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T-1636-81

T-956-93

T-3150-92

Neutral Citation : 2001 FCT 480

FINAL REASONS FOR JUDGMENT

COURT FILE No. T-1636-81

BETWEEN:

JOE MATHIAS, on his own behalf and on
behalf of all other members of the Squamish Indian Band
and the SQUAMISH INDIAN BAND

PLAINTIFFS and
DEFENDANTS by
COUNTERCLAIM

AND:

HER MAJESTY THE QUEEN

DEFENDANT

AND:

CHIEF WENDY GRANT, JOSEPH R. BECKER, DELBERT GUERIN,
MARY CHARLES, JOHNNA CRAWFORD, A. GEORGE GUERIN,
MARILYN POINT, N. ROSE POINT, SUSAN A. POINT,
LEONA M. SPARROW, THE ELECTED COUNCILLORS OF
THE MUSQUEAM INDIAN BAND suing on their own behalf and
on behalf of all other members of THE MUSQUEAM INDIAN BAND

DEFENDANTS and
PLAINTIFFS by
COUNTERCLAIM

AND:

LEONARD GEORGE as Chief, MATTHEW THOMAS
CARLEEN THOMAS and GERALD D. THOMAS
as Councillors on their own behalf
and on behalf of the members of the Burrard Indian Band,
and the said BURRARD INDIAN BAND

DEFENDANTS and
PLAINTIFFS by COUNTERCLAIM

COURT FILE No. T-956-93

AND BETWEEN:

LEONARD GEORGE as Chief, MATTHEW THOMAS
CARLEEN THOMAS and GERALD D. THOMAS as Councillors
on their own behalf and on behalf of the
members of the Burrard Indian Band, and
the said BURRARD INDIAN BAND

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,

AND:

CHIEF JOE MATHIAS, CHIEF PHILIP JOE,
CHIEF NORMAN JOSEPH, SAM GEORGE, GWEN HARRY,
FRANK RIVERS, GILBERT JACOB, RICHARD WILLIAMS,
LESLIE HARRY, LINDA GEORGE, BYRON JOSEPH,
DENNIS JOSEPH, ANN WHONNOCK, WILMA GUSS, JAMES NAHANEE, for themselves, and
on behalf of
all other members of the Squamish Nation or Tribe,
and the SQUAMISH INDIAN BAND

DEFENDANTS

COURT FILE No. T-3150-92

AND BETWEEN:

CHIEF WENDY GRANT, JOSEPH R. BECKER, DELBERT GUERIN,
MARY CHARLES, JOHNNA CRAWFORD, A. GEORGE GUERIN,
MARILYN POINT, N. ROSE POINT, SUSAN A. POINT,
LEONA M. SPARROW, THE ELECTED COUNCILLORS OF THE
MUSQUEAM INDIAN BAND suing on their own behalf and
on behalf of all other members of THE MUSQUEAM INDIAN BAND
and the said MUSQUEAM INDIAN BAND

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

AND:

CHIEF JOE MATHIAS, CHIEF PHILIP JOE,
CHIEF NORMAN JOSEPH, SAM GEORGE, GWEN HARRY,
FRANK RIVERS, GILBERT JACOB, RICHARD WILLIAMS,
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DENNIS JOSEPH, ANN WHONNOCK, WILMA GUSS, JAMES NAHANEE
for themselves and on behalf of all other membership of
the Squamish Nation or Tribe, and the SQUAMISH INDIAN BAND

DEFENDANTS

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* These matters were settled. Please see Phase 1, paragraph 6.

PART I - THE INTRODUCTION

***** ***These matters were settled. Please see Part I, paragraph 6.***

PART I - THE INTRODUCTION*

[1] This case concerns an 86 acre property which, before its surrender, was the False Creek Indian Reserve (the "False Creek Reserve", the "Kitsilano Reserve", or the "Reserve") in the City of Vancouver, British Columbia. The plaintiffs are Indians and Indian bands who, in broad terms, allege that the federal government breached its fiduciary duty to them by improperly allocating the Reserve, by mismanaging the Reserve, by improperly taking its surrender, and by selling the Reserve when it should have been leased over the long term.

[2] Three separate actions were tried together. This procedure meant that, on some issues, the plaintiffs opposed one another and, on other issues, they joined together in opposition to Her Majesty the Queen in Right of Canada (the "Crown", the "Federal Crown", or the "Federal Government").

THE GEOGRAPHY OF THE VANCOUVER AREA

[3] The map which follows has been prepared to provide the reader with the location of some of the geographic sites which are important to an understanding of the facts in this case.

THE LITIGATION

[4] The actions are listed below in the order in which they were commenced.

i) In the first action (the "Squamish Action"), the plaintiffs are the Squamish Indian Band (the "Squamish Band") and its late hereditary chief, Joe Mathias. This action was given court file number T-1636-81. It was started in 1981 and was brought only against the Crown. However, by order dated July 16, 1993, the Musqueam chief, several named Musqueam people and the Musqueam Band councillors, together with the Burrard chief and several named Burrard Band councillors were added as defendants in the Squamish Action.

The Musqueam and Burrard defendants in the Squamish Action have counterclaimed against the Squamish plaintiffs in that action. In the case of the Musqueam, their counterclaim in the Squamish Action is identical to the claim made by the Musqueam in their separate action

described below. In the case of the Burrard, their counterclaim in the Squamish Action includes a limitations argument that is not made in the separate Burrard action described below. In all other respects, the Burrard counterclaim in the Squamish Action and its claim in the separate action are identical.

ii) In the second action (the "Musqueam Action"), the plaintiffs are the Musqueam Indian Band (the "Musqueam Band"), Wendy Grant, who was the Musqueam chief when the action was started in 1992, and the elected band councillors at that time. In this action, the Crown and the Squamish plaintiffs are defendants. The action bears court file number T-3150-92.

iii) In the third action (the "Burrard Action"), the plaintiffs are the Burrard Indian Band (the "Burrard Band"), its elected chief, Leonard George, and the band councillors who were elected in 1993, the year in which the action was commenced. The Crown and the Squamish plaintiffs are the defendants in this action. It was assigned court file number T-956-93.

Collectively, these actions will be described as the "Mathias Litigation".

THE SETTLEMENT

[5] On July 27, 2000, the Squamish Action against the Crown was dismissed on consent without costs based on a settlement reached between the two parties (the "Settlement"). The Settlement had earlier been approved by the Squamish Band in a ratification vote held on July 23, 2000. After the Settlement, the following actions remained outstanding (i) the Musqueam and Burrard counterclaims in the Squamish Action; (ii) the Musqueam Action, and (iii) the Burrard Action.

[6] In view of the Settlement, all parties agreed that Parts V(b), VI and VII need not be decided. Accordingly, they are not found in the body of these reasons.

THE PLAINTIFFS

[7] In all three actions, the individual plaintiffs are "Indians" and the Squamish, Musqueam and Burrard Bands are Indian "bands" as those terms are defined by the *Indian Act*, R.S.C. 1985, c. I-5. The plaintiffs will be referred to collectively as the "Plaintiffs".

The Squamish

[8] The present-day Squamish Indians and their Squamish ancestors will be referred to as the "Squamish" or the "Squamish People". Today, the Squamish Band numbers approximately 1,927 members and it holds 21 reserves. Three are located on the north shore of Burrard Inlet in the cities of West and North Vancouver. They are the Capilano, Seymour Creek and Mission reserves. The balance of the Squamish reserves are in Howe Sound and further north in the Squamish River valley.

The Musqueam

[9] The present-day Musqueam Indians and their Musqueam ancestors will be referred to as the "Musqueam" or the "Musqueam People". Today, the Musqueam Band population is

approximately 1,029 people. Most Musqueam People live on Musqueam Indian Reserve No. 2. which is located in the City of Vancouver ("Vancouver" or the "City") on the north arm of the Fraser River. The Musqueam Band also holds, *inter alia*, Musqueam Indian Reserve No. 3 on Sea Island near the Vancouver airport.

The Burrard

[10] The members of the Burrard Band are, in part, descendants of the Tsleil Waututh people, whose main village was located near the present-day village of Belcarra at the eastern end of Burrard Inlet. The Tsleil Waututh people were particularly devastated by the epidemics that swept through British Columbia even before the first European explorers arrived in Burrard Inlet in the late 18th century. It is difficult to say what the population might have been prior to the epidemics, but it appears that there came a time when only a handful of Tsleil Waututh people remained. The evidence indicates that they married Squamish Indians and that their original language, a dialect of the Halkomelem language, was replaced by the Squamish language. By 1877, at least for administrative purposes, the Burrard were considered to be part of the Squamish People. It was not until 1923, in response to a Squamish proposal for amalgamation, that the Burrard formally asserted a separate political status as the Burrard Band.

[11] Today, the Burrard Band has approximately 364 members and occupies Burrard Indian Reserve No. 3 on the north shore of Burrard Inlet in the City of North Vancouver. For many years, the Burrard shared an additional reserve with the Musqueam. It was called Inlailawatash and was located at the north end of Indian Arm. However, in May 1927, the Musqueam Band relinquished its interest in this reserve. From the amalgamation in 1923 to the present day, Burrard Indians will be referred to as the "Burrard" or the "Burrard People". As well, in the years before 1923, when it is necessary to distinguish them from the Squamish People, the ancestors of the Burrard People will also be referred to as the "Burrard" or the "Burrard People".

THE TERMINOLOGY

Indian

[12] In these reasons, the word "Indian" is used because the band members who gave evidence, and the Plaintiffs' counsel, used the term throughout their evidence and argument. I should also note that I was not asked to use other terms, such as "First Nations People" or "Aboriginal People", to describe the Plaintiffs. Accordingly, since the parties used the term Indian, since "Indian" is used in the *Indian Act*, and since the historical documents refer to the Plaintiffs as "Indians", this judgment will also describe the Plaintiffs as Indians.

Indian Words

[13] Counsel for the Plaintiffs indicated to me that their clients do not feel strongly about which written version of an Indian word is used in this decision. The issue arose because Salishan languages are phonetically different from European languages, and some sounds are impossible to transcribe using the Latin alphabet. This explains why early explorers, traders, settlers and missionaries often transcribed very different versions of Indian personal and place

names. It also explains why the parties' Glossary of Terms[1] sometimes provides a multitude of spellings for one Indian word.

[14] Linguists have developed a special expanded alphabet to accommodate the aspirates and glottalizations which are common sounds in Salishan languages but foreign to the Latin alphabet. Unfortunately, these linguistic renditions of Indian words are meaningless to a lay person. Accordingly, I have simply chosen to use the anglicized version of an Indian word that is most comfortable for me. For example, I will use the spelling "Capilano" to describe the chief, the river, and the reserve which bear that name in preference to other versions which were used historically or at trial, including Kiapilano, Kiyeplanexw, Qeyepel E'nuxw, and Qeyepelenewh.

The Minister, The Superintendent General, The Department

[15] From 1868 to the present, the Superintendent General of Indian Affairs under the *Indian Act* has had the responsibility for Indian affairs. However, the position of Superintendent General was assigned from time to time to different ministers of the Federal Crown. As well, the name of the group of public servants charged with the conduct of Indian affairs changed periodically. For ease of reference, I will call all the cabinet ministers who had responsibility for Indian affairs over the years the "Minister" or the "Superintendent General", and all deputy ministers who had responsibility for Indian affairs the "Deputy Minister" or the "Deputy Superintendent General". As well, the relevant group of federal public servants will be called the "Department".

The Indian Act

[16] Canada's *Indian Act* was first enacted in 1868, but it did not become law in British Columbia until 1874. Thereafter, the legislation was revised many times. Throughout this judgment, where appropriate, I will refer to the applicable act by year. For example, the *Indian Act, 1880*, S.C. 1880, c. 18 will be the "*1880 Indian Act*".

[17] Counsel provided a helpful compendium of legislation related to Indian affairs, entitled *Indian Acts and Amendments 1868-1975 An Indexed Collection*[2]. A chronological listing of Canada's Indian legislation is found on pages *lxv* to *lxvii* of the collection.

Tribe

[18] The documents, both before and after Confederation, make it clear that the term "tribe" was not given any specific meaning. It is common to see the word used broadly to describe a large group of Indians who spoke the same language, and narrowly to describe a smaller group in a single settlement. At trial, the term was often used by experts and counsel to refer to a large body of Indians, of which a particular band, village or reserve was a sub-unit. However, the Central Coast Salish people did not organize themselves socially or politically on a tribal basis. While the anthropologists agreed that a broad tribal consciousness may have existed in pre-contact times among people who spoke a common language or who came from a specific area, the evidence is clear that the concept of a tribe as a cohesive political and social unit

evolved after non-native settlements were established. In these reasons, the word "tribe" in quotation marks will be used in the broad sense to describe a large group of Indians who spoke the same language.

MATTERS OF STYLE

Emphasis in Quotations

[19] To focus the reader's attention on the pertinent passages in quotations, I have emphasized them in bold, underlined typeface. In cases where this has been done, the words "*my emphasis*" appear in square brackets. However, when passages in quotations are italicized, the emphasis appeared in the original document.

Errors in Quotations

[20] Many of the source documents contain unusual spellings and typographical errors - at least by today's standards. Because they are so numerous, I have neither corrected the errors nor used the indication "*sic*" to identify them. When I tried to do so, the passages often became unreadable. The quotations therefore appear in their original form.

ABORIGINAL TITLE CLAIMS

[21] Just prior to the opening of trial, all the Plaintiffs brought motions to amend their pleadings to delete their claims to an interest in the False Creek Reserve based on aboriginal title. This was done because they had been advised that they could not participate in British Columbia's treaty negotiation process, which was designed to deal with such issues, if they were also pursuing them in court.

[22] However, the Musqueam Band alleged at trial that it is entitled to either an exclusive or, in the alternative, a shared interest in the Reserve because it was allocated to its residents in 1869. The entitlement was asserted firstly on the basis that the Reserve site was in Musqueam traditional territory and Musqueam People had the power to exclude others from that territory. The Musqueam said that, if Indians of other bands were resident at the Reserve site, it was only with the consent or permission of the Musqueam. Secondly, the Musqueam said that they traditionally used the site and that their seasonal use continued until after 1869. On this basis, they alleged that they were entitled to be included among the residents of the Reserve in 1869.

[23] To support these allegations, the Musqueam presented evidence and argument which, in different circumstances, could have been used to advance aboriginal title claims. However, their purpose in this case was to rely on this material only as the foundation for a claim to Reserve entitlement based on their use and control of the site in 1869.

THE EVIDENCE - AN OVERVIEW

[24] In the course of approximately 200 hearing days, the evidence was received in the following ways:

- as video tapes and transcripts of commission evidence taken before trial
- as transcripts from pre-trial examinations for discovery

- as oral evidence given at trial by lay witnesses
- as oral evidence given at trial by expert witnesses
- as documentary evidence in two formats:

1. As part of the Common Book. Common Book documents were filed on consent as admissible documents pursuant to the terms of a document agreement signed by counsel for all parties. That agreement is trial Exhibit 1. The Common Book was updated during the trial as documents were added on consent. Common Book documents will be referred to as "CB" documents.

2. As traditional exhibits. These were documents which were not filed on consent as part of the Common Book. They were proved at trial through witnesses in the ordinary way. Exhibits will be referred to as "EX" documents.

A description of the witnesses is found in Schedule "A" to these reasons.

[25] The oral evidence at trial was recorded on an audio tape and was also taken down by court reporters who used a computer-assisted manual input to create instant or "real time" transcript on monitors located before all counsel, the court staff, and the judge (but not the witness). Transcripts of the oral evidence were later prepared both on disk and in a traditional hard copy format.

[26] The Common Book documents were scanned into the court's computer system by court personnel prior to each of the two phases of the trial, and the disks containing the Common Book documents, as well as the hard copies of the Common Book documents, were made exhibits. At trial, when counsel referred to a document using its Common Book number, a registrar would call it up and it would appear on a second monitor which was available to all counsel, the court staff, the judge, and the witness.

[27] As many of the Common Book documents were archival materials, no witnesses were available to speak to them. Accordingly, most of the information in the Common Book documents was received at trial in a process which came to be known as the "document read-in". In this process, counsel for each party took the Court through the documents he or she deemed relevant and highlighted the pertinent passages. Other Common Book documents were brought to the Court's attention through oral evidence and submissions.

