to control the operation of the Water Control Structure. Canada's only direct involvement with the Water Control Structure was with respect to its study, approval and financing. Manitoba owned the Water Control Structure and operated it. The only power that Canada had would have been to bring an action for trespass (or perhaps some other type of action) against Manitoba. Although the plaintiffs argue that Canada should have commenced such an action on their behalf, subsection 31(3) of the *Indian Act* preserves the right of the band and/or its members to bring such an action themselves. The Band did not cede that power to Canada nor was there any mutual understanding between Canada and the Band giving rise to a reasonable expectation that such an action would be commenced by Canada.

The Fairford Band was not in a vulnerable position *vis-à-vis* Canada with respect to third parties who trespassed on their land or otherwise interfered with their interests. While it might be said that the Indians were vulnerable and at the mercy of the effects of the operation of the Water Control Structure, they were not reliant on Canada to exercise discretion as to whether or not to protect their interests.

As I have already determined, actions taken by the Indian Affairs Branch were in the performance of public law duties under the *Indian Act*. Such actions cannot be construed as a holding out or course of conduct giving rise to a fiduciary duty.

4.D.2.b. *Navigable Waters Protection Act*

In support of their argument under the NWPA, the plaintiffs rely on sections 4 and 5 of that Act which provide, in part:

4. (1) No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

. . .

5. (1) Any work to which this Part applies that is built or placed upon a site not approved by the Governor in Council, or is not built or placed in accordance with plans so approved, or, having been so built or placed, is not

maintained in accordance with such plans and regulations, may be removed and destroyed under the authority of the Governor in Council by the Minister of Public Works, and the materials contained in the said work may be sold, given away or otherwise disposed of, and the costs of and incidental to the removal, destruction or disposition of such work, deducting therefrom any sum that may be realized by sale or otherwise, are recoverable with costs in the name of her Majesty from the owner.

The plaintiffs assert that the Water Control Structure was never approved by the Governor in Council. They submit that because Canada had the authority to remove and destroy the Water Control Structure under section 5, Canada therefore had considerable leverage with which to compel Manitoba to operate the Water Control Structure in such a way as to eliminate, or at least minimize, harm to Fairford Indians and Reserve land, or to pay additional compensation to the Band.

There are two problems with this argument. First, it is not clear from the evidence as to whether the Governor in Council ever approved the Water Control Structure pursuant to section 4.

More importantly, the NWPA does not give Canada the kind of authority that the plaintiffs claim it does. It is not open to Canada, pursuant to section 5 of the Act, to use its authority to destroy the Water Control Structure as leverage to persuade Manitoba to operate the Structure in a way that would minimize harm to the Fairford Band and its members' interests, or to provide them with additional compensation. The NWPA concerns the navigability of waterways. The Governor in Council's authority to make regulations or orders is set out in section 10, which provides, in part:

10. (1) The Governor in Council may make such orders or regulations as he deems expedient for navigation purposes respecting any work to which this Part applies . . . [Underlining added.]

Sections 4 and 10 of the Act authorize the Governor in Council to make orders or regulations for the purpose of ensuring navigability of the water body concerned. They do not give Canada the general authority to exact concessions unrelated to the purposes of the Act on the threat of tearing the Structure down.

As a result I must conclude that the plaintiffs' argument that Canada breached its fiduciary duty in failing to use the provisions of the NWPA as leverage to exact concessions from Manitoba respecting the flooding of the Fairford Reserve land is also untenable.

4.E. Did Canada breach its fiduciary duty to the Band "in the unconditional section 35 transfer of 23 acres of land `for road purposes' in 1962 without: consulting the Band; prescribing terms and conditions in the transfer to ensure minimal infringement on the interests of the Fairford First Nation; and ensuring just compensation"?

4.E.1. Facts

In conjunction with the construction of the Water Control Structure, Provincial Trunk Highway No. 6 was diverted to use the top of the Water Control Structure as a bridge over the Fairford River. In using the Water Control Structure as a bridge, Manitoba realigned the highway through the Reserve to eliminate curves. In order to realign the highway, Manitoba required approximately 34 acres of Fairford Reserve land as highway right of way.

The relevant provision of the *Indian Act* for the taking of land for provincial purposes is section 35:

35. (1) Where by an Act of the Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

(2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.

(3) Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of

the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

(4) Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

By Band Council resolution dated December 7, 1960, 11 acres closest to the Water Control Structure were authorized to be transferred to Manitoba. Compensation was agreed in the sum of $50 per acre. Partial payment of eighty percent of the purchase price was made. Canada did not enact an order in council under section 35 and thus, a transfer of title of these 11 acres was not legally effected at this time.

By Band Council resolution dated June 12, 1962, a further 23 acres (south of the 11 acres which was the subject of the December 7, 1960 Band Council resolution) was agreed to be transferred to Manitoba. Again, compensation was agreed to in the sum of $50 per acre plus $500 for severance and general inconvenience. Partial payment of the agreed upon amount was paid. This time, by Order in Council 1962-1761 dated December 13, 1962, Canada consented to the transfer of the 23 acres to Manitoba in accordance with section 35 of the *Indian Act*.

It then appears there was misunderstanding, error and delay with respect to the payment of the balance of the amount owing by Manitoba and the finalization of the transfer of title to Manitoba for both the 11 and 23 acres. Eventually, in 1971, payment in full, including interest, was made by Manitoba. By federal order in council 1973-1734, dated June 19, 1973, Canada consented to the taking by Manitoba of the entire 34 acres for the highway right of way. This 1973 Order in Council covered both the 23 acres that had already been the subject of Order in Council 1962-1761 and the 11 acres which had not been the subject of an order in council.

4.E.2. Failure to Consult

The plaintiffs say they were not consulted with respect to the transfer of land for highway purposes but clearly they were. The evidence shows they passed Band Council resolutions for both the 11 and 23 acres and were consulted as to the compensation therefor. There is no evidence to suggest the compensation was not appropriate. The plaintiffs led no evidence to indicate that the fair market value of the land was greater than was agreed upon or that the taking exceeded a minimal infringement of the Band's interests.

The plaintiffs argue that by reason of Order in council 1973-1734 covering all 34 acres having been delayed for over a decade, the fact the highway was then in place made the land more valuable and that the Order in Council should not have been passed without renegotiating the value of the land as highway land. This argument ignores the fact that 23 acres were the subject of Order in council 1962-1761 in 1962. Moreover, the value of land is determined by the value of comparable land in the area, not by placing a special value on the land for the highway.[18] No evidence was led to suggest the value of comparable land was higher than $50 per acre when the Band Council resolutions were passed or that the value increased between the early 1960s and the early 1970s.

4.E.3. Trespass by Manitoba

The plaintiffs also say that until the land was formally transferred, Manitoba was trespassing and Canada failed to obtain appropriate compensation for the trespass. This argument could only apply to the northern 11 acres for which there was no order in council until 1973. The plaintiffs do not indicate what amount would be appropriate compensation for the trespass. However, the evidence is that Manitoba paid eighty percent of the agreed upon price when the Band originally agreed to the taking of the 11 acres in 1960. As evidenced by its Band Council resolutions, a meeting held at Ashern, Manitoba, between Indian Affairs and the Band Council on September 16, 1971, where an explanation of the delay was given that was satisfactory to the Band Council, and payment of the balance of the amount owing, including interest, the Band was informed of, and understood, the circumstances.