[28] The following summaries were particularly helpful:

- The "Crown's List of Names" which was filed as Exhibit OC3. It is a master list which covers virtually all the individuals whose names appear in the record in the years covered by the litigation.

- The "Political Who's Who" prepared by counsel for the Squamish and filed as Document 844 in court file T-1636-81. It gives the names of those who held various senior positions in the Federal, British Columbia and Vancouver governments in the period from 1885 to 1974.

- The "Glossary of Terms" was prepared by all parties and filed by counsel for the Musqueam as Document 672 in court file T-1636-81. It provides 96 pages of transcriptions for Indian words which appear in the trial transcript.

- The "Common Book Chronological Index". It was filed as Document 914 in court file T-1636-81 by the Crown on behalf of all parties.

ORAL HISTORY EVIDENCE

[29] In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (*"Delgamuukw"*), at para. 80, the Supreme Court of Canada repeated a direction it had given in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 68. There, the Court said:

In determining whether an aboriginal claimant has produced **evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition** integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the **evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in**. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[*My emphasis*]

[30] In *Delgamuukw*, the court described oral history by making reference to the Report of the Royal Commission on Aboriginal Peoples[3] where oral history was said to comprise "... legends, stories and accounts handed down through the generations in oral form". As well, the Supreme Court referred (in para. 86) to Dickson J.'s description of oral history in *Kruger v. The Queen*, [1978] 1 S.C.R. 104 at 109. There he said that oral history consisted of "out of court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present day".

[31] The Supreme Court in *Delgamuukw* indicated that oral history evidence of this description is to be placed on an equal footing with other types of historical evidence in reaching a determination about an historical truth. This, the Court said, is to be the case even though the oral history evidence may not meet the requirements of an exception to the rule against hearsay, may not be historically accurate, may lack detail, and may only be verified by the community which tenders it as evidence.

[32] Accordingly, in spite of its potential failings, oral history relating to pre-sovereignty practice, customs and traditions has been accepted of necessity because it is the only evidence Indian plaintiffs have been able to offer in litigation which profoundly affects their interests. This acceptance was entirely reasonable in cases such as *Delgamuukw* in which the issues or historical truths being addressed were broad questions which covered a long period of time. In *Delgamuukw*, the historical truths sought were answers to questions about which bands used and occupied lands, about the internal boundaries between the bands' lands, and about the Indians' land tenure practices prior to and at the assertion of British sovereignty.

[33] In *R. v. Marshall*, [1999] 3 S.C.R. 533 ("*Marshall*") and *R. v. Badger*, [1996] 1 S.C.R. 771 ("*Badger*"), the Supreme Court of Canada considered oral history evidence relating to historical truths in post-contact and post-sovereignty times. In both cases, the truth sought was information about the historical or cultural context in which treaties were negotiated and signed (in 1760-61 and in 1899 respectively). Oral history evidence on those topics was accepted to enable the court to reach conclusions about the intention of the Indians. The evidence was directed to the situation before and at the date the treaties were signed. The subject matter concerned long-standing customs and practices.

[34] In contrast to cases such as *Marshall, Badger* and *Delgamuukw*, precise historical accuracy is important in this case. Here the evidence described as oral history was tendered for the following very specific purposes:

- to demonstrate that either the Squamish or the Musqueam People were the predominant, or at least a significant, presence in and around Burrard Inlet in 1869 when the Reserve was created; and

- to demonstrate that the residents of the Reserve in 1869 and 1877 were either Musqueam or Squamish Indians.

[35] Most of the oral history in this case consisted of statements made by identified Indian people who had died prior to trial. They spoke of their genealogy and about the use made by the Musqueam and Squamish People of Burrard Inlet, False Creek and the Fraser River. The witnesses who gave oral history evidence included:

1. lay witnesses at trial;

2. lay witnesses who gave pre-trial commission evidence;

3. expert witnesses who gave evidence about information they had obtained from the works of authors including A.C. Haddon, Homer Barnett, Major J.S. Matthews, Charles Hill-Tout, Wilson Duff, Diamond Jenness, Wayne Suttles and Marian Smith; and,

4. expert witnesses who testified about information which Indian informants had given them in person. Those witnesses included Dr. Michael Kew, Randy Bouchard and Dorothy Kennedy.

As well, oral history evidence was introduced when the Court was referred directly to documents in the Common Book which contained such evidence.

[36] The oral history evidence in this case had the following attributes:

- It did not relate to the pre-contact or pre-sovereignty periods except in the most tangential way. That is, it was argued by the Musqueam that the identity of the occupants of Burrard Inlet before contact in 1791 had a bearing on who was actually resident, entitled to be resident, or likely to be resident at the False Creek Site in 1869.

- It did not take the form of a formal authenticated litany such as those referred to in *Delgamuukw*. The one exception, it was argued, was genealogical information passed on during a Musqueam naming ceremony.

- It was directed to the proof of precise historical truths at a given place on given dates (i.e. who lived on the Reserve in 1869 and in 1877).

- It was not the only available evidence on the issue of who was resident at the False Creek Reserve in 1869 and 1877 (for example, there was census and other information available for the use of all Plaintiffs).

- It was sometimes contradictory.

[37] As the Supreme Court noted in *Delgamuukw*, oral history evidence may not be historically accurate (paras. 87, 98). Because in this case specific historical accuracy is important, it is useful to consider the reasons why oral history evidence may be imprecise. It is well known that, simply by repetition, stories and information are distorted to some degree. In addition, oral history, in the context of this case, may have been distorted or indeed lost because of changes and events, such as massive depopulation due to disease or natural disasters, the suppression of the potlatch ceremony where traditional stories were told, the end of the longhouse style of living which had facilitated the oral history tradition, the imposition of the residential school system which removed children from access to the stories of their parents and grandparents, the disappearance or near disappearance of traditional Indian languages, and the publication of historical accounts and opinions about historical matters. As well, in common with all types of evidence, there is the possibility that self-interest distorted oral history evidence.

[38] In reaching the conclusions set out below, I have considered the Supreme Court of Canada's direction in *Delgamuukw* to the effect that oral history must be assessed on a case-by-case basis (para. 87) and its admonition that the courts must treat oral history evidence in a manner which gives due weight to the perspective of aboriginal peoples but which does not "strain" the Canadian legal structure (para. 82).

[39] I have heard and considered all the oral history evidence, but I have done so with regard for the context in which it was received. As noted above, there were competing oral histories and sometimes one will have to be preferred over the other. As well, there was additional relevant evidence which was not oral history evidence. Further, the historical truths sought in this case are narrow, specific questions. It is one thing, in cases like *Delgamuukw, Marshall*, and *Badger* to rely on information which may not be historically precise to prove patterns of behaviour over a long period of time. It is quite another to rely on undated, and sometimes confused, evidence to show who was resident at the False Creek Site in 1869 and

at the Reserve in 1877.

[40] Accordingly, for the purposes of this case, I have concluded that the oral history evidence must be assessed in light of:

- its relevance to the specific dates in issue; and

- its reliability when considered in light of:

- competing oral history evidence;

- evidence of other types;

- any corroboration;

- the source of the evidence (this includes a consideration of who related the information, when it was related and for what purpose); and

- changes or events which could have distorted the evidence.

THE OBLATE RECORDS

[41] One of the most important sources of genealogical information at trial was the baptismal, marriage, and death records of the Catholic Oblate Order (the "Oblate Records"). They were from the archives of St. Mary's Mission in New Westminster and St. Paul's Mission in North Vancouver. The Oblate Records covered the period from the early 1860s to the beginning of the 20th century and provided evidence about individuals' names, ages, family relations and tribal affiliations. They were the subject of intensive study by Squamish expert Dorothy Kennedy, and they informed many of the opinions and conclusions she presented at trial.

[42] Her extensive reliance on the Oblate Records was challenged by the Musqueam and Burrard. They emphasized the problems with the material and noted that the records were handwritten by the priests in the French language, and that some of them were barely legible. They also observed that it was not clear how a priest would have obtained the information he recorded about an individual. Dorothy Kennedy suggested that the information was probably given to the priests by the individual(s) in question. But the Musqueam and Burrard speculated that the information could have been provided by the priest himself, by a translator, or by the person who sponsored or witnessed an event. Counsel for the Musqueam and Burrard also queried whether a French-speaking priest could meaningfully transcribe information which was provided in a Central Coast Salish language.

[43] In spite of these objections, all parties relied on the Oblate Records to some extent. Musqueam lay witness Dominic Point testified that many Musqueam names had been lost because of the depopulation caused by the smallpox and flu epidemics, and because of the

social dislocation and loss of language which followed the arrival of the non-Indian settlers. He said that the dissemination of the information in the Oblate Records was important because it reintroduced lost names to the Musqueam People. This testimony provided a strong endorsement for the Oblate Records. It illustrated that, in some cases, they may be the sole source of relevant genealogical information.

[44] I have concluded that the problems which concerned the Musqueam and the Burrard do not render this material generally unsafe or unreliable. There is no reason to think that either the priests or the Indians who participated in ceremonies would have had any reason to fabricate the information included in the Oblate Records. As well, there is no suggestion that the Oblate Records have been tampered with or that they are not authentic. For these reasons, I consider them to be very important source material.

[45] The strength of Dorothy Kennedy's work for the Squamish was her ability to use the Oblate Records to corroborate her conclusions which were based on other material, such as census information, Departmental records and oral histories. In contrast, the Oblate Records were not relied on by Musqueam expert Dr. Kew. Where the conclusions of Ms. Kennedy are preferred over those of Dr. Kew, the preference is often based on Ms. Kennedy's use of the Oblate Records.

THE EXPERT EVIDENCE

[46] The Musqueam challenged the reliability of the opinions offered by Squamish experts Randy Bouchard and Dorothy Kennedy on the basis that they compromised their independence and objectivity when they promoted an interpretation of the evidence favourable to the Squamish case. The Musqueam accused them of marshalling evidence in support of their Squamish clients instead of presenting a complete and unbiased review of the record on which they then based their opinions. In particular, the Musqueam alleged that Ms. Kennedy selectively quoted excerpts from the Oblate Records that supported her opinions and ignored other inconsistent or ambiguous records. Further, she was accused of interpreting the records inconsistently to ensure a "pro-Squamish" conclusion. In essence, the Musqueam argued that Mr. Bouchard and Ms. Kennedy had become advocates for the Squamish rather than independent experts. Further, the Musqueam noted a number of situations in which Squamish counsel appeared to have involved themselves inappropriately in the preparation of the experts' reports. However, the Musqueam did not suggest that all their evidence be rejected. Rather, they submitted that their opinions should be viewed with caution and given less weight than they might otherwise command.

[47] In my view, the expert evidence in this case was generally of high quality and of significant assistance to the Court. However, a number of expert witnesses for both the Squamish and the Musqueam[4] clearly did not understand that the role of an expert should involve the presentation of an opinion based on a complete and unbiased review of all the relevant evidence. This misunderstanding, and the resulting presentation of one-sided expert reports, was unfortunate and appears to have arisen in part because of the instructions given the experts by counsel. One-sided reports may also have been the inevitable consequence of the witnesses' long associations with their respective clients. Both the Squamish and the Musqueam retained experts who were already familiar with their respective histories. Dr. Kew, for example, is married to a Musqueam woman and has close personal and professional ties to

the Musqueam Band. Ms. Kennedy and Mr. Bouchard, although they have undertaken work for a number of Indian communities, have had a particularly lengthy and close professional relationship with the Squamish Band. Ms. Kennedy's master's thesis on Squamish genealogy was the foundation of much of her evidence for this trial.

[48] However, since most of the primary sources for the experts' opinions were included in the Common Book or elsewhere in the trial record, counsel were able to effectively cross-examine opposing experts. In cross-examination, the one-sided aspect of their work was exposed and explored. For this reason, I have been able to consider the experts' opinions based on all the facts and have found it unnecessary to diminish the weight given to any of the reports based on their one-sided character.

[49] In respect of the allegation that the Squamish counsel involved themselves inappropriately in the drafting of Mr. Bouchard's expert reports, I am not convinced that the incidents cited by the Musqueam put into doubt the overall credibility of Mr. Bouchard's conclusions. I accept Mr. Bouchard's assertion that he took responsibility for everything in his report, and that he was the author of the opinions it presented. I also accept that the vast majority of his evidence was not influenced or altered during his consultations with Squamish legal counsel. While counsel for the Squamish did edit out some material which he viewed as being of lesser importance or better used in rebuttal, Mr. Bouchard agreed with the changes. He also agreed with the contents of several paragraphs in his report which were dictated by the lawyer to speed up the report's preparation. Accordingly, I have accepted Mr. Bouchard's expert report on the basis that it does in fact express his opinions.

THE FACTS - AN OVERVIEW

[50] For the purposes of this introduction, I have attempted to outline the significant facts in a simple and neutral fashion. However, it should be borne in mind that virtually all the events described below are more complicated and controversial than they presently appear.

[51] The False Creek Reserve no longer exists. It was located in the Kitsilano area of Vancouver at a site on the south shore of False Creek where it joins English Bay. Today, the former Reserve property is bisected by Burrard Street as it leaves the south shore of False Creek and heads north across the Burrard Bridge into downtown Vancouver.

[52] The False Creek Reserve was first created in 1869, in what was then the Crown Colony of British Columbia, when colonial authorities set aside 37 acres of land for "the use of the Indians respectively residing thereon". Later, in 1877, six years after British Columbia joined Confederation, the Joint Indian Reserve Commission issued a minute of decision which re-allocated the Reserve. It was enlarged to 80 acres and set apart for the "Skwawmish Tribe". As will be discussed later in these reasons, I have concluded that the Commission's decision became effective on February 7, 1889, when Royal Assent was given to the *Land Act* of 1888[5].

[53] In the years that followed, False Creek Reserve land was expropriated for the following purposes:

- railways (3.62 acres in 1886 and 7 acres in 1901)
- road access and landscaping for the Burrard Bridge (8.074 acres in 1930)
- the Seaforth Armouries (4.285 acres in 1934)

[54] In 1913, in a transaction which all parties agree was illegal (the "1913 Sale"), the Indians who lived on the False Creek Reserve "sold" and the government of the Province of British Columbia ("British Columbia" or the "Province") "purchased" the Reserve. British Columbia paid the Indians approximately $11,500 per family to leave and, after 1913, no Squamish People lived on the Reserve. The Federal Government refused to recognize the 1913 Sale. For many years, while the Federal Government and the Province argued about title to the Reserve, it remained either vacant or home to squatters.

[55] Over the years, two non-Indian interests affected the development of the Reserve. Firstly, after 1913, British Columbia asserted its reversionary title to the unoccupied Reserve and demanded payment for its interest. Secondly, after 1929, Vancouver periodically opposed any commercial development of the western portion of the Reserve and zoned it for residential use to prevent such development. These actions were taken by the City in the hope of one day acquiring a large portion of the Reserve for a public park.

[56] In 1916, further to the McKenna-McBride Royal Commission's Interim Report No. 82, the False Creek Reserve was expropriated by the newly-formed Vancouver Harbour Commission. It occupied the Reserve for ten years and, due to dredging operations in that period, the property was enlarged by 6 acres to approximately 86 acres. However, the Vancouver Harbour Commission never made any compensatory payments and finally, in 1926, it abandoned the expropriation.

[57] In the meantime, in 1923, under a proposal it called "amalgamation", the Squamish People asked the Department to consolidate, for the purposes of administration, the numerous Squamish reserves in Burrard Inlet, Howe Sound, and the Squamish River valley. The False Creek Reserve was included in the proposal. The Squamish also sought the amalgamation of all the Squamish bank accounts. In response, the Burrard People, who lived primarily on Burrard No. 3 Reserve, indicated that they did not wish to be included. In the result, the body of Indians now known as the Burrard Band became a separate entity with its own reserves. I should note here that, although I recognize that the Burrard prefer to describe the agreement of 1923 as the "severance", I will describe it as the "Amalgamation" because that term was used at trial once the Burrard's position was noted.

[58] In 1927, at a meeting of the chiefs and councillors of the newly amalgamated Squamish Band, the band council passed a resolution indicating its willingness to surrender the False Creek Reserve for sale on the basis that, from the proceeds of sale, $350,000 would be paid to British Columbia in full settlement of all claims the Province might have had to an interest in the Reserve. This band council resolution followed an agreement which had been reached between the Federal Crown and British Columbia. The effect of the agreement was that, once the Reserve was surrendered and once the Province was paid, the False Creek Reserve could be sold by the Federal Government for the benefit of the Squamish, free from claims by British Columbia. However, the surrender vote and subsequent sale of the Reserve which were contemplated in the 1927 band council resolution were forestalled by the collapse of land prices

during the Great Depression of the 1930s.

[59] During the Depression, two projects were undertaken which involved the expropriation of Reserve lands. As mentioned above, they were the building of the Burrard Bridge and the construction of the Seaforth Armouries.

[60] When World War II broke out in 1939, the Department of National Defence ("DND") selected the False Creek Reserve for an RCAF storage depot and other military purposes. Under permits issued by the Department, DND constructed substantial concrete buildings and, during the war, occupied approximately 50 acres of the Reserve.

[61] After the war, a surrender vote was taken and the False Creek Reserve was surrendered by the Squamish Band for sale or lease on April 17, 1946. The surrender was accepted, but only for sale, by Federal Government's Order in Council P.C. 1706, dated April 29, 1947. One month before the acceptance of the surrender, British Columbia formally conveyed the False Creek Reserve to the Federal Crown. This was accomplished by British Columbia's Order in Council 374 dated March 4, 1947.

[62] After the surrender, the False Creek Reserve was sold in six parcels as follows:

- In 1947, a sale of 41.74 acres to DND (this property is now Vanier Park)

- In 1948, a sale of 8.067 acres to the Central Mortgage and Housing Corporation (this property is now the site of the Molson Brewery)

- In 1955, a sale of 2.233 acres to Arthur J. McLellan, as nominee for Charles Madden (this property is now the Parkview Towers apartments at 1450 Chestnut Street)

- In 1955, a sale of 4.103 acres to the Department of Public Works for a Fishermen's Wharf on False Creek (it still exists today)

- In 1959, a sale of 6.04 acres to National Trust Company Limited as nominee for Pacific Press Limited (this property is now part of the Pennyfarthing Development)

- In 1965, a sale of 1.94 acres to Giroday Sawmills Limited (this property is also part of the Pennyfarthing Development)

By 1965, the entire Reserve had been sold for a net revenue to the Squamish People of just over one million dollars.

[63] In 1966, the land on the west side of the Reserve, which had been purchased by DND after World War II, became surplus to the requirements of the Federal Crown. It subsequently leased it to the City for 99 years for an annual rental of one dollar. This 42-acre property is now Vanier Park. Together with the Fishermen's Wharf and the Seaforth Armouries, Vanier Park is still owned by the Federal Government. The balance of the Reserve, approximately 36 acres, is now in private hands and has been developed as the Pennyfarthing condominium and

commercial buildings, the Molson Brewery on Burrard Street, and the Parkview Towers apartment building at 1450 Chestnut Street.

THE ISSUES AND THEIR ORGANIZATION - AN OVERVIEW

Part II - The Colonial Reserve Allocation: 1869

[64] This section of the reasons will focus on the identity of the residents at the site of the Reserve[6] at the time of its creation in 1869, and the meaning of its allocation to the "Indians respectively residing thereon" as described in a notice in the *British Columbia Government Gazette*. The parties adduced oral history, documentary and expert evidence to demonstrate who lived at the False Creek Site and in Burrard Inlet in 1869. The Musqueam asked for a broad and liberal interpretation of the phrase "Indians respectively residing thereon" and sought to define the phrase in accordance with Central Coast Salish traditions. In addition to these matters, consideration will be given to the reserve creation policy in place in the colonial period and to the intentions of the colonial officials and the Indians when the Reserve was created.

Part III - The Joint Indian Reserve Commission's Reserve Allocation: 1877 (1889)

[65] Part III will deal with Musqueam Band's claims arising from the re-allocation of the Reserve by the Joint Indian Reserve Commission to the "Skwawmish Tribe". The Musqueam asserted that the Joint Indian Reserve Commission made a mistake when it allocated the Reserve to the Squamish and argued that the Commission intended to, or should have, allocated the Reserve to the Musqueam. They also submitted that the Commission did not have the authority to divest the existing Reserve residents (whom they said included Musqueam Indians) by "re-allocating" the Reserve exclusively to the Squamish. The Musqueam based their arguments on their interpretation of the Federal Crown's duties and responsibilities under the *Constitution Act, 1867,* the *British Columbia Terms of Union* and under the orders-in-council and memoranda which established and instructed the Joint Indian Reserve Commission.

Part IV - The Pre-Surrender Fiduciary Duty

[66] This section will discuss the Plaintiffs' submission that the Crown owed a fiduciary duty to them with respect to the Reserve's allocation and its administration under the *Indian Act*. This duty was said to include all the obligations found in a conventional private law fiduciary relationship.

Part V - The Pre-Surrender Period: 1877-1945

[67] Part V concerns the claims of the Squamish and Burrard arising from the Crown's administration of the Reserve prior to the surrender.

In Part V(A), conclusions will be reached about:

- the Burrard allegations that the Crown breached its fiduciary duty to them by assenting to the Amalgamation and by failing to protect the interests of the Burrard People in the False Creek Reserve;

in Part V(B) conclusions would have been reached about:

- the Squamish allegation that the Crown breached its fiduciary duty to them by assenting to, or at least failing to prevent, the 1913 Sale;

- the propriety of the agreement made between the Crown and the Province in 1927 respecting the surrender and sale of the Reserve and the payment of $350,000 by the Squamish to the Province;

- the Squamish allegations that the Crown breached its fiduciary duty to them by failing to collect rents owed to the Squamish Band, by entering into unconscionable leasing arrangements, and by failing to obtain adequate leasing revenue for unoccupied and unused Reserve lands; and

- the Squamish allegation that the Crown breached its fiduciary duty to them by facilitating or permitting the expropriation of various parcels of the Reserve without, *inter alia*, adequate compensation.

Part VI - The Surrender Period: 1945-1947

[68] In this period, consideration would have been given to: (i) the Squamish claim that the Crown breached its fiduciary duty to the Squamish Band by promoting and accepting the surrender of the Reserve for sale; and (ii) the Squamish claim that the surrender was improvident because it provided for the payment of $350,000 to the Province from the proceeds of the sale of the Reserve.

Part VII - The Post-Surrender Period: 1947-1966

[69] This section would have dealt with the Squamish allegation that the Crown breached its fiduciary duty to the Squamish Band by selling the Reserve in uneconomic parcels instead of entering into long-term lease agreements and thus preserving the Reserve as an ongoing revenue-producing asset. This part will also consider the Squamish allegation that the Crown breached its fiduciary duty by failing to obtain (in most cases) the best possible price when it sold the Reserve lands, and the Squamish submission that the Crown acted in a conflict of interest, and therefore breached its fiduciary duty to them, when it purchased certain Reserve lands for its own use.

MATTERS NOT IN ISSUE

[70] It is important to note those matters which are not in issue. They are:

• Aboriginal title - none of the Plaintiffs claim an interest in the False Creek Reserve based on exclusive use and occupation of the site at the time of the assertion of British sovereignty in 1846.

• Aboriginal rights - none of the Plaintiffs claim an interest in the False Creek Reserve based on activities at the site at the time of European contact in 1791.

- Treaty rights - none of the Plaintiffs claim an interest in the False Creek Reserve by reason of a treaty.

- Section 35(1) of the *Constitution Act, 1982* - none of the Plaintiffs assert a claim to the Reserve based on this provision.

THE REMEDIES SOUGHT - AN OVERVIEW

[71] a. In the Squamish Action (which has been settled), the plaintiffs sought declarations and other remedies against the Federal Crown which, if they had been granted, would have had the effect of either returning Vanier Park and the other lands still owned by the Federal Crown to the Squamish Plaintiffs as reserve land, or awarding equitable damages for the loss of use and the current value of those lands. As well, the Squamish sought equitable damages for the loss of use and the current value of the portion of the Reserve now in private hands.

b. In the Musqueam Action and in the Musqueam counterclaim in the Squamish Action, the plaintiffs seek declarations and damages against the Crown which are similar to those sought by the Squamish, but the Musqueam base their claim primarily on the Crown's failure to protect the Musqueam interest in the Reserve when the Joint Indian Reserve Commission allocated the False Creek Reserve to the Squamish in 1876. In addition, the Musqueam seek an accounting and damages from the Squamish based on that band's use of the Reserve to the exclusion of the Musqueam.

c. In the Burrard Action and in the Burrard counterclaim in the Squamish Action, the plaintiffs also seek relief against both the Federal Crown and the Squamish plaintiffs. The relief is substantially the same as that sought by the Musqueam but, in the Burrard case, it is based on its alleged loss of its interest in the False Creek Reserve and its proper share of band funds as a result of the Amalgamation.

Although there are individual plaintiffs in each action, none of them seek remedies in their personal capacities.

[72] The Plaintiffs do not claim damages against or seek to dispossess the private parties who now occupy the former Reserve. Only damages are sought from the Crown with regard to land which is now in private hands.

THE ASSESSMENT OF DAMAGES

[73] By order dated May 6, 1998, which was made with the consent of all parties, the issues relating to the valuation of remedies were ordered to be heard separately and possibly by another judge of this court. This judgment will deal with the liability, if any, of the Crown and the Squamish, and with the nature of any appropriate remedies. However, it will not assign a dollar value to those remedies. A similar procedure was adopted in *Delgamuukw* in the case of *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344 ("*Apsassin*") and in *Fairford Indian Band v. Canada*, [1999] 2 F.C. 48 (T.D.).

CONSTITUTIONAL QUESTIONS ON LIMITATIONS ISSUES

[74] The Burrard and Musqueam Bands each filed a Notice of Constitutional Question pursuant to s. 52 of the *Federal Court Act*, R.S.C. 1985, c. F-7. The Burrard Band questioned the constitutional validity and applicability of subsection 39(1) of the *Federal Court Act*, which makes British Columbia's limitations legislation applicable in this case. The Burrard said that section 39(1) infringes their equality rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms* and subsection 1(b) of the *Canadian Bill of Rights*.

[75] The Musqueam Band, in its notice, asserted that British Columbia's limitations legislation, incorporated by reference into s. 39 of the *Federal Court Act*, is *ultra vires* and of no force and effect in respect of issues relating to the extinguishment or surrender of Indian interests in reserve land.

CENTRAL COAST SALISH SOCIETY AND LANGUAGES

[76] The Squamish, Musqueam and Burrard People are part of a wider aboriginal group classified by anthropologists as Central Coast Salish people. Despite linguistic differences, Central Coast Salish people shared similar social structures and cultural practices.

[77] All the expert witnesses who testified on the subject agreed that, before the arrival of the traders and settlers, Central Coast Salish society was structured around the extended family and its kinship ties to other family groups. Extended family members and related families shared longhouses in permanent villages during the winter months. At other times of the year the families, singly and in longhouse groups, scattered in many directions on their "seasonal rounds", to fish, hunt, and harvest resources in preparation for the following winter, when they would return to their permanent winter villages.

[78] The anthropologists who testified disagreed to some extent about how kin groups owned resource sites such as the False Creek Site. However, they did agree that, although winter villages were identified with permanent groups, Central Coast Salish people did not view other property such as resource sites as privately owned. Instead, they conceived of ownership of resource sites in terms of rights of access to those sites. Often, rights of access were held by more than one group of Indians.

[79] The experts agreed that a central feature of socio-economic existence was the lack of formal political structure. "Chiefs" were not the elected or hereditary leaders of today but were respected elders in the permanent winter villages. Family units shared resources and cooperated in times of emergency, and were linked together by a complex web of intermarriage and common ancestry. As mentioned above, "tribes" did not exist as political units. However, the experts all acknowledged that, in addition to an Indian's allegiance to a kin group or to an extended family, some notion of a "tribal" consciousness also existed which involved an awareness of a common language and/or culture or ancestral attachment to a particular place or territory.

[80] Central Coast Salish people had a strong tradition of exogamy, which was a practice

that prohibited marriage to any related person. It meant that men and women often had to search beyond their villages and linguistic groups to find acceptable mates. Consequently, kinship ties extended over wide stretches of territory and crossed both linguistic and "tribal" boundaries. This situation was further complicated by the fact that Central Coast Salish people traditionally traced their descent bilaterally. This meant that they did not differentiate between the importance of their mothers' or fathers' kin.

[81] The mobility and intermingling caused by the tradition of exogamy meant that bloodlines were mixed. It would be a rare person in Central Coast Salish society who could not claim a fairly recent blood connection to a number of different ancestral, kinship and linguistic groups. As well, many Indians spoke more than one Indian language. Because ancestry was mixed, linguistic abilities were diverse, and "tribal" affiliations were not always strong or exclusive, the identification today of Indians who lived in the 1800s as "Squamish, "Musqueam" or "Burrard" people is difficult. The Plaintiffs described these individuals by presenting evidence about their choice of residence, the reserves in which they were interested, their burial places, their reputations, the identity of their associates and kin, and their self-identification. I have accepted that, in the nineteenth century, these were all important indicia of an Indian person's identity.

[82] For most of the period covered by this litigation, the Squamish and virtually all of the Burrard People spoke the Squamish language. It was spoken in Burrard Inlet, in Howe Sound and in the Squamish River valley. On the other hand, the Musqueam spoke a dialect of the Halkomelem language. Halkomelem dialects were also spoken by other groups of Indians, including the Burrard People (before they spoke Squamish), the Indians on the lower Fraser River, in Washington State, and on a portion of the east side of Vancouver Island. The Squamish language is unintelligible to Halkomelem speakers and vice versa. Neither language was traditionally used in written form.

[83] In dealings with early traders, the Squamish, Musqueam and Burrard People spoke the Chinook language. It was a mélange of the English, French and Indian languages. Later, as non-Indian settlement increased, the Plaintiffs' ancestors started to learn English as they entered the wage economy (primarily in logging, stevedoring and domestic employment) and as they attended schools and religious services.

PART II - THE COLONIAL RESERVE ALLOCATION: 1869

INTRODUCTION

BACKGROUND

[84] Vancouver Island became a Crown colony in 1849 under James Douglas, who was the chief factor for the Hudson's Bay Company. Two years later, in 1851, he was made governor of the colony. In the 1850s, he negotiated a series of treaties with a number of Indian groups on Vancouver Island.

[85] On the mainland, the Hudson's Bay Company had earlier established a fur trading post

on the Fraser River at Fort Langley[7]. However, there was little non-Indian settlement of mainland British Columbia until gold was discovered in the interior of the Province in the 1850s. The resulting influx of prospectors and settlers prompted the creation of the Crown colony of mainland British Columbia in 1858, with its capital at New Westminster on the lower Fraser River. At that time, Douglas became governor of both colonies. When he retired in 1864, Frederick Seymour became the governor of British Columbia and Arthur Kennedy held the post for Vancouver Island. In 1866, the two colonies were merged and remained the colony of British Columbia under Governor Seymour until British Columbia joined Confederation in 1871.

[86] The evidence disclosed that, before the arrival of the first European explorers in the Vancouver area in 1791 ("Contact"), groups from different Indian "tribes", while on their seasonal rounds, camped on a temporary basis on the Fraser River, at the False Creek Site (known as "Sen'aqw"), and at sites in Burrard Inlet. However, for the winter months they returned to their respective winter villages. The Squamish winter villages were located in and to the north of Howe Sound, the Burrard's permanent village was at the eastern end of Burrard Inlet, and the Musqueam winter villages were in the lower reaches of the north arm of the Fraser River.

[87] The journals kept by the traders at Fort Langley showed that the seasonal rounds continued for many years after Contact. However, the evidence also indicated that, at some point in the mid-1800s, Indian people for the first time established permanent dwellings and cultivated plots of land on the False Creek Site. The Squamish and Crown argued that this development coincided with, and was a part of, a larger permanent migration of Squamish Indians from the Squamish River area to Burrard Inlet that started in the mid-1800s and continued into the 20th century.

[88] As the Indians established new year-round villages close to growing non-native settlements, it became a priority for colonial officials to take steps to protect the Indian settlements from acquisition by settlers. It was this priority which provided the impetus for the designation of Indian settlements as Indian reserves[8].