Although the formality of transfer of the northern 11 acres did not take place in 1960, the entry onto the Reserve and use of the land by Manitoba was not unauthorized. It is difficult to conceive of this as a trespass when there was agreement to the transfer by the Band, eighty percent of the acquisition price was paid, there was authorized entry onto and use of the land without objection and, when the final payment was made in the early 1970s, interest

was added for the period of delay in payment and this was satisfactory to the Band at the time.

4.E.4. Failure to Complete Transaction

The circumstances here involve the taking of land from the Reserve. Once Band Council resolutions were passed by the Band, Canada was obliged to effect the transfer of land and obtain the agreed upon compensation. Canada failed to effect the transfer of the northern 11 acres for over a decade after the Band Council resolution authorizing the transfer had been passed. Further, Canada failed to secure payment of the full agreed upon price for the entire 34 acres until 1971.

Canada's necessary involvement under section 35 of the *Indian Act* in the taking of land from the Fairford Reserve for highway purposes by Manitoba gave rise to a fiduciary duty upon Canada to ensure that the best interests of the Band were protected in so far as Canada's unilateral discretion with respect to the transaction was concerned. (See *Kruger v. The Queen*, reflex, [1986] 1 F.C. 3 (C.A.), at page 13, *per* Heald J.A. and at page 45, *per* Urie J.A.). While the transfer of the land and the amount of compensation was agreed to by the Band Council, the Band was vulnerable to the exercise of Canada's discretion with respect to the effecting of the transfer and the obtaining of payment.

The failure by Canada to properly consent to the transfer of the northern 11 acres to Manitoba by order in council for over 12 years constituted a breach of fiduciary duty to the Band. Failure by Canada to collect the full purchase price from Manitoba in a timely manner also constituted a breach of fiduciary duty. The Band was completely reliant on Canada with respect to payment arrangements. Clearly, Canada failed to act in a reasonable and prudent manner as if it were looking after its own interests when it came to securing payment in full.

In *Blueberry*, *supra*, Gonthier J. found at page 365 that the Crown's fiduciary duty in that case extended to exercising the power it had under section 64 of the *Indian Act* to correct the error it had committed in inadvertently selling certain mineral rights. In the present case, the Crown's fiduciary duty also extended to completing the transaction by consenting to the transfer of the northern 11 acres by order in council and by securing payment of the balance owing by Manitoba including interest.

Ultimately, payment in full was received with interest and an order in council consenting to the transfer of the entire 34 acres to Manitoba was executed. The breaches of fiduciary duty were thus remedied. I can see no further outstanding cause of action based upon breach of fiduciary duty in these circumstances.

4.F. Did Canada breach its fiduciary duty "by encouraging the Fairford First Nation to engage in land exchange negotiations with Manitoba in 1969 when Canada knew that the construction and operation of the Water Control Structure adversely impacted the Fairford First Nation's practical and legal interests far beyond merely land and that the Fairford First Nation had no capacity or authority to conclude such negotiations or agreements"?

Editor's Note (replacing

paras. 174-182)

On that aspect of breach of fiduciary duty, the plaintiffs argued first that the Crown knew that the dam adversely impacted the Fairford Band and its members in respect of matters beyond land, that is fishing, hunting and trapping, and second, that the Band had no capacity or authority to conclude an agreement. Facts relating to these arguments were reviewed. The Fairford Band was, at the time, being advised by legal counsel and could not therefore argue that it had ceded its authority respecting negotiations with Manitoba to the Crown or that it had any expectation that the latter would negotiate on its behalf.

4.F.3. The Crown's Duty

The relationship between the Crown and Indian bands respecting their lands and rights is governed by the twin policies of autonomy and protection. Depending upon the significance of the rights at issue, different levels of protection and autonomy may apply. In *Opetchesaht*, *supra*, at page 145, Major J. explains the balancing of these two policies:

It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected. These sometimes conflicting values were identified by McLachlin J. in *Blueberry River Indian Band, supra*, at p. 370:

My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection.

Gonthier J. at p. 358, speaking for the majority, accepted this principle:

As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.

This *dicta* points out that even though there is protection afforded by the *Indian Act,* Aboriginal peoples are to be treated as autonomous actors whose decisions must be respected and honoured. There is therefore no legal reason why the Fairford Band could not and should not have negotiated with Manitoba. Canada's role arises with respect to the carrying out of the policy of protection. It is not necessary and, having regard to the fact that Aboriginals are to be treated as autonomous actors, it may be undesirable, for Canada to actively participate in a band's negotiations with third parties.

Later, it will be explained that because the compensation land had to be transferred from Manitoba to Canada in order for it to become part of the Reserve, a fiduciary duty arose at the time of transfer to ensure that the Band was not exploited. However, that duty arose only when Canada was asked to ratify the agreement negotiated by the Band.

During the negotiating stage there was no such duty. The Band was in the best position to know the losses it suffered. It retained counsel. I can think of no reason in principle why an Indian band should not be able to determine its own requirements, conduct its own negotiations and conclude those negotiations. I think this approach is consistent with the *dicta* in *Opetchesaht, supra*. If and when Canada is called upon to ratify a negotiated agreement, as I have said, a fiduciary duty arises to ensure the Band has not been exploited, but not before.

Editor's note (replacing

paras. 187-195)

The conclusion drawn in this deleted portion was that the evidence did not support the plaintiffs' arguments that the Crown may have withheld information crucial to negotiations between the Fairford Band and the Province of Manitoba.

4.G. Did Canada breach its fiduciary duty to the Fairford Band "by failing to disclose to the Fairford First Nation and attempting unilaterally to correct the clear lack of authority for the province to be on Reserve land by purporting to transfer, in 1973, a 34-acre block of land for `public road purposes', again without consulting the Fairford First Nation"?

4.G.1. Plaintiffs' Position

This argument pertains to the same 34 acres of reserve land taken for Provincial Trunk Highway No. 6 already discussed under issue 4.E. above. The plaintiffs say the Crown did not disclose or consult with the Band when it completed the transactions involving the land taken for the highway.

4.G.2. Duty to Consult

As earlier noted, Canada was under a fiduciary duty to protect the Band's interests when it was in the process of consenting to transfer reserve land to Manitoba and obtaining the compensation agreed upon. There is no doubt that in questions involving surrenders of reserve land, there is a duty of consultation on the Crown. In my opinion, this duty of consultation extends to dispositions of reserve land by Canada under section 35 of the *Indian Act*. In *Guerin, supra*, Dickson J. found at page 388:

When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed.

In *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010, Lamer C.J. states at page 1113:

This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*.

The degree of the consultation required is described by Lamer C.J. again at page 1113:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

The question then is whether there was consultation in the present case and if so, if it was of sufficient depth and detail to satisfy Canada's fiduciary duty to the Fairford Band.