[89] In this context, in 1868, a delegation representing 42 Indians, who lived at the False Creek Site, approached Magistrate H.M. Ball and asked that a reserve be created for its community. The following year, on November 27, 1869, the False Creek Reserve was set aside for the "Indians...residing thereon", and notice of the Reserve's creation was given in the *British Columbia Government Gazette*[9] (the "Gazette Notice").

THE ISSUES

[90] The Musqueam submissions raised two general issues with regard to the allocation of the Reserve in 1869. The first was whether, and if, Musqueam Indians were resident on the False Creek Site when it became the Reserve in 1869 and when it was reallocated in 1877, and the second concerned the breadth of meaning to be given to the phrase "Indians...residing thereon".

THE EVIDENCE ABOUT THE ALLOCATION OF THE RESERVE

[91] In early 1868, two delegations of Indians approached the colonial officials in New Westminster and asked for reserves. The first delegation approached local Magistrate H.M. Ball in February 1868 and asked that the settlement at the False Creek Site be made a reserve for the 42 residents who had lived there for several years. Ball described this delegation in a letter to Chief Commissioner of Lands and Works Joseph Trutch. He said:

My dear Trutch: **the bearers are Indians who have had a House on False Creek for several years and they wish a reserve be made in their favour for themselves & families.** There are 14 men and 16 women, 12 children, with potatoe patches for each family--

It appears on the Map that the land in question is on a part of the Land reserved for Stamp, but as the Co. have no interest in the land a reserve might be marked off for them provided they did not cut the Timber required by the Mill Co. (CB113)

[*My emphasis*]

With the exception of surveyor J.B. Launders' identification of Chief George at the False Creek Site in 1869, which is discussed below, the officials' records and correspondence at that time did not name any of the 42 individuals at the site or make any reference to their ancestry or to the language they spoke. The second delegation which approached Magistrate Ball was led by Chief Snatt, who was known to be a Squamish man and the leader of a group of Squamish Indians. He asked for a reserve on the north shore of Burrard Inlet, which became the present-day Mission reserve.

[92] Trutch later met with both delegations on February 17, 1868, and was satisfied that there was an Indian village at the False Creek Site. The next day, he described his meetings in a letter to the Colonial Secretary in Great Britain. He wrote:

Two parties of Indians came to this office yesterday to make application, by Mr. Ball's recommendation, **for tracts of land to be reserved for their use around their villages situated respectively on the South shore of False Creek Bay** and on the North shore of Burrard Inlet immediately opposite Stamp's Mill.

There are no white settlers on either of these tracts of land. That on False Creek Bay is included within the limits of Captain Stamp's timber cutting license, but I cannot see that its occupation by the Indians would interfere with his use of the timber for logging purposes.

.....

I, therefore, beg to recommend that, if on examination of the localities there appear to be no reasons to the contrary, **these reserves be established to the extent of not more than 10 acres to each family, and that the same be surveyed in the spring and duly notified in the Gazette as Indian Reserves. (CB114)**

[*My emphasis*]

[93] Trutch received no reply to this memorandum and the matter remained dormant for well over a year until July 29, 1869, when Chief Snatt complained to A.T. Bushby, another New Westminster magistrate, and said that a white settler had purported to pre-empt a portion of the land he had sought as a reserve for his group of Squamish Indians. The next day, Bushby contacted Trutch about this complaint (CB131). Later, in a letter dated August 14, 1869, Bushby recommended to Trutch that the Indian settlements in Burrard Inlet be surveyed and secured for their residents (CB138). Thereafter, in a letter to the Colonial Secretary respecting the settler's infringement of Snatt's lands, Trutch endorsed the creation of the Burrard Inlet reserves and also recommended that the False Creek Site be surveyed and gazetted. He wrote:

I would recommend that this Indian settlement be surveyed as well as that on False Creek alluded to in the enclosed minute [from Bushby] and established by Notice in the Government Gazette **as permanent reserves for the use of the Indians resident thereon** (CB140).

[*My emphasis*]

[94] On Trutch's instructions, J.B. Launders was dispatched in September 1869 to survey the proposed reserves. He defined a reserve parcel of 37.4 acres (which he labelled "Reserve No. 2", but which was later re-named I.R. No. 6) on the southeast side of the peninsula at the entrance to False Creek. In his field notes, Launders noted the presence of one large structure, which he called a "ranch", and a smaller house. Launders did not mention the ancestry of or the language spoken by the Indians living at the False Creek Site. However, he did identify "Sh-praem" as the chief of the settlement (CB151). All parties agreed that this man was Chief George. He was the chief, or head man, at the False Creek Reserve until his death in 1907.

[95] The Gazette Notice for the Reserve was published on November 27, 1869 (CB158). It announced the allocation of three reserves. Two were on the north shore of Burrard Inlet, and the third was at the False Creek Site. No "tribes" were mentioned. All three reserves were allocated to the "Indians...residing thereon". The Gazette Notice read:

NOTICE IS HEREBY GIVEN that **Reserves for the use of the Indians respectively residing thereon**, have been defined and staked out at the undermentioned places, viz:

IN THE NEW WESTMINSTER DISTRICT

No. 1. Thirty-five (35) acres on the North Shore of Burrard Inlet, immediately opposite the Vancouver Island and British Columbia Spar, Lumber and Sawmill Company's Mill.[10]

No. 2. Thirty-seven (37) acres on the South shore of False Creek, about half a mile from English Bay.

No. 3. One hundred and eleven (111) acres on the North shore of Burrard Inlet, about one mile West of the North Arm.[11]

Plans of the above Reserves may be seen at the Lands and Works Office, Victoria, and at the Office of the Assistant Commissioner of Lands and Works, at New Westminster.

By Command,

JOSEPH W. TRUTCH

Lands & Works Office, Victoria,

November 25th, 1869.

[*My emphasis*]

THE PARTIES' POSITIONS

MUSQUEAM ARGUMENT #1: THAT THE "INDIANS...RESIDING THEREON" WERE EITHER ACTUALLY OR BY NECESSARY INFERENCE A COMMUNITY OF MUSQUEAM INDIANS.

[96] In their pleadings the Musqueam stated that the party of Indians who approached H.M. Ball in 1868 "was a delegation of the Musqueam Indian Band", and that in 1869, at the time of the colonial allotment of the Reserve, "the Indians present and resident on the lands were members of the Musqueam Nation and ancestors of the members of the Musqueam Band".

[97] The Musqueam noted that there was little documentary evidence about who was actually resident at the False Creek Site, and later at the Reserve, prior to the work of the Joint Indian Reserve Commission in 1876-77. Accordingly, in their opening statement at trial, they asserted that "the Indians seeking a reserve at False Creek were primarily Musqueam since the Musqueam people had a long association with the Burrard Inlet area and, in particular, False Creek." In this connection, the Musqueam relied on their oral history, on expert anthropological and linguistic evidence, and on the documentary record to show that Musqueam People lived in Burrard Inlet and at the False Creek Site in the pre-Contact period, and up to and after the creation of the Reserve in 1869. The Musqueam argued that, if the documentary record was silent about the identity of the residents of the False Creek Site in 1869, the evidence of a Musqueam presence elsewhere in Burrard Inlet nevertheless supported the inference that Musqueam People were also present at the False Creek Site at that time.

[98] The Squamish and the Crown responded by saying that the Reserve was allocated only for the use and benefit of the 42 individuals who were represented by the delegation which petitioned Magistrate Ball in 1868. In answer to the Musqueam claim that the False Creek Site was a Musqueam village, they adduced evidence to show that a permanent community of Squamish Indians existed at the False Creek Site in 1869 and that it had been there for some years. Through the expert evidence of Dorothy Kennedy, the Squamish argued that most of the Reserve's residents can be identified at least by 1876-77, when the Joint Indian Reserve Commission conducted a census of the Reserve. Moreover, the Squamish and the Crown said that sufficient evidence existed to infer that the community that was recognized as Squamish by the Joint Indian Reserve Commission in 1877, was the same group of people which was referred to as the "Indians...residing thereon" in the Gazette Notice of 1869.

[99] The Squamish and the Crown also presented evidence to rebut the Musqueam claim that Musqueam People were present in Burrard Inlet in large numbers by 1869. They asserted

that, notwithstanding any traditional Musqueam use of Burrard Inlet or the False Creek Site in the period before non-Indian settlement of the area, the Squamish People predominated throughout Burrard Inlet by the late 1850s. The Squamish and Crown argued that, when reserves were set aside for the "Indians...residing thereon" in False Creek and Burrard Inlet in the colonial period, those reserves were overwhelmingly populated by the Squamish People and recognized as Squamish villages.

MUSQUEAM ARGUMENT #2: THAT AT LEAST SOME MEMBERS OF THE GROUP OF INDIANS PERMANENTLY RESIDING AT THE FALSE CREEK SITE IN 1869 WERE, OR "LIKELY" WERE, MUSQUEAM PEOPLE, AND THAT AN ALLOCATION TO THE RESIDENT INDIANS WAS A RECOGNITION OF A POPULATION COMPOSED OF MORE THAN ONE "TRIBE".

[100] The Musqueam took the position that, even if the False Creek Site could not be considered a Musqueam village populated primarily by Musqueam Indians, there were Musqueam people who lived on the Reserve in 1869. This fact, they say, means that the Musqueam People as a whole, in the form of the present-day Musqueam Band, obtained a continuing interest in the Reserve when it was allocated to its residents. The Musqueam noted that a significant number of current Musqueam Band members can trace a genealogical connection to the Musqueam residents of the False Creek Site in 1869. The Musqueam said that these residents and their descendants have never lost their interests in the Reserve. However, in this litigation, although named in the style of cause, no individual present-day Musqueam band members actually claim personal interests in the Reserve. A reserve interest is claimed only by the current Musqueam Band.

[101] The Musqueam made an alternative claim for an interest in the Reserve on the basis that, even if no Musqueam people were shown to have been actually resident, some unidentified Musqueam Indians "likely" resided at the False Creek Site in 1869. The Musqueam introduced oral history evidence that spoke of a Musqueam presence in Burrard Inlet and False Creek before and after Contact, and they submitted that the Court should draw an inference from this evidence that Musqueam Indians were likely resident on the False Creek Site and at the Reserve both in and after 1869.

[102] The Musqueam also suggested that the colonial officials used generic language and set aside the Reserve for the "Indians...residing thereon" because they understood or suspected that the Indian community at the False Creek Site was composed of Indians from more than one ancestral or "tribal" group. They submitted that, where the colonial officials recognized a clear association between a reserve and a "tribal" group, a reserve was set aside in the name of that "tribe". On the other hand, in the case of locations such as the False Creek Site, where the "tribal" affiliations of members of the community were unknown, the reserve was set aside for a non-specific group of Indians who were described as the "Indians...residing thereon".

[103] The Squamish and the Crown disputed the factual basis for the Musqueam claim that some residents of the False Creek Reserve were Musqueam Indians. They relied primarily on the expert evidence of Dorothy Kennedy to show that, in 1869 and at all times thereafter, the Reserve was a Squamish community composed almost entirely of individuals who considered themselves to be Squamish Indians. Furthermore, if Musqueam or other Indian people were

living at the Reserve, it was because they were married to, or living with, Squamish Indians who were resident on the Reserve. The Squamish and the Crown stated that, in view of the comprehensive and detailed evidence relating to the identity of the residents compiled by the Squamish experts, there is no room for speculation that Musqueam people also "likely" lived at the False Creek Reserve in 1869 and thereafter. As well, there is no room to conclude that a "multi-tribal" community existed at the False Creek Site.

[104] The Squamish and the Crown also challenged the relevance of this Musqueam argument. They said that, even if the Musqueam could show that some or several of the Reserve's residents were Musqueam by blood or repute, the Reserve belonged communally to its members, regardless of their individual "tribal" affiliations. For this reason they submitted that the Musqueam plaintiffs cannot establish a legal connection between an individual Musqueam resident's participation in the community's interest in the Reserve in 1869 and a claim by the present-day Musqueam Band to an interest in the Reserve.

MUSQUEAM ARGUMENT #3: THAT, REGARDLESS OF WHO PERMANENTLY LIVED THERE, MUSQUEAM PEOPLE WERE CONSIDERED TO BE "RESIDING" AT THE FALSE CREEK SITE AT AND PRIOR TO 1869 BECAUSE THEY USED IT ON A SEASONAL BASIS.

[105] The Musqueam said that the colonial officials, by their allocation of the Reserve to its residents, did not intend to restrict the access of Indians, like the Musqueam People, who had traditionally used and who continued to use the site on a temporary or seasonal basis. The Musqueam maintained that the Reserve was allocated to its residents to protect the rights of the Musqueam People to pursue their traditional seasonal activities at the False Creek Site. They argued that, notwithstanding who else may have lived at the False Creek Site on a permanent or temporary basis, Musqueam Indians before and after 1869 used it as a temporary campsite while gathering resources on their seasonal rounds as their ancestors had done for generations. They further argued that the language in the Gazette Notice, which allocated the Reserve to its residents, was selected to recognize and permit Musqueam seasonal use of the site.

[106] Alternatively, the Musqueam suggested that there was insufficient evidence to determine what the colonial officials intended when they used the term "residing" in the Gazette Notice. The Musqueam urged the Court to apply a broad and liberal interpretation to the meaning of "residing" in the context of the colonial allocation. They alleged that a European notion of permanent residence and exclusive ownership were foreign to Central Coast Salish society in which, during the months of good weather, groups of Indians travelled widely on their seasonal rounds.

[107] The Squamish and the Crown responded in two ways. Firstly, they said that, as a matter of policy and fact, colonial officials did not allocate reserves in order to protect sites used by Indians on a seasonal basis. They also said that the colonial policy was to protect Indian settlements from pre-emption by creating reserves for permanent village sites and cultivated plots of land in continuous use. Secondly, even if the theory behind this Musqueam argument were to be accepted, the Squamish and the Crown maintained that there was no evidence that any Musqueam Indians were actually using False Creek on a seasonal basis by 1869.

Notwithstanding Musqueam oral history evidence that indicated that Musqueam people used Burrard Inlet and False Creek before the arrival of non-Indian settlers, the Squamish and Crown asserted that, by 1869, the Squamish People were predominant throughout Burrard Inlet and the only residents and users of the False Creek Site.

MUSQUEAM ARGUMENT #4: THAT, REGARDLESS OF WHO LIVED PERMANENTLY ON THE FALSE CREEK SITE OR WHO USED IT SEASONALLY, MUSQUEAM PEOPLE WERE CONSIDERED TO HAVE BEEN RESIDENTS OF THE SITE BECAUSE IT WAS PART OF TRADITIONAL MUSQUEAM TERRITORY IN 1869.

[108] The final Musqueam submission was to the effect that Musqueam People were among the Indians recognized by the colonial officials as "residing" on the Reserve because the False Creek Site was located in traditional Musqueam territory. The Musqueam maintained that, if people of other "tribes" were permanently resident at the False Creek Site, or periodically using it, they were present only at the invitation of, or with the permission of, the Musqueam People.

[109] The Musqueam acknowledged that there was a substantial Squamish presence in Burrard Inlet by 1869, and later in 1876-77, when the Joint Indian Reserve Commission conducted its work in Burrard Inlet and at the False Creek Reserve. The Musqueam agreed that the Squamish population in Burrard Inlet grew in the middle and latter half of the 19th century until the Squamish eventually became the predominant Indian group in that area. However, the Musqueam submitted that both Burrard Inlet and False Creek were part of traditional Musqueam territory. They argued that the Squamish, whose traditional homeland was in Howe Sound and in the Squamish River valley, came down to live permanently in Burrard Inlet only after the sawmills were established in the 1860s. According to the Musqueam, the Squamish settled primarily on the north shore of Burrard Inlet east of the First Narrows[12]. There they intermingled with and eventually supplanted the Musqueam People at what had formerly been Musqueam villages and campsites.

[110] However, the Musqueam argued that the supplanting of the Musqueam by the Squamish in Burrard Inlet was a gradual process and that, in 1869, when the False Creek Reserve was allocated to its residents, there was still a substantial Musqueam presence in the Inlet. More importantly, the land was still considered by colonial officials to be part of traditional Musqueam territory, despite the relatively recent influx of Squamish people. The Musqueam therefore urged the Court to define the "Indians...residing thereon" according to Central Coast Salish traditions of ownership and residency.