4.G.3. Facts

As previously discussed, on September 16, 1971, a meeting was convened at Ashern, Manitoba between officials of the Department of Indian Affairs and the Fairford Band Council, and a representative of the Manitoba Indian Brotherhood, to bring the matter of the right-of-way for Provincial Trunk Highway No. 6 up to date. The minutes indicate disclosure of the fact that right-of-ways for roads had never been finalized, that total compensation had not been paid and that interest would be paid. While the minutes make it obvious that officials of the Department wanted to finalize the matter, it was left to the Band Council to decide whether to confirm the original arrangements. The minutes indicate a very complete disclosure of the circumstances to the Band Council. I quote from the minutes:

Mr. Jackson opened the meeting by explaining that the matter of right-of-ways for roads for Fairford Indian Reserve since approximately 1960 had never been finalized and that the purpose of the meeting was to bring Chief and Council up to date, if they approve Provincial plans for the public road through their reserve which would promote this issue to be finalized and completed satisfactorily. There was also the matter of settlement for lands involved in PTH #6.

Chief Anderson stated that in view of negotiations of former Councils, all of which are on file, they would uphold and approve the agreement as per the records. However, he had mentioned that he would like to know what lines of communication he should follow with regards to road maintenance since road maintenance in the past was not satisfactory to the Band and he was anxious to see that the problem was overcome.

. . .

Chief Anderson again stated that they were in agreeance [*sic*] with the terms and conditions of the road right-of-way laid out by the former Chiefs and Councils, however, again he mentioned that the Province did not uphold their end of the bargain [with regard to road maintenance].

. . .

Chief and Council then signed a provisional copy of plans and requested that copies of the plans be sent to them for their records.

Mr. Jackson then stated that the province had taken 5.22 more acres than originally called for in the agreement for one of the public roads leading to P.T.H. #6. It was now necessary for Chief and Council to submit a band council resolution approving the same and upon submission the province would pay the band $500.00. Mr. Wright then suggested that on occasion, unused sections of a road could be and has been at times, returned to the former owners. Chief Anderson then stated that he would appreciate the unused section of this highway being returned to the Band. Mr. Jackson stated that he would follow this up. A band council resolution was made up and signed by the Chief and Council as noted above.

Mr. Jackson stated that band council resolution drawn up in 1960 in respect to P.T.H. #6 had been checked and if [*sic*] had been found that total compensation had not been paid by the provincial government and that the provincial government were prepared to reimburse the band including interest. Chief Anderson stated his appreciation for this information being brought to his attention and requested copies of documents pertinent to the lands utilized in the construction of highway #6 and costs paid and unpaid.

Chief and Council were made aware of the interest outstanding for a period of 10 years in the amount of $173 calculated at the rate of 5% and that the province was prepared to pay this amount also. Chief and Council were agreeable to this.

The Band Council decided to confirm the original arrangements and was satisfied with the terms of payment including interest.

It was not until 1973 that Order in Council 1973-1734 which consented to the transfer of land to Manitoba for Provincial Trunk Highway No. 6 was passed. However, there is no doubt that it was the consultation in 1971 that led to the Order in Council and the payment of the balance of the purchase price for the land including interest, as the Order in Council refers to the Band Council Resolution dated September 16, 1972 (it appears that the reference to 1972 was in error and should have been 1971). I am satisfied that in the circumstances here, the consultation conducted between Indian Affairs and the Band Council accorded with the standard of consultation prescribed by *Delgamuukw*.

4.H. Did Canada breach its fiduciary duty "in failing between 1977 and 1984 to address the deficiencies in the purported 1974 compensation land transfer agreement in a timely or appropriate fashion"?

4.H.1. Facts

As already detailed, the Fairford Band had been negotiating with Manitoba for compensation as a result of flooding from the operation of the Water Control Structure since 1967. These negotiations culminated in 1974 in the preparation by Manitoba of an agreement between the Band, Manitoba and Canada for the transfer of compensation land to the Fairford Band. Because of its importance, I set out the agreement *in extenso*:

WHEREAS certain lands of the Fairford Indian Reserve No. 50 (hereinafter called "the Reserve") have been flooded from time to time due to the operation of the Fairford River water control structure by Manitoba,

AND WHEREAS Manitoba owns certain lands adjacent to the Reserve which it is prepared to transfer to the Reserve as compensation for the loss of hay and pasture lands on the flooded Reserve lands on an acre for acre basis,

AND WHEREAS the Band has selected certain of these lands owned by Manitoba which can be added to and form part of the Reserve,

AND WHEREAS Canada and the Band are prepared to accept the transfer of certain of these lands from Manitoba to the Reserve and subject to the terms and conditions as hereinafter provided,

NOW, THEREFOR, the parties hereto agree as follows:

1. That subject to the provisions of The Crown Lands Act, being Cap. C 340 of the Statutes of Manitoba, Manitoba shall transfer or cause to be transferred to Canada for the Reserve the lands more particularly described in Schedule "A" which is attached hereto and forms part of this Agreement, comprising a total of 5,651.37 acres (hereinafter called "the transferred lands") which are outlined in red on the map which is attached hereto as Schedule "B" and forms part of this Agreement.

2. That in consideration of the fact that the transferred lands represent a total acreage less than that required to meet the agreed 6,000 acre addition and transfer to the Reserve, Manitoba shall provide the Band in lieu thereof with

(a) 190 acres of developed acreage as part of the transferred lands, made up of 150 acres within the W" 10-30-9W and S.W." 12-30-9W which are suitable for the production of hay and made up of 40 acres within N.E." 10-30-9W which are cultivated and suitable for hay or annual crops,

(b) a survey to establish the southern boundary of the transferred lands for fencing,

(c) funds for constructing not more than five and one-half (5") miles of boundary fencing on a portion of the west side of the transferred lands, and

(d) transportation of livestock from flooded Reserve lands to safe pasture areas.

3. That Manitoba shall provide cattlemen on the Reserve who are members of the Band with sufficient hay supply to feed those cattle held on the Reserve during the 1974-1975 winter feeding period, but the amount of feed provided shall not exceed an amount of hay equal to that which may have been lost due to flooding of the Reserve lands by the operation of the Fairford River water control structure.

4. That the Band shall continue to recognize the interests of Harold Moar and Gordon and Douglas Sanderson and other residents who are not members of the Band but who occupy premises on the transferred lands as shown on Schedule "B" hereto, under General Permits from Manitoba which will be terminated, and the Band hereby agrees that the Reserve shall enter into similar lease arrangements with these occupiers to permit continued access, occupation, and enjoyment of their premises and the use of such services as hydro, telephone and access roads.

5. That the flooded Reserve lands shall remain as part of the Reserve.

6. That the Band and Canada hereby release and forever discharge Manitoba from all manner of actions, claims, demands, suits, debts, accounts, damages, costs and liabilities of every nature and kind whatsoever which they or either of them now have or hereafter may have, and whether not known or anticipated, and howsoever arising out of or from the flooding of the Reserve lands due to the operation of the Fairford River water control structure by Manitoba, and the Band and Canada further agree to indemnify and save harmless Manitoba from and against any and all claims, demands, suits or actions whatsoever arising out of or from the flooding of the Reserve lands due to the operation of the Fairford River water control structure by Manitoba.

7. That the parties shall co-operate with each other in providing whatever documents and initiatives are necessary to carry out and complete this Agreement.

8. That Manitoba shall prepare the necessary documentation for a proper disposition of these transferred lands under The Crown Lands Act and when a fully executed Transfer of Land is forthcoming under the Act, Manitoba shall forward this Transfer to the Band and Canada for completion and for registration in the Winnipeg Land Titles Office.