[111] Musqueam expert Dr. Kew testified that ownership of land in Central Coast Salish culture was based on rights of access to resources sites, rather than on linear boundary lines. In his opinion, resource sites were owned and controlled by what he described as core lineage groups. These were groups of individuals who were related by blood. Dr. Kew said that, in practice, access to resource sites was widely shared with persons outside core lineage groups, but that those groups nevertheless protected their ownership of a site. Relying on this model of traditional Central Coast Salish ownership of resource sites, the Musqueam asserted that sites in Burrard Inlet and, more importantly, the False Creek Site were controlled by Musqueam lineage groups.

[112] The Squamish and the Crown repeated their submission that there was no evidence that colonial officials defined residence or ownership in traditional Central Coast Salish terms. Moreover, the Squamish presented their own evidence, including the research of anthropologist Homer Barnett, to show that the Squamish People had also been seasonal users of Burrard Inlet and the False Creek Site before the arrival of the non-Indian settlers.

THE BURRARD

[113] In their pleadings, the Burrard plaintiffs initially took the position that the Indians present and resident on the Reserve in 1869 were, or included, members of the Burrard People. The Burrard rejected the Musqueam claim for an interest in the Reserve and presented evidence and argument to show that the Burrard People were the ancestral users of the False Creek Site. The Burrard noted that, unlike the Musqueam and Squamish, whose ancestral winter villages were at the mouth of the Fraser River and in and to the north of Howe Sound, respectively, the Burrard People were the only Indians with a permanent winter village in the Burrard Inlet. The Burrard said as well that they used all of Burrard Inlet, including False Creek, on their seasonal rounds. However, they did not rely on their ancestral use of the False Creek Site to support their claim to a Reserve interest. Their claim to an interest in the Reserve was based on the Joint Indian Reserve Commission's allocation of the Reserve to the "Skwawmish Tribe" in 1877. There was no issue at trial that, at that time, the Burrard People were accepted as members of the Squamish "tribe". Accordingly, for present purposes, there is no need to discuss the Burrard's traditional use of the False Creek Site.

[114] At trial, counsel for the Burrard took issue with the suggestion made by Squamish experts Randy Bouchard and Dorothy Kennedy that, by 1869, the Burrard People had been assimilated into the larger Squamish population. Counsel for the Burrard called evidence to rebut the evidence about the "Squamishization" of the Burrard People. However, as noted above, since the Burrard claim an interest in the False Creek Reserve based on their undisputed membership in the Squamish "tribe" at the time of the Joint Indian Reserve Commission's allocation in 1877, I have concluded that the respective positions of the Squamish and Burrard on this point are not relevant to any reserve entitlement issues.

SUMMARY OF FINDINGS

[115] I have considered the Musqueam arguments and have reached the conclusions described below. My reasons in support of these conclusions will be discussed at length in the next section.

RE: THE 1869 RESERVE ALLOCATION

[116] I have found no basis for concluding that, as a matter of reserve creation policy, colonial officials took Central Coast Salish traditions into account when they allocated the False Creek Site to its residents. It is clear that such matters had no bearing on the identification of the residents who were allotted the False Creek Reserve in 1869. In the minds of both the colonial officials and the Indians who asked for the Reserve, its residents were the Indian people who were occupying the False Creek Site on a permanent year-round basis in 1869.

[117] Although I have found that Central Coast Salish traditions were not relevant to the

colonial officials' reserve allocation at the False Creek Site, I should note that I was not persuaded that:

i) By 1869, the Musqueam People or a Musqueam lineage group, owned or controlled the False Creek Site.

ii) By 1869, the Musqueam People were seasonal users of the False Creek Site.

RE: THE "TRIBAL" IDENTITY OF THE RESIDENTS OF THE FALSE CREEK SITE

[118] I have decided that, in 1869, and later in 1877, the village at the Reserve was a Squamish community populated overwhelmingly by Squamish Indians. Further, I have concluded that the evidence about the identity of the Indians at the False Creek Site and at the Reserve does not disclose the presence of any Musqueam residents in 1869 or 1877.

RE: THE BURRARD INLET POPULATION

[119] The Musqueam and the Squamish each provided extensive evidence in an effort to demonstrate that their respective ancestors used Burrard Inlet both prior to non-native settlement of the area and up to and including 1869. However, I have decided that it is not necessary to discuss the extensive evidence about the use and occupation of Burrard Inlet over the years. I have reached this conclusion in part because of my finding that the False Creek Site was a permanent Squamish community by 1869. Since that decision was based on direct evidence about who actually lived at the False Creek Site, there is no need to draw inferences about the identity of the Reserve's residents based on general information about the prior use and/or ownership of Burrard Inlet. As well, it would have been unsafe to use the traditional patterns of use and occupation of Burrard Inlet as a basis for any inferences about who used or resided at the False Creek Site by 1869. The 1860s was a time of rapid industrial growth on the Burrard Inlet waterfront and a time of major changes in the Indians' use of the Inlet. Some Indians established new permanent settlements in the Inlet, some moved into housing provided by mill owners and some lived there on a semi-permanent basis.

RE: THE PRESENT MUSQUEAM BAND'S CLAIM

[120] Even if some residents of the False Creek Site in 1869 had been Musqueam Indians, and even if current members of the Musqueam Band are descended from Indians who were resident at the Reserve in 1869, the communal interest which was held by those residents does not provide a legal foundation for the reserve interest which is today claimed by the Musqueam Band.

CONCLUSION

[121] I have found no basis for a Musqueam entitlement to any interest in the False Creek Reserve and a judgment will be issued dismissing both the Musqueam Action and the Musqueam counterclaim in the Squamish Action.

DISCUSSION OF THE FINDINGS

THE 1869 ALLOCATION

The Musqueam Submissions

[122] The Musqueam have said that, in 1869, when the Reserve was allocated to the "Indians...residing thereon", the recipients included the Musqueam People because:

- Colonial reserve creation policy was structured to take Central Coast Salish traditions into account, as evidenced by the opinion of Dr. Lane, by the provisions of the *1868 Indian Act*, and by the fact that colonial documents show that reserve allocations were usually made to identified "tribes";

- Chief Snatt, a Squamish Indian, made claims which indicated that the Squamish had interests only at the Mission reserve on the north shore of Burrard Inlet;

- There was correspondence written by Joseph Trutch which confirmed the multi-tribal nature of the residents at the False Creek Site; and

- A broad and liberal interpretation of the word "residents", which includes a Central Coast Salish concept of residence, is appropriate in the circumstances.

[123] Regarding colonial reserve creation policy, it is noteworthy that the Musqueam did not suggest that colonial officials were obliged by common law or statute to take Central Coast Salish traditions and ancestral or territorial rights into account in the allocation of reserves. Rather, they argued that colonial policy was to actually take them into account. The Musqueam therefore said that the words and actions of the colonial officials should be interpreted in this case on the basis that they recognized such traditions and rights.

Colonial Reserve Creation Policy

The Evidence About Colonial Reserve Creation Policy

[124] In the period from 1850 to 1854, James Douglas entered into a number of treaties with Indian bands on Vancouver Island. His purpose was to open land for growing non-Indian settlement. However, because the treaty process was costly, and because the Imperial government refused to help finance the costs, Douglas only made treaties in situations where land was immediately needed.

[125] In 1858, the discovery of gold in the B.C. interior brought an influx of prospectors. Problems soon developed between the Indians and the newcomers because the latter group did not always respect Indian lands and settlements. On March 14, 1859, Douglas wrote the Secretary of State for the Colonies, Sir Edward Bulwer-Lytton, recommending the adoption of a policy of establishing permanent Indian reserves in the colony. He said:

I have the honour to acknowledge the receipt of your Despatch No. 62, of the 30th December last, containing many valuable observations on the policy to be observed towards the Indian

tribes of British Columbia, **and moreover your instructions directing me to inform you if I think it would be feasible to settle those tribes permanently in villages**; suggesting in reference to that measure, that with that settlement civilization would at once begin; that law and religion would become naturally introduced among them, and contribute to their security against the aggressions of immigrants....

.....

2. I have much pleasure in adding, with unhesitating confidence, that I conceive the proposed plan to be at once feasible....

.....

8. Anticipatory reserves of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. **Those reserves should in all cases include their cultivated fields and village sites**, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.

.....

12.**I would...propose that every family should have a distinct portion of the reserved land assigned for their use and to be cultivated by their own labour**, giving them however for the present no power to sell or otherwise alienate the land.... (CB374-13)

[*My emphasis*]

It is clear from Douglas' letter that he envisioned Indian reserves which would include land for cultivation and which would be permanent communities.

[126] Other correspondence confirms Douglas' policy of setting aside permanent villages and cultivated sites. In a circular to colonial magistrates and gold commissioners dated October 1859, he instructed those officials that:

You will also cause to be reserved, the **Sites of all Indian villages, and the land they have been accustomed to cultivate**, to the extent of Several hundred acres round each village for their Special use and benefits.

(CB32-9)

[*My emphasis*]

The cornerstone of colonial reserve creation policy was permanent and continuous occupation. Douglas described the policy some years later when, in 1874, he wrote:

The principle followed [in setting aside reserves] in all cases, was to leave the extent and selection of the land, entirely optional with the Indians, who were immediately interested in the Reserve...**and to include in each Reserve, the permanent village sites, the fishing**

stations, and Burial Grounds, cultivated land and all the favourite resorts of the Tribes; and, in short, to include every piece of ground to which they had acquired an equitable title, though continuous occupation, tillage or other investment of their labour. (CB223)

[*My emphasis*]

[127] Subsequent colonial and provincial authorities criticized Douglas for being too generous. They felt that, by letting the Indians determine the extent of their reserves, he had unduly restricted the pool of Crown land which was available for pre-emption by non-Indian settlers. After Douglas retired in 1864, colonial officials, with an eye to the current and anticipated migration of non-native settlers to British Columbia, adopted a rule which generally limited reserve allotments to no more than ten acres per Indian family.

[128] The evidence disclosed that the generic phrase "to the Indians residing thereon" was commonly used in colonial reserve allocations. For example, in August 1868, Chief Commissioner of Lands and Works Trutch wrote to an official in the Nicola Lake area[13] advising him to set aside lands "for the use of the Indians resident thereon". In this context, he was referring to lands which had been occupied and partly cultivated by the Indians. Significantly, Trutch went on in the letter to instruct the official about the principles to be followed in reserving land. He wrote:

The extent of land to be included in each of these reservations must be determined by you on the spot, with due regard to the numbers and industrial habits of the Indians **permanently living on the land**, and to the quality of the land itself, but **as a general rule it is considered that an allotment of about ten acres of good land should be made to each family of the tribe**. (CB119)

[*My emphasis*]

This correspondence demonstrated that Trutch considered the "Indians resident thereon" to be only those Indian families permanently living on the land.

[129] There was no evidence that colonial officials like Joseph Trutch or Magistrate Ball concerned themselves with the ancestry or linguistic identity of the petitioners who lived on the False Creek Site. However, even when such matters were raised for their consideration, they were disregarded. For example, Constable Tompkins Brew wrote a letter in which he expressed the opinion that the Squamish People generally were "squatting" on lands in Burrard Inlet (CB129, 130)[14]. Brew clearly believed that the Squamish People had no entitlement to Burrard Inlet reserves based on ancestral occupation and use. Nevertheless, in spite of Constable Brew's opinion, Trutch created the Mission reserve for Chief Snatt and his Squamish followers in Burrard Inlet (CB158). This evidence shows that, even though the Squamish People were viewed by some officials as recent arrivals, they were accepted as the permanent residents of the day. The sole consideration for the colonial officials was that a body of native people had established permanent houses and agricultural plots on a continuously used parcel of land.

Dr. Lane's Opinion

[130] Dr. Barbara Lane is an historian who testified as an expert witness for the Musqueam. She said that, as a matter of reserve creation policy, colonial officials consistently acknowledged the right of native communities to continue to occupy all or part of their traditional territories. Dr. Lane also said that the colonial policy was to establish reserves on the traditional territories of native people for their exclusive use.

[131] Counsel for the Squamish and the Crown took issue with Dr. Lane's conclusions and suggested that they were substantially weakened by the admission in her expert report to the effect that the historical record contained no evidence that colonial officials made "any systematic effort to investigate who were the traditional occupants of any given locality" (EX-M4, p. 36).

[132] To refute Dr. Lane's evidence, the Squamish and the Crown noted that the documentary record from the colonial era shows that colonial officials diminished reserves if they were deemed to be too large for the number of Indians actually occupying the land. For example, Joseph Trutch in August 1868 instructed one of his officials to visit the existing Bonaparte Indian reserve in the southern interior of the Province with a view to diminishing the size of the reserve "within such limits as you can consider proportionate to the numbers and requirements of the Indians residing thereon" (CB119). The Squamish and the Crown said that the colonial practice of tailoring the size of Indian reserves to the numbers of Indians occupying them was consistent with allocations based on current occupation and use and inconsistent with a policy of setting aside reserve lands based on ancient occupancy or use.

[133] In the early 1860s, a small reserve was allocated to Musqueam Chief Tsemlano and his family at a site near New Westminster. There was clear evidence that the colonial officials knew that this area traditionally belonged to the Kwantlen Indians (another lower Fraser River Halkomelem people), and that they had abandoned the site only a few years earlier. However, the reserve was allocated to and retained by the Musqueam despite evidence that the Kwantlen people disputed the allocation (CB82).

[134] In view of the evidence of actual colonial policy and practice discussed above, and in view of Dr. Lane's own admission that colonial officials did not investigate ancestral use, I am not able to accept her opinion. It is clear to me that the Indians who were the then permanent residents of a site were allocated reserves without regard for the duration of their residence or for the identity of any traditional occupants of the land.

The 1868 Indian Act

[135] The Musqueam argued that, although it did not apply in British Columbia at the time of the 1869 allocation of the Reserve, the *1868 Indian Act*[15] nevertheless provided a contemporaneous legislative context for the meaning of the term "residents" as it was used by colonial officials. In particular, the Musqueam looked to section 15 of the Act which codified the concept of "repute" as a means of determining who was entitled to belong to a tribe, band, or body of Indians. Section 15 has been described as the "repute" provisions. It read, in part:

15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and

other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:

Firstly, All persons of Indian blood, **reputed to belong to the particular tribe**, band or body of Indians interested in such lands or immoveable property, and their descendants;

Secondly, All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian **reputed to belong to the particular tribe**, band or body of Indians interested in such lands or immoveable property, and the descendants of all such persons;

...

[*My emphasis*]

[136] The Musqueam said that, in light of these provisions, the policy of the colonial officials was to defer to the traditions of the Indian people when determining issues of community membership. They also suggested that the repute provisions caused colonial officials to incorporate Central Coast Salish traditions into their reserve allocation process. Those traditions included the fact that certain sites were resource-gathering locations for a number of Indian groups on their seasonal rounds. In particular, the Musqueam said that, by choosing to allocate the Reserve to its "residents" instead of specifying the entitlement of a particular "tribe", colonial officials implicitly recognized and protected the rights of the Musqueam People to gather resources at the False Creek Reserve.

[137] As the Musqueam acknowledged, the *1868 Indian Act* was not law in the colony of British Columbia when the Reserve was allocated in 1869. In addition, there was no evidence to suggest that the repute provisions in the *1868 Indian Act* ever actually "informed" the actions of the colonial officials in British Columbia in their allocation of reserves. Based on the limited record available to me, it appears that colonial officials in British Columbia did not concern themselves with band membership issues. Indian communities, once granted reserves, were apparently free to welcome or refuse new residents as they saw fit.

[138] However, the fact that colonial policy allowed the Indian people to determine for themselves the membership of their communities does not, in my view, lead by necessary inference to the second conclusion urged by the Musqueam. It cannot mean that colonial reserve creation policy recognized or endorsed traditional Central Coast Salish notions of residency and property ownership, given that the preponderance of the evidence contradicted this submission.

[139] I have concluded that the reserve creation policy of the colonial officials was motivated by the need to protect permanent Indian villages, settlements, cultivated lands and important cultural sites (such as burial grounds) which were in continuous use from encroachment and pre-emption by non-Indian settlers. There is no credible evidence to suggest that, in setting

aside reserves, colonial officials considered either the ancestral occupation or the seasonal use of a site.