IN WITNESS WHEREOF the Honourable the Minister of Indian Affairs and Northern Development, for and on behalf of Her Majesty the Queen in Right of Canada, has hereunto set his hand and affixed the seal of his Department, and the Chief and Council of The Band of the Fairford Indian Reserve No. 50, for and on behalf of the Reserve, have hereunto set their hands and seals, and the Honourable the Minister of Agriculture, for and on behalf of Her Majesty the Queen in Right of the Province of Manitoba, has hereunto set his hand and affixed the seal of his Department on the day and year first above written.

On or about October 28, 1974, the Chief and Council of the Band signed the agreement.

Apparently, Manitoba was having difficulty assembling all the compensation land. For this reason, and perhaps others, Manitoba did not consent to the agreement until late 1976. On December 29, 1976, Manitoba enacted order in council 1398/76 providing for the execution of the agreement.

On January 14, 1977, Manitoba provided Canada with copies of the agreement signed by the Band (but not yet by Manitoba) and requested that it be signed by Canada.

The compensation land was not transferred to reserve status until 1992. While the plaintiffs complain of the entire delay between 1977 and 1992, they breakdown the delay into two periods, one from 1977, when Manitoba was prepared to proceed, until 1984, and then from 1984 onwards. It is the period between 1977 and 1984 that is dealt with here.

As soon as the 1974 compensation agreement was provided to Canada, Canada recognized that there were difficulties with it. As the subject-matter was the transfer of land to an Indian reserve, title to such land had to be held by Her Majesty in right of Canada. (See subsection 18(1) and the definition of "reserve" in subsection 2(1) [as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 1][19] of the *Indian Act*.) Canada was of the view that the compensation agreement was not workable with the Fairford Band being a party to it. On May 17, 1978, government lawyer J. B. Beckett wrote an opinion to the effect that a federal order in council under section 35 of the *Indian Act* would be required in order to permit flooding of reserve land and that the agreement was inadequate for this purpose. He also advised that the indemnification of Manitoba by Canada would require an Act of Parliament.

In September 1978, Canada determined that the agreement included lands which were already reserve lands and requested an amended order in council from Manitoba.

On March 8, 1979, the Chief and Council of the Fairford Band wrote to the Minister of Indian Affairs and Northern Development asking that the transfer of the compensation land to the Reserve be completed so that Band members could proceed to occupy and develop the land.

On June 12, 1979, Canada advised Manitoba that the compensation agreement was unacceptable, that it would have to be embodied in a provincial order in council and that the Fairford Band could not be a party. It was pointed out that without a federal order in council under section 35 of the *Indian Act*, flooding of Reserve land could not be permitted and that the indemnity sought by Manitoba would require an Act of Parliament. The letter states that Indian Affairs did not disagree with the conditions of the agreement and that the only objection was with respect to procedure. In this respect, the letter is somewhat ambiguous in that it does not propose a federal order in council authorizing flooding of the Reserve or an Act of Parliament.

Almost one year elapsed before Manitoba responded to the June 12, 1979 letter. It appears there was at least one meeting between federal and provincial lawyers in the spring of 1980 on the matter.

In a letter dated May 6, 1980 from I. D. Frost of the Manitoba Department of the Attorney General to C. Henderson of the federal Department of Justice, Frost points out that section 35 of the *Indian Act* and indemnity difficulties referred to in the June 12, 1979 letter did not preclude compensation agreements covering these issues being completed with respect to the Little Saskatchewan or Lake St. Martin Bands. Manitoba appears to have taken the position that it would be satisfied with the agreement signed by Canada in so far as the issue of flooding of the Reserve and indemnity by Canada were concerned.

For some reason, there was no response to this letter until November 26, 1981. The correspondence from Manitoba to Indian Affairs over this eighteen-month period evidences Manitoba's frustration over the federal Justice Department's delay in dealing with the matter. The November 26, 1981 letter reiterates the position Canada took in its June 12, 1979 letter. Again, the letter is ambiguous and while the need for section 35 of the *Indian Act* authority for flooding and an Act of Parliament authorizing indemnity from Canada are mentioned, there is no suggestion as to how Canada proposed to deal with these issues.

There was then further delay. A meeting was held between provincial and federal officials on November 23, 1982 at which some type of agreement as to how to proceed appears to have been reached. What that agreement was is not entirely clear from the evidence. There then followed a period of some 15 months in which correspondence between Canada and Manitoba was exchanged. Finally, on February 1, 1984 the Director, Reserves and Trusts,

Manitoba Region, Indian and Inuit Affairs recommended to the Director General of Reserves and Trusts, Ottawa, that Canada enact the necessary order in council to accept the compensation land and grant the Province use of Reserve land for flooding. No reference is made to the indemnity which the Beckett legal opinion had said required an Act of Parliament. Nor is there any indication of the description of the land that Manitoba was to be authorized to flood.

By the end of March 1984, a submission to the Governor in Council had been prepared; however, it appeared that there was a substantial backlog of submissions to the Governor in Council and there would be a further delay. Indeed, nothing further was done to complete the transfer of compensation land to reserve status.

In September 1984, Jim Gallo, Land Entitlement Adviser, Indian and Inuit Affairs, Manitoba Region of the Department of Indian Affairs and Northern Development, became involved and set a new direction for negotiations between Canada and Manitoba. This will be dealt with under issue 4.J.

4.H.2. Fiduciary Duty Analysis

I accept Canada's argument that the delay through the 1977 to 1984 period is not solely attributable to Canada and that there was some consultation with the Fairford Band. Clearly, Manitoba took considerable time before responding to concerns raised by Canada in its letter of June 12, 1979. The correspondence indicates that the Chief of the Fairford Band was advised periodically of discussions between Canada and Manitoba.

At the same time, I am satisfied that the prime cause of the delay rested with Canada and the delay was unjustified. Canada proceeded very slowly, to say the least, in its analysis of the situation and in its steps to move the matter forward. The correspondence indicates some degree of confusion amongst officials of the Indian Affairs Branch with respect to exactly what was required to finalize the transaction. It is not clear how Canada could propose an order in council authorizing Manitoba to flood reserve land when there was no description of that land in the agreement with Manitoba and what steps, if any, could be taken respecting the indemnity sought from Canada.

In any event, Canada did not ratify the compensation agreement and by September 1984, there had been no progress from where the transaction stood when Canada was asked to ratify it in 1977. In a letter from Mr. Gallo to Manitoba dated September 18, 1984, Mr. Gallo, correctly in my view, describes the compensation agreement matter as "in a state of total and utter disarray".

I think that when Canada received the compensation agreement from Manitoba in early 1977, it assumed a role as a fiduciary in relation to the Band. Indeed, it was Canada's position that the Band could not be a party to the agreement. It was Canada that had the unilateral authority to ratify the agreement. The usual circumstance in which Canada has been found to act in the role of a fiduciary is with respect to the surrender of reserve land. What gives rise to the fiduciary duty is the discretion vested in Canada to deal with surrendered land and the vulnerable position of the Indian band once it has surrendered the land. The same conditions apply when land is to become part of an Indian reserve. The legal title to the land is to be vested in Her Majesty in right of Canada and the land is to be set apart by Her Majesty for the use and benefit of a band of Indians. Her Majesty must agree to take title to the land on specified terms and conditions. Once the band of Indians asks that the land become part of the reserve and places the matter in Canada's hands, it becomes completely vulnerable. It is reliant on Canada to agree with the party providing the land as to the terms upon which the land is provided and to carry out the transaction. As with surrendered land, when land is to become part of a reserve, the Crown is interposed between the party providing the land and the Indian band to protect the band from making an improvident transaction. Because the transaction involves land that is to become Reserve land, the Crown's obligation to the Band is not a public law duty but is in the nature of a private law duty (*Guerin*, *supra*, at page 385). Accordingly, I conclude that Canada acts in a fiduciary capacity with respect to the Indian band in such circumstances.

A fiduciary must deal with the property he is entrusted to look after as if it was his own. The fiduciary must act with reasonable skill and diligence. Generally, I think that must include acting in a timely manner. See *Alexander Band No. 134 v. Canada (Minister of Indian Affairs and Northern Development)*, reflex, [1991] 2 F.C. 3 (T.D.), at page 15, *per* Strayer J. (as he then was).

Canada did not act in a timely manner after it received the compensation agreement from Manitoba in 1977.

The complicating factor in this case, however, is that, as will be explained, the 1974 compensation agreement was an improvident transaction from the Band's perspective. In exchange for 5771.91 acres of land, the Band was prepared to release Manitoba from any further claims and from any restriction on the operation of the Water Control Structure, irrespective of the extent of flooding that might result. While Canada is responsible for delay, it was to the Band's benefit that Canada did not ratify the agreement.

The issue then is whether, in not ratifying an improvident transaction to which the Band was prepared to agree, Canada is saved from a finding of breach of fiduciary duty on account of delay. I do not think so. The facts demonstrate confusion on the part of those responsible as to what was required of Canada. Canada's letters to Manitoba were ambiguous, evidencing this confusion.

In March 1984, Canada agreed to provide an order in council under section 35 granting Manitoba use of the Reserve for flooding. However, there is no indication of the amount of Reserve land that was involved. Nor is there any indication of how and whether Canada was prepared to deal with the indemnity that the agreement required of Canada.

Canada may have been liable for breach of a fiduciary duty if it had proceeded to ratify an improvident transaction. However, Canada is not free of fiduciary liability because it delayed in ratifying the transaction. That is because the delay is not related to the improvidence of the transaction. Canada seems to have been willing to go along with the agreement. The delay was attributable to confusion on the part of Canada as to how to proceed.

The duty of a fiduciary relates to the discretion that is to be exercised. That must include assessing the merits of the agreement from the point of view of the Indian band. What Canada was required to do was to determine, in a timely manner, what, if anything, was improvident in the compensation agreement and advise the Fairford Band. That is the reason for Canada's role as a fiduciary, interposed between the third party (Manitoba) and the Fairford Band. As Isaac C.J. stated at page 25 of *Semiahmoo, supra*:

I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. [Second underlining mine.]

Of course, had Canada acted in a timely manner, it is not known whether Manitoba would have agreed to a transaction that was not improvident from the point of view of the Band. However, this does not absolve Canada from liability for delay. In *Guerin, supra*, Dickson J. states at page 388:

When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed.

That was the obligation on Canada in this case. In a timely manner, it should have determined that the compensation agreement was not acceptable, explained its reasons to the Band and sought instructions as to how to proceed. In not doing so, Canada breached its fiduciary duty to the Band.

It is difficult to determine exactly when the breach occurred and its duration. I think the breach must have occurred when Canada's delay in dealing with the agreement became unreasonable. The matter was complex and certainly sometime had to be allowed for Canada to assess the transaction and decide on a course of action. Canada was presented with the agreement in January 1977. The first serious legal analysis is reflected in the J. B. Beckett opinion of May 1978. It had been requested on December 1, 1977. There is no explanation as to why it took over ten months to request the legal opinion and why the legal opinion took approximately six months to be delivered. I cannot see why, at least by the end of 1977, Canada should not have realized that in order to grant Manitoba use of Reserve land for flooding, that the relevant land would have to be described and that a definitive decision would have to be taken as to whether Canada was to provide the indemnity sought by Manitoba and if so, the means of providing such indemnity.

In my view, Canada was in breach of its fiduciary duty to the Fairford Band commencing at the beginning of 1978 in respect of not exercising its discretion with respect to the compensation agreement based upon a sound analysis

of its deficiencies and in not so, advising the Fairford Band and seeking instructions. Between the beginning of 1978 and the time that Mr. Gallo took over the file in September 1984, there was no progress on these issues, little or no advice given to the Band as to the deficiencies of the agreement and no discussion with the Band as to how the matter should proceed. This period of over six and one half years constituted a period of unreasonable delay during which there was no adequate consultation with the Band. I have acknowledged that Manitoba was responsible for some delay over the elapsed period but that was minimal as compared to the delay caused by Canada. Over this period I find that Canada was in breach of its fiduciary duty to the Fairford Band in failing to competently address the deficiencies of the compensation agreement in a timely manner and in failing to consult with the Band once the deficiencies should have been discovered to determine a course of action to be taken.

Editor's Note (replacing

paras. 231-277)

At issue was whether the Crown breached its fiduciary duty to the Fairford Band in failing between 1977 and 1991 to address the problems resulting from the incomplete transfer of the 1974 compensation lands to reserve status while at the same time encouraging Indian settlement on the said lands. After addressing the question of the difficulties and loss and damage alleged by the plaintiffs, His Lordship concluded that the non-reserve status of the compensation land caused the Band and its members some administrative difficulty. However, the difficulties identified by the plaintiffs either did not give rise to specific loss or damage or were addressed by the Crown. Also deleted are the facts relating the question of whether the Crown breached its fiduciary duty to the Fairford Band in actively negotiating with the Province of Manitoba from 1984 to 1991 in respect of compensation for the adverse effects of the dam, without the involvement or knowledge of the Band. There was a lengthy chronology of events and references to documents covering the period 1984 to 1992.

4.J. Did Canada breach its fiduciary duty to the Fairford Band "in actively negotiating with the Province from 1984 (after it became clear to Canada that no agreement existed with Manitoba) to and including 1991 in respect of compensation for the adverse effects of the Water Control Structure, without the involvement or knowledge of the Band in the details of same"?

By Order in Council 1992-430 dated March 12, 1992, Canada accepted the 5771.91 acres of compensation land and set it apart for the use and benefit of the Fairford Band as an addition to IR No. 50.

4.J.4. Conclusions Drawn from the Facts

This lengthy chronology of events and reference to documents from 1984 to 1992 indicates:

1. It was clear that as of September 1984, Canada understood it could not ratify the 1974 agreement the Band had signed without leaving the Band open to unlimited flooding without recourse against Manitoba;

2. By December 1984, Canada had determined that the Band had entered into an improvident transaction with Manitoba and that it would be difficult to get Manitoba's consent to reopen the agreement;

3. By December 1985, Manitoba had conceded that flood limits would have to be established;

4. Canada took the position that mapping and survey work would be required to determine if Manitoba's proposed flood limits were reasonable;

5. Between September 1984, and February 1986, there is no evidence of any relevant communication between Indian Affairs and the Fairford Band;

6. After February 1986, the communications and information flowing between Indian Affairs and the Band were significantly increased;

7. Much information had to be gathered to determine flood limits and this took considerable time;

8. Delays were occasioned by Manitoba and the Band over this period but not by Canada;

9. The compensation land was transferred to Canada and was set apart for the use and benefit of the Fairford Band as an addition to IR No. 50 without the Band giving up the rights it was prepared to forego in the 1974 compensation agreement.