The Pearse Schedule and the Gazette Notices

[140] The Musqueam said that reserve allocations were normally made to specific identified "tribes" but that colonial officials deliberately used the generic phrase "Indians...residing thereon" in situations where more than one group of Indians used a site and where they did not know the groups' identities. In support of their submissions, the Musqueam relied on a letter dated October 16, 1871, from B.W. Pearse to Trutch, who by then had become Lieutenant Governor of the Province. The letter included a schedule (the "Schedule") (CB1374, pp. 55-58) of the Indian reserves which had been surveyed in the colonial period. The Musqueam pointed out that the Schedule contained a column headed "Tribe to which the Natives belong", which showed that 50 of the 75 reserves created in colonial times were allocated to Indians who were identified by a "tribal" name.

[141] I have concluded that the Schedule does not provide evidence about whether "tribal" designations were used when the reserves were allocated. It would be more accurate to describe the Schedule as a summary which shows that, by the time British Columbia joined Confederation in 1871, some 50 of the 75 reserves listed in the Schedule had come to be described using a "tribal" name. The Gazette notices from the colonial period, rather than the Schedule, are the best evidence about the use of "tribal" names in reserve allocations (CB158; 1374, pp. 87-88). The Gazette notices in evidence report the allocation of approximately 46 reserves and indicate that, contrary to the Musqueam submission, the usual practice was to allocate reserves in generic terms for the use of "the Indians", or for the use of "the Indians respectively residing thereon". Approximately 43 of the 46 reserves were allocated in this manner without any reference to a "tribal" name.

[142] The Musqueam placed considerable emphasis on the fact that the earliest of the Gazette notices in evidence shows that, in October 1866, the colonial officials allocated three reserves specifically to the "Kamloops" and "Shuswap" tribes (CB1374-87). The Musqueam interpreted this as evidence that the colonial officials allocated reserves to specific "tribes" if they knew that a single tribe had an exclusive interest in a reserve. By inference, the Musqueam argued, a generic allocation of a reserve to the "Indians...residing thereon" should not be interpreted to provide any "tribe" with an exclusive interest. However, the three reserves allocated to the Kamloops and Shuswap tribes were the exceptions among the 46 reserves, and there is no evidence to show why these allocations were different from all the others.

[143] Based on all the evidence, I have concluded that the colonial officials' ordinary practice was to allocate reserves to "the Indians" or to "the Indians respectively residing thereon". I have also concluded that the use of such generic language does not necessarily indicate that the officials did not know who the residents were, or that the residents were from more than one "tribe". Generic language referring to the "residents" was used so frequently, in what must have been a variety of circumstances, that no reliable inferences about colonial policy can be drawn from its use. In my view, the language used simply indicated that, in most cases, the officials did not concern themselves with the residents' "tribal" affiliations. I note in particular the case of Chief Snatt. When he asked for a reserve, the colonial officials clearly knew that he and his

followers were Squamish (CB129-13). Yet their reserve allocation was nevertheless made to the "Indians...residing thereon"(Reserve No. 1 in CB158).

Chief Snatt's Claims

[144] The Musqueam noted that Constable Tompkins Brew, in the letter in which he described the Squamish as "squatting" in Burrard Inlet, also indicated that Chief Snatt and his group of Squamish Indians "have no other claim" than to the site of the future Mission reserve. As well, in his petition dated August 19, 1869, Chief Snatt disavowed any connection to the Capilano reserve on the north shore of Burrard Inlet and took pains to differentiate his people from those led by Chief Capilano[16] (CB144). The Musqueam suggested that it should be inferred from this material that the Squamish People generally had no other claims in Burrard Inlet and, therefore had no right to the False Creek Site.

[145] However, the evidence indicated that Chief Snatt and his followers were a distinct religious community, and they appeared to differentiate themselves from other Indian groups for that reason (CB144). I therefore am not prepared to conclude that Chief Snatt had taken it upon himself to speak for all the Squamish. In my view, he was speaking for his particular followers and not for the Squamish People generally.

The Trutch Correspondence

[146] The Musqueam argued that a letter sent by Joseph Trutch to Magistrate Ball dated November 25, 1870 (CB171), was evidence that the colonial officials recognized the "multi-tribal" composition of the community at the False Creek Site. With the letter, Trutch forwarded to Ball the maps which had been prepared in the previous year by surveyor J.B. Launders for three Burrard Inlet reserves, including the False Creek Reserve. Trutch instructed Ball to deliver copies of the maps to the "chiefs or principal men of each tribe for their information and that of the neighbouring settlers". Counsel for the Musqueam suggested that copies of all three maps were given to the chiefs or principal men of "each tribe" interested in the three reserves, and that the Musqueam "tribe" was one of the groups to receive the maps. However, no evidence was adduced to substantiate this submission. A more likely interpretation, and the one I accept, is that the chief or head man of each reserve received a copy of the map which pertained to his reserve.

A Broad and Liberal Interpretation

[147] The Musqueam argued that a broad and liberal interpretation of the phrase "Indians...residing thereon" was appropriate for two reasons. Firstly, because the phrase was not otherwise defined in colonial legislation and was therefore open to a broad interpretation and, secondly, because of the circumstances regarding non-Indian pre-emption of Crown land. In this regard, after 1866, *An Ordinance Further to Define the Law Regulating Acquisition of Land in British Columbia*, 1866, 29 Vict. No. 24, prohibited Indians from pre-empting Crown land in the Colony without permission. The Musqueam said that this legislation meant, in practical terms, that vast tracts of traditional Indian land were available for pre-emption by non-Indian settlers and Indian people were limited to their interests reserves. The Musqueam said that, in

these circumstances, "a very broad and liberal interpretation" should be given to the word "residing" in the Gazette Notice.

[148] In this regard, the Musqueam relied on the following statement by Dickson J. in *R.*v. *Nowegijick* (1983), 144 D.L.R. (3d) (S.C.C.) 193 at 198. There, His Lordship said:

...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones* v. *Meehan* (1899), 175 U.S. 1, it was held that: Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.

[*My emphasis*]

[149] The Musqueam reminded the Court that a broad and liberal approach is taken because the honour of the Crown is at stake in all its dealings with native people. In *Badger*, at page 773, Cory J. stated:

Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned.

[150] I have considered these submissions and have concluded that they have no application to the facts of this case. Here, the meaning of the phrase "Indians...residing thereon" in the Gazette Notice is neither in doubt nor ambiguous. The documents make it very clear that the Indians who approached the colonial officials asked for a reserve at the False Creek Site only for themselves and their families - 42 people in total, and that the Reserve was allocated on that basis. The fact that the acreage set aside for the Reserve was related only to the number of Indian families at the False Creek Site supports this conclusion (CB114). In light of the intentions of both the Indians and the officials, as expressed in the documents, I can find no basis for interpreting the word "residing" in the Gazette Notice in favour of any Indians other than those who asked for the Reserve.

Central Coast Salish Traditions

[151] The submission that Musqueam Indians were the residents of the False Creek Site was based on Central Coast Salish traditions. The Musqueam said that, in 1869, regardless of whether they permanently lived on the False Creek Site, they were considered to be residents of the site according to those traditions if:

- the site was in their traditional territory and they "controlled" it by excluding others or by requiring them to obtain permission for its use; or

- they "used" the False Creek Site on a seasonal basis; or

- a Musqueam core lineage group "owned" the False Creek Site.

Territory and Control

[152] In their pleadings, and in their opening at trial, the Musqueam defined for the Court the matters which they considered relevant to a determination about whether the False Creek Site was in their territory. They said that Musqueam People traditionally exerted control over the False Creek Site and surrounding areas to the exclusion of other peoples, and that, if any non-Musqueam residents lived on the site in 1869, they had the permission of, or kinship ties to, the Musqueam People.

[153] On the issue of territory, the Musqueam placed in the Common Book a copy of the Musqueam Declaration of June 10, 1976 (CB1259). It was described as part of the collective oral history of the Musqueam People and it showed that the Musqueam claim that the False Creek Site[17] was within their traditional territory. The Declaration did not specifically indicate that the False Creek Site was a Musqueam village.

[154] Dominic Point was the principal lay witness for the Musqueam Band. He was born on the Musqueam Reserve in 1916, and was 80 years old and an elder of the band when he testified at trial. He has since passed away. He was an important witness for the Musqueam because his evidence included much of the Musqueam oral history relating to False Creek. When asked leading questions by the Musqueam counsel at trial, Mr. Point included the False Creek Site in Musqueam traditional territory. However, when he spoke spontaneously without prompting, he said that Musqueam territory was located around the entrances to the Fraser River. This description would not include the False Creek Site.

[155] Mr. Point also testified that a trail connected a site in Marpole[18] to the False Creek Site. This evidence was offered to suggest that the territory adjacent to and at the ends of the trail belonged to the Musqueam. However, Mr. Point said that Squamish People lived seasonally at both ends of the trail and that Musqueam People did not live year-round at the False Creek Site. Based on this evidence, it appears likely that this trail was used by both Musqueam and Squamish People and that it was only used in the summer months. Accordingly, in my view, this evidence does not show that the False Creek Site was in Musqueam territory. However, there was additional evidence on this issue.

[156] For example, Arnold Guerin (another Musqueam elder) made statements to Dorothy Kennedy and Randy Bouchard in 1983 which indicated that, at some undefined time, the False Creek Site was a Musqueam village and that the Squamish were only "recent arrivals" (EX-M12, pp. 2-3).

[157] As well, evidence was provided by Musqueam elder Frank Charlie. He was an informant for Major J.S. Matthews[19] and he told Matthews that the False Creek area and English Bay "belonged to Musqueams", although he stressed that the Musqueam, Squamish and Sechelt were "always good friends" (CB1222-33). At another time, he told Matthews that all of English Bay and the Point Grey peninsula "belonged" to the Musqueam, and that the Squamish had only come down to Burrard Inlet to work in the sawmills. However, he also stated that, before

moving into the area permanently, the Squamish "camped" in Burrard Inlet and "just" came down to English Bay "to get food" (CB1222-145). This evidence corroborated Squamish oral history evidence which indicated that the Squamish used Burrard Inlet and False Creek seasonally prior to establishing permanent villages.

[158] Musqueam elder Jack Stogan, who was often referred to as Chief Tsemlano, also gave evidence about Musqueam territory. He was an informant for anthropologists A.C. Haddon and Homer Barnett. In 1909, Haddon wrote the Department to pass on a complaint he had received from Chief "Johnny Simlano". The Chief had told Haddon that:

...the white people are not treating his people well. At one time they owned the country from the river to the mountains[20]. (CB630-4)

[159] In 1935, Homer Barnett asked Jack Stogan about the apparently conflicting claims of the Musqueam and Squamish People to certain places in Burrard Inlet (although he did not mention False Creek) (EX-M3, p. 41). Mr. Stogan reiterated Musqueam oral history to the effect that the Squamish People only left their ancestral villages in the Howe Sound area to live permanently in Burrard Inlet because of the employment opportunities afforded by the inlet's sawmills. He maintained that the Squamish had no rights to their new settlements. However, he also told Barnett that the Squamish traditionally came to the Point Grey area to harvest clams.

[160] Long after the colonial allocation of the Reserve and the subsequent work of the Joint Indian Reserve Commission, the Musqueam filed a number of petitions with the Department. In two of them, they claimed an interest in the Reserve and asserted that all of Burrard Inlet was once traditional Musqueam territory[21]. In 1923, the petition of Musqueam elders claimed that:

...before the white man came to B.C. the Musquiam tribe of (Point Grey) were the only real settlers around False Creek, Capilano all over Burrard Inlet as far up as the Tselawata River (Indian River). (CB963)

[161] Four years later, in the 1927 petition, elders representing the "Musquiam Tribe" claimed that certain Musqueam Indians, who were descendants of the original Chief Capilano, lived "year-round" on the Reserve (CB1050). They therefore claimed the Reserve as "our property". The petition claimed that the Squamish People were "absolutely outsiders" and only came to Burrard Inlet to work in the sawmills.

[162] Finally, on the issue of territory, Musqueam expert Dr. Kew wrote of his long association with the Musqueam People and related how they often told him about their occupation of, and rights to, Burrard Inlet. He noted that "there is a strong conviction carried in [the] memories and oral traditions of the Musqueam people, to the effect that they had villages and exercised rights of residence and resource use in Burrard Inlet" (EX-M3, p. 20).

[163] Evidence about Musqueam territory also came from non-Musqueam sources. Peter Pierre and his son Simon were Katzie Indians (a Halkomelem-speaking people) from the Fraser Valley, and they were informants for a number of anthropologists, including Diamond Jenness, Marian Smith, Wilson Duff, and Wayne Suttles. Simon Pierre contributed his views on

the conflicting Musqueam and Squamish claims to Burrard Inlet in a conversation with Dr. Suttles in 1952. He said:

The last keeplenexw (Capilano) had a son. He stayed at Capilano Creek -- because it was Musqueam territory. His name was lewe? He became chief of that tribe. **Then with the coming of the white man they built Moody's Mill...The Squamish people came from their original home on the Squamish River**. Hundreds of people came just to watch the saw cut the logs -- day and night on both sides of the mill...That's how the Squamish came. The only Musqueam there (where the mission is) was skwatetxwemqen...The Squamish set up shacks and tents and worked at Moody's Mill and Hasting's Mill. (EX-B3, pp. 2-3)

[*My emphasis*]

[164] In the same conversation, Simon Pierre told Dr. Suttles that False Creek was "a hunting grounds of the Musqueam -- not Squamish" (EX-B3, p. 6). Simon Pierre also defined traditional Musqueam territory in a conversation with anthropologist Wilson Duff. Duff wrote:

The Musqueam (xwma'skwiem) held the North Arm below the Kwantlens, most of Lulu Island, Sea Island, and the whole of Burrard Inlet to Point Atkinson. There were several permanent villages -- one near Steveston, another on Sea Island, others at Capilano Creek and Seymour Creek -- as well as the main Musqueam village. **The Squamish did not move into Burrard Inlet until the time of white settlement in the Vancouver area**. This information agrees with the statement of Hill-Tout that the early inhabitants of Burrard Inlet were not Squamish, but were related to the Fraser River tribes. (CB1195-38)

[*My emphasis*]

[165] Marian Smith's notes of his conversations with Peter Pierre indicated that Mr. Pierre described a broad Musqueam territory. He said:

Muskwiam ground to the head of Indian River. Squamish belong up at that [Squamish?] River -- different language -- where mission now was Muskwiam. There were seven reserves from Pt. Grey to Indian Arm belonging to Muskwiam. (EX-M11; EX-M3, p. 16)

[*My emphasis*]

[166] Anthropologist Wilson Duff initially created maps which showed that all of Burrard Inlet, including the False Creek Site, was Musqueam territory (CB1195-40; 1217-16), even though it appears that none of his informants were Musqueam or Squamish Indians (EX-M3, p. 44). However, in a later publication, Duff suggested that Burrard Inlet was shared between the Squamish and Musqueam (EX-M3, p. 45).

[167] Having considered all the evidence about territory, I have concluded that Central Coast Salish "tribes" had two different types of territory. Firstly, they had their winter villages with permanent dwellings and related lands, including cultivated sites and burial grounds. These areas I will describe as their "core territory". This territory, it seems to me, could be said to be exclusive territory which was controlled by its occupants. In the mid-1800s, Musqueam core territory included the land immediately around the Musqueam winter village(s) in the lower

reaches of the north arm of the Fraser River.

[168] The second type of territory was what I will call "used territory" because it was seasonally used by the members of a "tribe". Such territory could have been used on an exclusive basis, or it could have been shared with other users. The False Creek Site, at least as late as the early 1800s, appears to have been shared used territory because, as the Squamish oral history states and as some Musqueam oral history evidence acknowledges, it was traditionally used seasonally by at least the Musqueam and the Squamish.

[169] Musqueam oral history includes territory such as the False Creek Site as part of the Musqueam traditional territory. However, even if I accept that it is appropriate for a band to define its traditional territory to include shared use sites, the problem remains that there was no evidence to support the Musqueam pleading that they controlled the False Creek Site in 1869. Indeed, it appears to me, based on the evidence I will discuss in the next section, that, by 1869, the False Creek Site had ceased to be a shared used territory. By then, it had become part of Squamish core territory and was a permanent Squamish village.

[170] Turning to the issue of control, the evidence to the effect that the Musqueam People controlled access to the False Creek Site, such that the Squamish were only there with permission, came primarily from Musqueam witness Dominic Point. During his testimony, it became clear to me that, despite his counsel's repeated use of the word "permission" in framing questions in examination-in-chief, Mr. Point was not comfortable with the term. He preferred the word "report", and said that, in June of each year, the people from Squamish and Sechelt[22] would report to the Musqueam as they arrived to fish in the Fraser River. He said that the Squamish and other non-Halkomelem-speaking Indian peoples used the Fraser River pursuant to a "gentleman's agreement", and that the Musqueam wanted to know the identity of those entering the river. He said that reporting showed respect but that entry was never refused. He also admitted in cross-examination that, if the Musqueam were not present at their villages near the mouth of the Fraser River when other "tribes", such as the Squamish, arrived, then they continued up river without reporting.

[171] Based on this evidence, I find it unlikely that the Musqueam People either actually or notionally controlled access to the Fraser River. The evidence is clear that large numbers of other Indian peoples came there to fish, and it is doubtful if the Musqueam had the practical ability to exclude them or the power to require them to ask permission or identify themselves. In my view, the reporting described by Mr. Point was courteous behaviour by friendly "tribes" at the site of the Musqueam winter village. However, it was optional and did not indicate control of the river which, I have concluded, was Musqueam shared use territory. In any event, I should note that there was no evidence that the Squamish or other peoples reported to the Musqueam or asked permission before they used the False Creek Site.

[172] Mr. Point testified about a story told in the longhouse, which I will call the "Boundary Story". It disclosed that, at an unknown time, a boundary was established between Point Atkinson and Bowen Island during the time of year when fish called the oolachan entered the

Fraser River. This was a six-week period in April and May each spring. Mr. Point first testified that the boundary was set up when the wars with northern tribes began[23]. He also said that, if the Squamish people wanted to cross the boundary, they had to "identify" themselves. Apparently some mistakes were made and several Squamish people were drowned[24]. Mr. Point stated that each year the boundary was removed at the beginning of June. It is noteworthy that, in this version of the Boundary Story, the Squamish were free to pass the boundary once they identified themselves.

[173] Mr. Point later provided a second and different version of the Boundary Story in which the boundary was set up as a control measure to exclude other Indians in an effort to prevent unauthorized oolachan and spring salmon fishing in Musqueam territory. I have not accepted this version of the story for the following reasons. Firstly, according to Mr. Point, the Squamish People had oolachan in the Squamish River so I have concluded that there was no need to control their access to the oolachan in other locations. Secondly, Mr. Point testified that the only salmon in the Fraser River which were of interest to the Squamish People were the sockeye salmon. All others were available in the Squamish River. Accordingly, there would be no reason to "control" Squamish access to spring salmon in the Fraser River. Thirdly, Mr. Point testified that the Squamish and Sechelt peoples did not come south on their seasonal rounds until June, and he said that, by the beginning of June, the boundary was removed[25]. Fourthly, he testified that resources were abundant, so I have concluded that the placement of a boundary to control fishing for oolachan and spring salmon makes no sense. Finally, I have some doubt about whether the boundary ever existed, at least in the location described by the witness. I say this because a line between Point Atkinson and Bowen Island could easily have been avoided simply by travelling on the west side the island.

[174] However, if the boundary existed, I am persuaded that it could only have been established as a means of giving an early warning of the arrival of unfriendly northern "tribes" in times of war. I do not accept that it was a means to control fishing in Musqueam territory. This conclusion is buttressed by an entry in the journals kept by the Hudson's Bay Company traders at Fort Langley on the Fraser River (CB6, 7, 8). The entry describes numerous Squamish Indians (whom the traders referred to as "Whooms") fishing in the Fraser River in April and May of 1828 (CB6, pp. 14-19). This is exactly the time when, if the boundary had been in place to control fishing, it would have excluded the Squamish from the Fraser River. My conclusion is also consistent with the uncontroversial expert evidence to the effect that friendly Central Coast Salish "tribes" shared resources and did not control territories using linear boundaries.

[175] Mr. Point also testified that lookouts were posted on Point Grey, but it became clear that their purpose was to warn the Musqueam People of the approach of hostile Indians in times of war. The lookouts were clearly not part of a scheme to control fishing in the Fraser River or at the False Creek Site.

[176] In another account, which I will call the "Mission Story", Mr. Point testified that there was a time when some Squamish Indians living on the Fraser River were accused of theft by the traders at Fort Langley. Thereafter, the Mission Story states that, at a gathering which included Indian agents and priests from Burrard Inlet, some unidentified Musqueam Indians expressed opinions about whether the Squamish would be welcome to live year-round on the Fraser River and at the False Creek Site.

[177] The facts were confused. It was not clear whether the assembly was a meeting or a trial, and it was not clear where it was held. At one time, Mr. Point testified that it was held at Marpole and at another time he indicated that it was held at the False Creek Site. As well, I found it was difficult to tell whether Mr. Point was speaking about where the alleged Squamish wrongdoers, or the Squamish People generally, might live. However, on balance, it appeared that he was speaking only of the wrongdoers. The clearest evidence on this point was given on December 4, 1996, at page 62 of the transcript. It reads:

So they went to Sen'aqw [the False Creek Site], they had the trial there and there was priests over at Sen'aqw. They came from the Mission Reserve or across there, they came to Sen'aqw to listen to the trial. And the Musqueam says there is a lot of these Squamish people working here. They are going to continue on working. But those others that were accused of theft and all of that up in New Westminster, they can leave Sen'aqw. Don't want them in the Fraser River, don't want them here.

[178] All I can conclude from this story is that, at an unknown time and place, some Musqueam people expressed opinions about where some alleged Squamish thieves might live. This evidence did not, in my view, demonstrate Musqueam control over the False Creek Site at any time. In particular, it did not demonstrate that the Squamish community at the False Creek Site in 1869 was present only with the permission of the Musqueam People.

[179] To complete the Mission Story, I should note that the situation was resolved when the priests decided that the Squamish Indians, who were the subject of the discussion, could live on the north shore of Burrard Inlet at a site which was, or would become, the Mission reserve.

[180] Although I ultimately decided that the Mission Story did not illustrate Musqueam control of the False Creek Site at any time, I did consider, in the course of my analysis, whether the events Mr. Point described made it possible to assign the story a date. The evidence indicated that Squamish Indians were settled permanently at the Mission site by the early 1860s, and that priests, who were based in New Westminster, travelled there periodically to offer services. By the mid-1860s, the priests had taken up full time residence at the Mission site. Accordingly, the events described in the Mission Story probably occurred after 1860. Mr. Point also said that the events occurred when the church was under construction at Mission, but at another time he said that, when the events occurred, the church had already been built. The difficulty was that two churches were built at Mission, one in August 1868 and one in 1884. Mr. Point testified that he had read the journals written by the traders at Fort Langley and that the Mission Story was described in their entries between 1828 and 1830. However, this must have been incorrect because there were no priests at the Mission site at that time. At another place in his testimony, Mr. Point indicated that the Mission Story happened when some Squamish People were working at the sawmills in New Westminster and Burrard Inlet. The mills in New Westminster started circa 1860, and the Burrard Inlet mills started briefly in 1865 and were in full operation by the late 1860s. Mr. Point also testified that Musqueam Band Chief Johnny was involved in suggesting a location for the gathering, and it is clear from Departmental records that Chief Johnny was elected chief of the Musqueam Band in 1893, long after the creation of the Mission reserve. Finally, Mr. Point indicated that Indian agents attended the meeting, and other evidence indicated that Federal Indian agents did not actually take charge in British Columbia until some time after 1876. Given this array of conflicting information, I have been unable to assign a precise date to the Mission Story which, as I indicated, the witness himself could not date. All I can conclude is that it must have occurred after 1893, because that is when

Chief Johnny was elected chief. Accordingly, the Mission Story, in addition to not offering evidence of control, did not describe events which occurred around 1869.

[181] Finally, to complete a review of the evidence on the issue of control, Peter Pierre told Diamond Jenness that the Musqueam controlled Burrard Inlet prior to the arrival of the Squamish. He said:

The Musqueam controlled both shores of Burrard Inlet even the north end of Indian Arm. After the whites settled around Vancouver the Squamish came down and settled along the north shore (CB1102-65; EX-M3, p. 16).

[*My emphasis*]

[182] In my view, the Musqueam have not supported their pleadings with evidence to demonstrate that colonial officials acknowledged anyone but permanent residents in their reserve creation policy. As well, even if the policy had been more inclusive, the Musqueam have not shown that colonial officials had any reason to conclude in 1869 that the Reserve was in territory which was controlled by the Musqueam, such that the Squamish were present at the False Creek Site only with permission.

Seasonal Use

[183] The Musqueam argued that, in interpreting the phrase "Indians...residing thereon" in the Gazette Notice, the Court should recognize and acknowledge that Musqueam people were residents of the False Creek Site because, notwithstanding any Squamish presence, the Musqueam had used the site on a seasonal basis in ancestral times and up to, and after, the 1869 colonial allocation. This submission, which was particularly emphasized in final argument, was said to be based on Musqueam oral history evidence. The Musqueam asserted that the colonial officials understood and recognized that the Indian community at the False Creek Site was fluid and mobile in 1869, with some groups using it as a campsite while pursuing their traditional resource-gathering activities, while other groups used it as a permanent home while participating in the developing wage economy.

[184] However, there was no evidence from the Musqueam which showed that the Musqueam People actually used the False Creek Site on a seasonal basis in 1869. Dominic Point provided oral history evidence which indicated that the Musqueam used the False Creek Site in the time before the arrival of the "white man"[26] (which he said meant before 1800). He testified that the site was used only seasonally in the autumn months for duck hunting, sturgeon fishing, and as a source of spring water. During this seasonal use, the Musqueam would camp in tents made of bull rush mats which were easy to transport by canoe. There were no longhouses or permanent structures in place at the False Creek Site in this period. Mr. Point acknowledged that, before the "white man", the Squamish People and other Indian peoples also used the False Creek Site and Burrard Inlet, and sites up the Fraser River, on a seasonal basis. He testified that, because resources were abundant, this shared use did not result in any conflicts.

[185] After the arrival of the "white man", Mr. Point said that seasonal use continued but that mat tents were replaced by temporary shelters made of waste lumber from the sawmills. There were no sawmills in False Creek until late in the 1890s, so until then the waste lumber had to come either from the Fraser River, where the mills started circa 1860, or from Burrard Inlet where, after a false start in 1865, the mills began to operate in earnest in 1869. In either case, it seems unlikely that waste lumber could have washed ashore or been brought the long distances from the mills to the False Creek Site. It seems most probable that Mr. Point's evidence about temporary shelters made of waste lumber could only have related to the late 1890s and early 1900s at the earliest, when sawmills began to operate in False Creek. For this reason, I have not accepted Mr. Point's testimony as evidence that Musqueam Indians used False Creek on a seasonal basis in or after 1869. While Mr. Point's evidence was wrong in time, it may have been correct in substance. After the 1913 Sale and the departure of the Reserve's residents, the evidence disclosed that squatters lived along the shores of the Reserve in huts made of waste lumber.

[186] What emerged from Mr. Point's testimony in cross-examination was evidence that, after the "white man" came and Vancouver began to develop, the Musqueam moved away from Burrard Inlet and from the False Creek Site ("Sen'aqw"). In this regard, the transcript reads as follows[27]:

Q And I take it there was no conflict between the Squamish and the Musqueam about using seasonal places, that there was plenty for everybody and so they could use the same place in a season if they wished to; is that right?

A That's correct, yes.

Q So they didn't fight over whether or not a person could fish at a particular beach or whether a person could do that, they would each use the seasonal areas in the Burrard Inlet?

A That is right, yes.

Q Okay. And is if fair to say that one of the sites we have been talking about, obviously of some importance, but Sen'aqw was a seasonal site for both the Squamish and the Musqueam people before white men came?

A Yes.

Q Now, after the white man came obviously Vancouver started to be built up and Indian people, some Indian people, wanted to live closer to Vancouver so they could have jobs and make a living, correct?

A That is correct. The Musqueams moved away from there after the white people were properly established over there.

Q Yes. But people started wanting to live over, perhaps, over the winter, where they previously had just been using it as a summer place?

A The Squamish people did.

[187] It is noteworthy that the thrust of this evidence, which suggested that the Musqueam abandoned the False Creek Site after the Squamish established permanent residence, was supported by Squamish oral history informant August Jack. He told Indian Agent Fred Ball that, **before** the Squamish built their big house at the False Creek Site, the Musqueam **occasionally** went there to fish but never built any kind of residence (CB1222-10). His failure to refer to any fishing after the Squamish built their big house strongly suggested to me that no such fishing occurred.

[188] From a review of all the evidence described above, I have reached the following conclusions about the use of the False Creek Site:

- Until circa 1850, the False Creek Site was not used by any Indian people as a year-round place of residence. However, it was used seasonally by both the Musqueam and the Squamish and perhaps by other Indian people.

- At some date prior to 1861, as the wage economy developed, some Squamish Indians began to live year-round and permanently at the False Creek Site. The Musqueam did not make that change.

- The evidence does not support a finding that the Musqueam were using the False Creek Site on a seasonal basis in 1869. Indeed, it suggests that the Musqueam terminated their seasonal use of the site when the Squamish took up permanent residence.

Lineage Group Ownership

[189] The Musqueam also said that some of their people should have been considered to have been residents in 1869 based upon the submission that a core Musqueam lineage group "owned" the False Creek Site.

[190] At trial, Musqueam expert Dr. Kew introduced the concept of the Central Coast Salish "lineage group" and stated his opinion that, within each Central Coast Salish extended family, there was a core group of individuals - a lineage group -- whose members were related by blood. According to Dr. Kew, the lineage group was the institution in Central Coast Salish society that owned the rights of access to resource sites enjoyed by an extended family. Relations who became affiliated with a core lineage group through marriage (the "affinal" kin) enjoyed access to resource sites only by affiliation to, and with the permission of, the lineage group. However, Dr. Kew testified that, in practice, because generosity was a mark of status in Central Coast Salish culture and because resources were abundant, a lineage group rarely restricted access to a site.

[191] The Squamish called experts to challenge Dr. Kew's emphasis on the property-owning prerogatives of the lineage group in Central Coast Salish society. Dr. Pamela Amoss and Dorothy Kennedy disagreed with Dr. Kew's view that a core lineage group of blood relatives owned and controlled access to resource sites. Instead, they said that resources were "owned" or used by extended families or households (which included affinal kin), and by villages (which could include more than one extended family or household) and even by individuals. According to Dr. Amoss, rights of access to resource sites were granted to community members based on a recognition of the amount of labour they devoted to exploiting the resources.

[192] On balance, I prefer the evidence of the Squamish experts to the effect that broad family groups (which would include affinal kin) or village groups were the social units associated with resource sites. I prefer this conclusion because it seems to be more consistent with other aspects of Central Coast Salish culture. As noted earlier, exogamy was practiced and mixed heritage was the norm. In such a social climate, it seems unlikely that affinal kin would be excluded and only people with blood ties would control resource sites. However, I need not reach a final conclusion on this issue. Perhaps because of the widespread abundance of resources, Dr. Kew's opinion about resource sites being owned by core lineage groups is entirely theoretical. There was no evidence of any Musqueam lineage group actually exercising ownership rights over sites or excluding others from sites.

[193] In particular, there was no evidence that any Musqueam lineage group ever owned the False Creek Site. Dr. Kew did say that two women, who were members of the Capilano lineage group, lived at False Creek in 1869 with their husbands. He also suggested that a son of Chief Capilano lived at the False Creek Reserve[28]. However, nowhere did Dr. Kew or any

other witness suggest that the presence of these people meant that the Capilano lineage group (which the Musqueam said was a Musqueam lineage group) controlled or owned the False Creek Site.

THE "TRIBAL" IDENTITY OF THE RESIDENTS OF FALSE CREEK

The Oral History Evidence about the Reserve and its Residents

[194] The Musqueam and Squamish both presented oral history evidence relating to their respective affiliations to False Creek. As the trial progressed, it became apparent that most of the oral history came from a small number of informants. For example, James Point, Arnold Guerin, Jack Stogan and Frank Charlie were often named as informants by Musqueam lay witnesses and experts, while August Jack and Louis Miranda were frequently relied on as authorities for Squamish oral history. Because many witnesses at trial only testified about what they had been told by an identified informant, I have described the evidence as being that of the informant. For example, I will discuss James Point's evidence, rather than the evidence of the witness Delbert Guerin, since Mr. Point was Mr. Guerin's informant.