The evidence demonstrates that while up to September 1984, Canada's understanding and progress with respect to the compensation land agreement was inadequate, the situation changed when Mr. Gallo took over the file. Mr. Gallo quickly identified important deficiencies in the compensation agreement. However, while he should have communicated with the Fairford Band as soon as he discovered these deficiencies and discussed with the Band how to proceed, he did not do so until February 1986. In the meantime, he continued to negotiate with Manitoba and by the end of 1985 had moved Manitoba to the point where flood limits were being considered. Canada did not enter into any binding agreement with Manitoba on behalf of the Fairford Band during this time.

After February 1986, the Band was involved and was consulted by Canada with respect to negotiations with Manitoba. The evidence does not support the plaintiffs' allegation that Canada actively negotiated with Manitoba after this date without the involvement or knowledge of the Band.

4.J.5. Fiduciary Duty Analysis

The only period during which the plaintiffs' allegation of non-consultation is supported by the evidence is from September 1984, to February 1986. I have said it would have been preferable for Mr. Gallo to have consulted with the Band over this time. Did Canada's failure to consult with the Band over this time give rise to a breach of fiduciary duty? In the circumstances here, I am of the opinion that it did.

In *Guerin, supra*, Dickson J. found that the obligation on Canada to consult arose when it proved impossible to obtain a lease on the terms upon which the Band had surrendered its land. At that point, rather than entering into a different, less favourable lease, Canada had a duty to consult with the Musqueam Band as to how to proceed (at page 388).

In the case at bar, at the time in question, September 1984, to February 1986, Canada's fiduciary duty was to protect the Band in its dealings with Manitoba. I think Mr. Gallo was attempting to carry out this duty. Over the relevant period there is no evidence of delay or, except for the failure to consult, any other malfeasance on his part. It appears to me that his actions were, except for the failure to consult, diligent and consistent with those expected of a fiduciary.

There is no indication in the material before me that earlier consultation would have had any impact on the course of negotiations with Manitoba. However, the duty to consult is not dependent on a retrospective assessment of whether consultation would have been useful. When Canada was unilaterally dealing with Manitoba, the duty to consult existed and the failure to consult during this period constituted a breach of fiduciary duty on the part of Canada.

5.LIMITATION OF ACTIONS

5.A. The Six-Year Limitation Period

The defendant argues that the plaintiffs' claims must be dismissed as they are statute-barred. They rely on clause 2 (1)(k) of *The Limitation of Actions Act* of Manitoba, R.S.M. 1987, Clause L150. Clause 2(1)(k) which states:

2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

. . .

(k) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;

Manitoba courts have held that clause 2(1)(k) applies to a breach of fiduciary duty (see: *C. (C.D.) v. Starzecki*, reflex, [1996] 2 W.W.R. 317 (Man. Q.B.), at page 323). A six-year limitation period is imposed on the claims advanced by the plaintiffs.

The plaintiffs' statement of claim was filed on September 15, 1993. The defendant submits that all claims are statute-barred, except those alleging a breach of fiduciary duty by Canada arising on and after September 15, 1987.

Subject to the following considerations, claims arising prior to September 15, 1987, are statute-barred.

5.B. Improper Pleadings

The plaintiffs argue that the defendant did not properly plead *The Limitation of Actions Act* as a defence. Counsel quoted from *Sandvik, A. B. v. Windsor Machine Co.* reflex, (1986), 8 C.P.R. (3d) 433 (F.C.T.D.) to the effect that a plea should set out the material facts giving rise to the invocation of the limitations legislation and specify which provincial limitations provisions are relied on and the effect that they have. However, plaintiffs' counsel offered no arguments respecting what material facts he thought were missing.

The defendant's statement of defence provides:

19. As to the Statement of Claim as a whole, he says that the Fairford First Nations and the named Plaintiffs are statute barred by the Limitations of Action Act R.S.M. 1987 c. L150 as amended, and in particular section 2(1) thereof and by the Federal Court Act, Revised Statutes of Canada, 1970 2nd Supplement, c. 10 as amended and in particular s. 39 thereof.

The defendant's pleading is not ambiguous. This case is not similar to *Sandvik, supra*, in which the defendants failed to identify which provincial limitations legislation they intended to rely on and the Trial Judge found that the pleas "leave the plaintiff completely in the dark" (*per* Collier J., at page 443). I find that in this case the plaintiffs had ample notice as to what was alleged in the statement of defence. Clause 2(1)(k) of *The Limitation of Actions Act* of Manitoba was properly pleaded.

. . .

5.D. Continuing Breach

The plaintiffs' general approach to their case has been to argue that Canada continually breached its fiduciary duties to the Band from the time when Canada approved and partly financed the Water Control Structure. In the words of counsel, "throughout the evidence, I kept trying to knit everything from 1958 forward into the breach of fiduciary duty." This "knitting" together of the facts commencing in 1958 was clearly an attempt to circumvent the six-year limitation period imposed by *The Limitation of Actions Act* .

Continuing breach has been argued in previous cases. In *Semiahmoo Indian Band v. Canada, supra,* Isaac C.J. specifically addressed this issue stating at pages 34-35:

While the respondent's post-surrender fiduciary duty can be seen as continuing so long as the respondent retains ownership and control over the land, I am of the view that any breach of that duty must be located at a specific point in time. It would defeat the very purpose of limitation periods to find that a breach of fiduciary duty continues for so long as the Crown retains the surrendered land . . . .

The Trial Judge's error, however, was in focusing on whether or not there could be a continuing breach of fiduciary duty, rather than locating the respondent's post-surrender fiduciary duty to the Band in respect of the surrendered land, and asking whether or not that duty was breached at one or more specific points in time . . . . The proper inquiry is to determine whether this continuing post-surrender fiduciary duty was breached at any point in time; not to look for a so-called "continuing breach." [Emphasis in original.]

In making the above comments, Isaac C.J. relied on *Wewayakum Indian Band v. Canada and Wewayakai Indian Band* reflex, (1995), 99 F.T.R. 1 (F.C.T.D.) and *Lower Kootenay Indian Band v. Canada,* reflex, [1992] 2 C.N.L.R. 54 (F.C.T.D.), at page 118. In *Wewayakum,* Teitelbaum J., canvassed the law and stated at page 68:

I agree, that . . . a cause of action arises, and may be sued upon only once . . . . The fact that Cape Mudge may have suffered a loss (which in my view they did not) between 1907 and the present does not give rise in law to "continuing damages" or a "continuing cause of action".