[195] As mentioned earlier, I considered a substantial amount of oral history evidence which dealt with the history of Burrard Inlet. However, only the oral history evidence which was relevant to False Creek is described below.

For the Musqueam, the evidence was from:	For the Squamish the evidence was from:
1. Dominic Point	8. Louis Miranda
2. James Point	9. August Jack

3. Arnold Guerin 10. Chief George

4. Frank Charlie 11. Squamish Charley

5. Jack Stogan 12. George Johnny

6. Peter and Simon Pierre 13. David Jacobs

7. The Musqueam Petitions 14. Louise Williams

15. Allen Francis Lewis Louis

16. David George Williams

17. Jimmy Frank

1. Dominic Point - *he was a Musqueam lay witness at trial*

[196] In addition to the evidence described earlier, Mr. Point stated that his great-grandmother "P'eliqwiye" was a Musqueam woman who once lived at the False Creek Reserve. He also identified Musqueam Band members Alec Dan and Gabriel Joe as residents of the Reserve. His evidence about these three people will be discussed in detail in the upcoming section entitled *Profiles of the Residents of the False Creek Reserve* (the "Profiles Section").

2. James Point - *he was a Musqueam informant for Delbert Guerin who, in turn, was a Musqueam lay witness at trial*

[197] A second important informant for Musqueam oral history was Dominic Point's uncle, James Point. He was born in 1879 or 1881 and died in 1979. One of his grandmothers was P'eliqwiye, and he told Delbert Guerin that, as a small boy, he recalled watching the great Vancouver fire of 1886 with his grandmother at the Reserve. At another time, when Delbert Guerin and James Point were driving through Vancouver, Mr. Point told Mr. Guerin that "our people" lived at False Creek. Later, in the same conversation, he also told Mr. Guerin that Indian people (whom Mr. Guerin assumed were Musqueam) used False Creek on a seasonal basis. Mr. Guerin testified that James Point had said that, as an adult, he stayed at the Reserve while working at a sawmill in Vancouver. Unfortunately, the evidence did not disclose when, or more importantly, for what period and on what basis James Point stayed at the False Creek Reserve. In particular, it did not show whether he stayed as a guest with friends or family, or whether he had his own residence.

[198] James Point also discussed the settlement of the False Creek Site. In a conversation with Dr. Suttles in 1963, James Point said:

There were no people on False Creek then (1850s). People came only after Vancouver was established (EX-B3, p. 9)

Based on this evidence, it appears that there was no permanent Indian village on the False Creek Site before the 1850s.

3. Arnold Guerin *- he was a Musqueam informant for Squamish expert witnesses Dorothy Kennedy and Randy Bouchard*

[199] Arnold Guerin was another elder of the Musqueam Band. He was a Halkomelem speaker and an informant for Musqueam genealogical history. Mr. Guerin spoke to Squamish experts Dorothy Kennedy and Randy Bouchard in 1983 about Musqueam claims to the False Creek Reserve. In consequence, they wrote:

AG heard that the Squamish liked to come here because things were rough up the Squamish Valley because of a particularly heavy snowfall and it was this fact, plus the knowledge that there were lots of mussels here, that brought the Squamish to sen7okw - AG's older sister (81 yr. old now) attended an Indian dance (winter dance) here when she was a little girl -- some of her relatives (they were Musqueam) were living here -- among them was Gabriel Joe's (from Musqueam) mother, Mary whose father was at least part-Squamish. AG recalls that Alec Dan lived at sen7okw, but AG can't recall exactly when this was. AG knows that the loss of sen7okw was a very "sore point" with his father's generation -- they felt that it wasn't "fair" that the Squamish, who they saw as only recent arrivals at **the Musqueam village**, should be the beneficiaries of the sale and should "claim" the place. (EX-M12, pp. 2-3)

[*My emphasis*]

In this passage, when he spoke of his sister's attendance at a dance as a little girl, Mr. Guerin mentioned that a number of Musqueam people lived at the Reserve in the years just prior to the 1913 Sale. He also identified Gabriel Joe's mother Mary as having some Squamish blood. It is not clear from this excerpt if other Musqueam relatives of Mr. Guerin's sister also lived at False Creek at this time, or how she was related to Mary. Finally, Mr. Guerin also recalled that Alec Dan, who was a Musqueam Band member, lived at the Reserve. These individuals are also discussed in the Profiles Section.

4. Frank Charlie **-** *he was a Musqueam informant for historian Major Matthews*

[200] Frank Charlie's evidence relating to the Musqueam and Squamish seasonal use of Burrard Inlet and English Bay was described earlier. Although he asserted that False Creek and English Bay "belonged" to the Musqueam, he agreed that the Squamish camped in the area "to get food".

5. Jack Stogan *- he was the chief of the Musqueam Band and an informant for anthropologists A.C. Haddon and Homer Barnett*

[201] As related earlier, Jack Stogan, also known as Chief Tsemlano, made general assertions of Musqueam ownership and control over the Burrard Inlet area. He also signed the 1923 and 1927 Musqueam petitions which are discussed below in paragraph seven.

6. Peter and Simon Pierre **-** *they were Katzie Indians and informants for a number of anthropologists and historians*

[202] As mentioned above, Simon Pierre, an elder of the Katzie Band in the lower Fraser River valley, told Musqueam expert Dr. Suttles in 1952 that the False Creek Site was originally the "hunting grounds of the Musqueam -- not Squamish" (EX-B3, p. 6).

7. The Musqueam Petitions

The 1912 Petition

[203] In petitions made by Musqueam band members, the Musqueam claimed that Musqueam people lived at the Reserve. However, the first of these petitions was not made until 1912, when rumours surfaced about a pending sale of the Reserve. This petition, dated January 23, 1912, was made by Chief Johnny Musqueam to Indian Agent Peter Byrne. Chief Johnny claimed that the False Creek Reserve belonged to the Musqueam. He wrote:

We were all together talking and we heard of Falls Creek Reserve is to be sold, I am going to tell you that, **and that Indian Reserve belong to the Musqueam tribe and the Indian that settle in that Reserve are all half Musqueam & Squamish** and my grandfather was half Musqueam that whay they call him Capalano that why they stayed around Fals Creek & Capalano & Seymour Creek Reserve thats why all other half Musqueam & Squamish stayed here the

Squamish Reserve is in the Squamish River, if you want to know you can ask the old man Pierre father of Fals creek he tell you the same. Please see to this the Agent Mr. Devlin know this I told him before he might have it in the Indian office. (CB675)

[*My emphasis*]

Indian Agent Peter Byrne responded to this petition in June of 1912, but he did not deal with the ownership claim. He said only that he knew nothing of a pending sale of the Reserve (CB1050).

The 1923 Petition

[204] The next petition was submitted in 1923 by certain Musqueam elders in support of the Burrard People's claim to be treated separately from the Squamish People in the process of Amalgamation. The purpose of this petition was to claim Musqueam heritage for Chief George "Sleighult", the leader at Burrard Indian Reserve No. 3. But the petition also repeated Musqueam claims to False Creek and Burrard Inlet generally. It said:

This note is to explain that before the white man came to B.C. **the Musquiam tribe of (Point Grey) were the only real settlers around False Creek**, Capilano all over Burrard Inlet as far up as the Tselawata River (Indian River).

.....

Witnesses

Old Tom Tse-la-wal-tun

age over 100 years

Pierre Bob

Musquiam Charlie

Musquiam Tommy

Louis Harry

Chief Tsem-lan-no (CB963)

[*My emphasis*]

The 1927 Petition

[205] Another petition was delivered on August 29, 1927, when a delegation of Musqueam leaders met Indian Agent C.C. Perry. This petition again came at a time when there was speculation about a possible sale of the False Creek Reserve. The petition began with a description of the Musqueam ancestry of Chief Capilano and the association of his descendants with the Musqueam and Capilano reserves. The petition then referred specifically to the False Creek Reserve, which it described as the "Kitsilano Reserve". It stated:

We the undersigned have the right to claim the Kitsalano Capilano and Seymour Reserves.... Some of the Musquiam Indians lived on the Kitsalano Reserve all the year round, Chief Tsem-lano as their leader, Old Jim Salemten and his family who lived there, these people mentioned were born and raised as Musquiams and are descendants of Chief Capilano from the first generation. The fishing grounds were over crowded at the mouth of the Fraser River therefore many went to False Creek to get there winters supply, where they had sturgeon traps set, with these traps; Salmon and other kinds of fish were caught, a practice carried on from generations back.

The Squamish came to Burrard Inlet to live for the purpose of working at the sawmills they spoke a different language and were considered outsiders. By this statement we wish the government to know and understand that we have the authority to claim the "Kitsalano Reserve to be our property."

We might recall that the said Kitsalano Reserve was sold without the consent of the Musqueam Chief. The late Chief Johnny made inquiries to the Indian Department when it was first rumoured that it was to be sold, the reply was; from the late Peter Byrne saying he had not heard anything about it, the letter is dated June 1912. When the reserve was sold, the Musquiams were entirely ignored. We wish to remind the Government of our claim now as we understand that there is to be **a settlement**.

Chief Tsemlano

James Point

Casimir Johnny

Aleck Peter (CB1050)

[*My emphasis*]

The Chief Tsemlano referred to in the text of the petition was an ancestor of Jack Stogan, who was also named Chief Tsemlano. This petition was the only evidence of any kind which affiliates Chief Tsemlano's family to the Reserve. The "tribal" affiliation of Old Jim "Salemten" and his family is a matter of dispute and is discussed in the Profiles Section.

[206] The Department rejected this petition by noting that the Reserve had been set aside for the "Kitsilano or False Creek branch of the Squamish Indians" in 1877. The Department also observed that the Musqueam did not make a claim to the Reserve before the McKenna-McBride Commission in 1915 when they had the opportunity to do so (CB1052).

The 1929 Petition

[207] The Musqueam petitioned a final time, on May 17, 1929. The petition was again directed to Indian Agent C.C. Perry. It was an appeal to the Department to clarify the beneficial interest of the Musqueam Band "in the various reservations set aside for them" and to "convene all those interested and ascertain what lands or other rights the Musqueam Band of Indians is entitled to..." (CB1065). While this petition did not refer to the False Creek Reserve, it is clear from Indian Agent Perry's response that the Musqueam representative, Fred James, raised the Musqueam claim to the Reserve when he presented the petition to Perry. On June 11, 1929, Agent Perry reprimanded the Musqueam for failing to comprehend the extent of their reserves and also decided that their claim to an interest in the Reserve could not be discussed with the Squamish. He wrote:

Since Mr. James, your representative, was here yesterday bearing this petition I have taken more time to consider the suggestion offered by him that a delegation of the Musqueam Indians should some time in the future meet with the Squamish Indian Council to discuss any questions arising in the matter of **the Musqueam Band's claim to revenue from the Kitsilano Reserve No. 6**. I have also

carefully considered the resolution of the Squamish Council of April 16th[29], a copy of which is sent herewith, and have decided that it would serve no good purpose to have such a discussion, but on the contrary might give rise to serious trouble. I therefore must decline to allow such discussion to take place. (CB1066)

[*My emphasis*]

[208] A committee of Musqueam members responded to Perry on June 15, 1929, and this time the petitioners referred specifically to their claim to the False Creek Reserve. They said:

Frankly we do not know the matters about which we petitioned you; possibly the fault is not

entirely our own. So far as I can ascertain, no member of our band has even seen the findings of the Royal Commission[30] referred to in your letter, or "the official records" likewise referred to, as defining the ownership of the Kitsilano Reserve. **We have always believed that we had rights in any reserve which has been used by our band in the past. This applies particularly to the Kitsilano Reserve, in which we believed we had an interest**. We should like to see the findings of the Royal Commission and have copies of the "official records" referred to. (CB1067)

[*My emphasis*]

The Department sent a letter in reply which contained a brief description of the reserves allocated by the Joint Indian Reserve Commission to the Musqueam (CB 1069). The Musqueam claim to rights in the False Creek Reserve was not addressed.

[209] It is apparent that the petitions claimed an interest in the Reserve based on past seasonal use of the site and on the fact that Musqueam Band members were the descendants of former residents of the Reserve. In many respects, the claims made in the petitions mirror the Musqueam arguments in this trial to the effect that the reserve lands were in Musqueam territory and were seasonally used and should therefore have been allocated to the Musqueam. It is interesting that the petitions did not object to the allocation of the Reserve to the Squamish. Rather, they asserted claims to the Reserve based on aboriginal rights and title.

[210] Regarding the individuals named in the petitions who are alleged to have been Musqueam Indians who lived at the Reserve, there is no other evidence linking Chief Capilano or Chief Tsemlano to the Reserve. Old Jim Salemton was a Reserve resident from at least 1877 to 1913, but the Squamish argued that he was not a Musqueam man. His ancestry is discussed in the Profiles Section, where I have concluded that Old Jim and his children Pierre and Susan were not Musqueam Indians, and that his daughter Mary, if she became a Musqueam band member through her marriage, did not live at the Reserve by reason of her association with the Musqueam People.

8. Louis Miranda - *he was a Squamish informant for expert witnesses Dorothy Kennedy and Randy Bouchard*

[211] Squamish elder Louis Miranda provided information to Dorothy Kennedy and Randy Bouchard. He spoke of a Squamish woman named "Selisiya" who was married to a Musqueam man (EX-M52). Selisiya told Louis Miranda that the Musqueam used to live at the False Creek Site "a long time ago ... before the Squamish people" and therefore should have received money from the 1913 Sale.

[212] Louis Miranda was a resident of the Reserve and was paid by the Province in the 1913 Sale. In 1984, he sketched a map of the houses located at the False Creek Reserve, circa 1912, and listed the owners of each dwelling. As will be discussed below in the Profiles Section, Dorothy Kennedy identified most of the individuals shown on Louis Miranda's map as Squamish Indians.

9. August Jack - *he was a Squamish informant for historian Major J.S. Matthews*

[213] August Jack Khatsalano was born in 1877 and died in 1967. He was a Squamish man who lived at the False Creek Reserve and, after the 1913 Sale, he was paid by the Province for his interest in the Reserve. His father was Supple Jack, who was mentioned on a map drawn by Attorney General H.P.P. Crease in 1863. Supple Jack lived on the Government Military Reserve (now Stanley Park) near a site now known as Lumberman's Arch.

[214] Major J.S. Matthews was an amateur historian and ethnologist, and, between 1932 and 1954, he wrote a book which was a compilation of oral histories entitled *Conversations with Khatsalano*. August Jack was the primary informant for the book. August Jack told Matthews about the beginnings of the village at the False Creek Site and said that Chief George migrated to the site from the Squamish River "early in the nineteenth century" and there established the first Indian settlement (CB1222, pp. 9, 12). Counsel for the Musqueam questioned the reliability of Matthews' work noting, in particular, an incident in which Matthews encouraged August Jack to portray himself as having been born at the False Creek Reserve, when that was not the case (CB1222-99). However, while I accept the need for caution in approaching this material, I note that Musqueam expert Dr. Kew was prepared to rely on evidence recorded by Major Matthews, including observations from August Jack and from Musqueam Band member Frank Charlie (EX-M3, pp. 36-40). I have decided that the information from August Jack about the Squamish settlement at the False Creek Site is reliable because it is consistent with other evidence which suggests that, at least in the 1800s, there was no permanent settlement at the False Creek Site until Chief George appeared as the leader of the community.

[215] August Jack was also an important source of information about the Squamish use of the False Creek Site. In 1932, Indian Agent Fred Ball noted that August Jack had told him that:

Chief Chip-kay-m, or Chief George was first chief to make a home at Hat-sa-lah-no[31], he and his brother-in-law, Chief Andrew's father. They built canoes there and dried smelts and made traps on the sandbar (Granville Island) for flounders, perch, etc. **They built a big house there, a great potlatch house. Before that, the Musqueam Indians occasionally went there to fish, but never established residence of any kind. Chief George Chip-kay-m came from the far end of the Squamish River to settle where the Kitsilano Reserve is now. They lived there all the time except when up Squamish drying salmon in summer.** (CB1222-10)

[*My emphasis*]

As noted earlier, it appears from this report that Musqueam seasonal use of the False Creek Site ended when the Squamish became permanent residents.

[216] August Jack