And, in referring to Dubé J. in *Lower Kootenay*, Teitelbaum J. went on to say [at pages 68-69]:

I also note that Dube, J., in **Lower Kootenay Indian Band and Luke v. Canada** reflex, (1991), 42 F.T.R. 241 (T.D.) rejected the argument that a "continuing" cause of action can circumvent a limitation defence. In the **Luke** case the plaintiff Band claimed damages on a year by year basis for each year during which the Crown failed in its alleged fiduciary duty to terminate an improvident lease negotiated by the Crown on behalf of the Band. Dube, J., rejected the Band's argument that the accrual of damages for each year during which the Crown failed to terminate the Band's lease gave rise to a new cause of action unaffected by a limitation period. At p. 293 Dube, J., made the following comments:

So there remains to be determined which limitation period applied to each breach and at what time. In my view, the original cause of action arose in 1934 at the outset of the 50 year lease. The mere fact that it is a lease does not automatically renew the cause of action every year and I know of no authority for such a proposition. But other causes of action may arise during that period.

A continuing breach argument is without merit. The plaintiffs assert an ongoing breach beginning in 1958. However, simply because subsequent circumstances give rise to a fiduciary duty and a cause of action for breach of that duty, does not mean that such cause of action retroactively revives a limitation period relative to an earlier cause of action arising from earlier circumstances. Each alleged cause of action arises out of a distinct set of circumstances. A separate and distinct cause of action for breach of fiduciary duty against Canada arises with respect to each distinct set of circumstances and a period of limitation will begin to run in respect of each alleged breach of fiduciary duty.

5.E. Discoverability

The date on which a cause of action arises is not necessarily the date at which a limitation period will begin to run. Clause 2(1)(k) of *The Limitation of Actions Act* of Manitoba, *supra*, has a built in "discoverability" provision, that time does not begin to run for limitation purposes until "the discovery of the cause of action". A cause of action is considered to be discoverable when "the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (*Central Trust Co. v. Rafuse* , 1986 CanLII 29 (S.C.C.), [1986] 2 S.C.R. 147, at page 224; see also *M. (K.) v. M. (H.)*, 1992 CanLII 31 (S.C.C.), [1992] 3 S.C.R. 6, at page 34).

In the context of discoverability, I turn to the causes of action which the plaintiffs have succeeded in establishing: that Canada breached its fiduciary duty to the Fairford Band in delaying consideration of the compensation agreement and failing to consult between the beginning of 1978 and September 1984 and in failing to consult the Band between September 1984 and February 1986. I limit my discussion of limitations to these issues as I have not found a valid cause of action to have arisen with respect to the plaintiffs' other allegations. Both the delay and the failures to consult occurred more than six years before the plaintiffs' statement of claim was filed on September 15, 1993.

The question then is at what point the plaintiffs could have discovered, through reasonable diligence, that they had these causes of action against Canada.

The documentation indicates that the Fairford Band was aware of delay as early as March 8, 1979, when they wrote to the Minister of Indian affairs asking that the transfer of the compensation land to reserve status be completed so that Band members could proceed to occupy and develop the land. On July 10, 1981, a Band Council resolution was passed indicating the Band Council's desire that Canada exercise diligence in setting aside the compensation lands as reserve lands "without further delay".

On subsequent occasions, either in writing or orally, the Band made known its frustration with respect to the delay in the compensation lands being transferred to reserve status. There is no question that the Band was fully aware that delay was occurring.

What the Band was not aware of, in my opinion, was whether the delay was for justifiable reasons or whether Canada was simply failing to act with the diligence required of a fiduciary. The evidence indicates that the Band did not become aware that the delay was unjustified until approximately 1992. In 1991, the Band engaged the firm

of E. E. Hobbs and Associates Ltd. to research events giving rise to the Water Control Structure and the subsequent failure to conclude a satisfactory settlement, as well as to assess the damages that had been suffered. After it was retained, Hobbs and Associates reviewed public records of both Manitoba and Canada and conducted interviews of various persons including present and past government officials.

Volume 1 of the Hobbs Report, dated February 1992, "It Has Cost Us Our Lives", provides an historical analysis of events including the period from 1977 to 1984. It is apparent from the Report that Hobbs and Associates reviewed files of the Department of Indian and Northern Affairs in conducting its analysis. The Report refers to various letters between Canada and Manitoba and between officials of the Department.

The Report makes express reference to the letter from the Department of Indian Affairs to Manitoba dated September 18, 1984, describing the status of the matter as "in a state of total and utter disarray".

The evidence before me suggests that during the 1977 to 1984 period, when queried by Band representatives as to the status of the compensation agreement, officials of the Department simply assured the Band that the matter was being attended to and was under control. On some occasions, Band members were told that the fault for the delay lay with Manitoba. At no time is there any indication that Canada accepted any blame for the delay. Canada's mishandling of the compensation agreement negotiations between the beginning of 1978, and September of 1984, only became known when Hobbs and Associates reviewed the Department's files and ascertained that "bureaucratic confusion and bungling" appeared to be the reason for delay.

I do not think Canada's mishandling of the matter could have been reasonably discovered before the Hobbs investigation. Until 1990, there is no indication that the Fairford Band thought it had a cause of action against Canada and nothing in the documentation demonstrates that the Band would have had reason to believe that when Canada was acting in a fiduciary capacity, it was not acting with reasonable diligence. It was not until October 11, 1990, when government lawyer Thomas A. Saunders wrote to Chief Andrew Anderson that the Band began to question the legality of Canada's conduct. The letter states in part:

I am unsure as to whether the Band has had legal counsel assisting them in this matter as yet or not, but it would be my suggestion that it is necessary at this point for the band to retain a lawyer to ensure its interest [*sic*] are properly looked after.

(If you presently do not have counsel and need assistance in selecting a lawyer, I would be pleased to offer you whatever help I can, if you would like.)

I am satisfied that prior to delivery of the Hobbs Report in February 1992, the Fairford Band could not have reasonably discovered the material facts relating to Canada's handling of the compensation agreement between the beginning of 1978, and September 1984. With respect to the plaintiffs' cause of action for delay over this period, I find that the action falls within the limitation period prescribed by clause 2(1)(k) of *The Limitation of Actions Act* of Manitoba and that the action is not statute-barred on this issue.

With respect to Canada's failure to consult the Fairford Band between September 1984, and February 1986, the evidence is that the Band was made aware, in February 1986, of the efforts that Canada had been making with Manitoba during that period. In his letter to Chief Anderson of the Fairford Band and to the chiefs of the Little Saskatchewan and Lake St. Martin Bands, dated February 17, 1986, L. Robinson, Director of Reserves and Trusts, Indian and Northern Affairs Canada, wrote:

Since September, 1984, we have been trying to obtain the Province's consent to amend two articles of the Fairford Control compensation agreements which were signed between 1974 and 1976. These amendments concern the level to which Manitoba can flood reserve lands and the nature of the title to the compensation lands to be set apart for each of the three reserves. The amendments which we are seeking are required before Canada can ratify the compensation agreements and make them of legal force and effect under the Indian Act.

This letter makes it clear that the Fairford Band was informed in February 1986 about the matters which Canada had failed to consult with it between September 1984 and February 1986. The plaintiffs' cause of action for failure to consult in this period became statute-barred in February 1992.

6. CONCLUSION

I have gone to considerable length to elaborate my understanding of the facts and the law in respect of each of the instances of breach of fiduciary duty alleged by the plaintiffs. I have done so because, in the circumstances of this case, I thought it important that the plaintiffs' claims be addressed substantively, and that they be given an explanation for the Court's findings.

On the evidence before me, I am quite satisfied that while in some material respects, living conditions on the Fairford Reserve have improved over the past forty years, in other respects there has been a deterioration in the quality of life for many members of the Band. From what I have heard, I think that this deterioration arises from a number of causes, one of which was the disruption to the Reserve and the activities and lives of Fairford Band members by the operation of the Water Control Structure.

As much as I have sympathy for the plaintiffs, my decision must be based on the facts proven in evidence and the rule of law. That means applying the provisions of the *Indian Act, The Limitation of Actions Act* of Manitoba and other relevant legislation and common law relating to fiduciary duties as expressed primarily by the Supreme Court of Canada. That results in only a very limited finding of breach of fiduciary duty that is not statute-barred in this case. The plaintiffs may now proceed to prove damages based on that breach.

The plaintiffs' claim is dismissed except for the finding of breach of fiduciary duty by Canada with respect to the delay and failure to consult between the beginning of 1978 and September 1984. This cause of action is not statute-barred.

The matter of costs is reserved for further submissions by the parties.

The parties shall communicate with the Registry to fix a date for the assessment of damages.

[1] Except when the plaintiffs' argument is quoted in these reasons, the term "Band" is used rather than "First Nation" as "Band" is the term used in the *Indian Act*, R.S.C., 1985, c. I-5, as amended.

[2] There was flooding in some earlier years but it was not as serious as in 1967 and later years.

[3] Initially the land to be transferred amounted to 5651.37 acres. This was increased by the closure of certain road allowances to 5771.91 acres.

[4] There was an indication from counsel that the Band has been engaging in continuing negotiations with the Province but that has no bearing on this decision.

[5] One allegation, that Canada breached its fiduciary duty to the Band by failing to address socio-political problems arising from the incomplete transfer of compensation lands has been treated by the Court as a determination of whether loss or damage has resulted from that breach.

[6] The plaintiffs relied on a Board resolution dated August 13, 1956, which they said proved that downstream interests such as those of the Fairford Band were ignored by the Board. As will later appear, I find this not to be the case.

[7] McLachlin J. wrote concurring reasons only for herself and Major J. Her reasons are the only ones to address the Band's argument as to the scope of the Crown's fiduciary duty.

[8] S. 35(1) provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[9] La Forest J. wrote for three judges and Iacobucci J. agreed with La Forest J. in the result. Sopinka and McLachlin

JJ. wrote for three judges in dissent.

[10] See particularly p. 466 when they state: "As we have seen, the cases suggest that the distinguishing characteristic between advice *simpliciter* and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other."

[11] In the reasons of La Forest J. reference is made at p. 410 to Finn, P. D., "The Fiduciary Principle" [in Youdan, T. G. (ed.). *Equity, Fiduciaries and Trusts*], at pp. 50-51:

. . . fiduciary responsibilities will be exacted where the function the advisor represents himself as performing . . . .

I interpret La Forest J.'s reference to undertaking as reflecting the same concept as Finn's reference to the advisor representing himself.

[12] The ceding of power by one party to the other, whereby the ceding party does not retain the power and ability to make decisions, would not seem to arise from a course of conduct.

[13] It could be argued that s. 31(1) places Canada in a fiduciary position as it gives Canada a discretionary power to take action on behalf of an Indian or band. For example, in *Blueberry*, the Supreme Court of Canada held that the failure of the Superintendent General to exercise his discretion to rectify errors prejudicing the interests of Indians under s. 64 [as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 10] founded a claim for breach of fiduciary duty against the Crown. However, the Minister's duty stemmed from the fact that the Indians were left vulnerable because they did not have the power to correct the error. The authority given to the Attorney General under s. 31(1) does not operate in such a way as to leave the Indians vulnerable or without the opportunity to bring their own action.

[14] In making this statement, I of course recognize that such other causes of action must still be proven and that the question of limitation of actions would still be relevant.

[15] S. 28(2) refers to a permit in writing. Permit is not defined in the *Indian Act*. By letter dated November 29, 1960, Mr. Leslie wrote to T. E. Weber, Chief Engineer, Water Control and Conservation Branch, Province of Manitoba quoting Mr. Jones' letter to him of November 21, 1960. Mr. Leslie then states:

I trust the above quoted observation will make final the arrangements for use of reserve land which have been under discussion, and that the permission indicated in the Headquarters letter is satisfactory to your purposes.

I treat Mr. Leslie's letter as a permit in writing in accordance with s. 28(2) of the *Indian Act.*

[16] Nature of the rights at issue:

There was no dispute that interference with hay production on Reserve land constituted interference with the use and benefit of the Reserve by the Band and its members. In their memorandum, the plaintiffs argued that their rights to hunt, trap and fish on an unoccupied Crown land lying adjacent to or near the Fairford Reserve were Aboriginal rights, as well as rights under Treaty No. 2 (Treaty between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions, 21 August 1871; for reference see: Canada, *Indian Treaties and Surrenders* (Ottawa: Queen's Printer, 1957) and the Natural Resources Transfer Agreement (NRTA), which came into force on July 15, 1930. The Agreement is set out in Schedule (1.) to the *Constitution Act, 1930*, [20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16)] [R.S.C. 1985, Appendix II, No. 26].

Canada argued that the plaintiffs' Aboriginal rights to hunt, trap and fish were extinguished by Treaty No. 2 based on oral representations made during the negotiation of the Treaty. The defendant says that the plaintiffs' rights to hunt, trap and fish now derive from the provisions of Treaty No. 2 and the NRTA alone. The plaintiffs, on the other hand, argued that Treaty No. 2 makes no mention of their rights to hunt, trap and fish and that these rights therefore survive the Treaty, and are later modified by the NRTA.

Para. 13 of the Manitoba NRTA extinguishes any existing Aboriginal or treaty right to engage in commercial hunting and fishing and continues, subject to certain qualifications, Aboriginal or treaty rights to hunt, trap and fish for food (see: *R. v. Badger*, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771, at p. 797, *per* Cory J. referencing para. 12 of the Saskatchewan NRTA). Para. 13 of the Manitoba NRTA provides:

13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

For the purposes of this case it is sufficient to recognize that the plaintiffs have a right to hunt, trap and fish for food on the Fairford Reserve and on adjacent or nearby unoccupied Crown land pursuant to para. 13 of the NRTA.

[17] As previously discussed, the reference is to p. 349 of *Guerin*, *supra*, at which Wilson J. states that Canada is under a fiduciary duty to protect and preserve a band's interest from invasion or destruction and p. 339 of *Union*, *supra*, at which MacKay J. notes that a duty exists not to permit unjustified adverse effects upon continuing Aboriginal interests.

[18] In 1970 the Canada *Expropriation Act* was amended by S.C. 1969-70, c. 41, s. 24 (now R.S.C., 1985, c. E-21 , s. 26(11)) to expressly provide that in determining the value of expropriated land no account is to be taken of the Crown's anticipated or actual use of the land after the expropriation. Prior to this amendment the criteria for calculation of compensation under Canadian expropriation law were less settled but it was nevertheless clear at that time that compensation was not to be based on value to the taker (see: *Diggon-Hibben Ltd. v. The King*, 1949 CanLII 50 (S.C.C.), [1949] S.C.R. 712, at p. 715 and *Woods v. The King*, 1951 CanLII 36 (S.C.C.), [1951] S.C.R. 504, at p. 508).

[19] **2**. (1) In this Act,

"reserve"

(*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(*b*) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands.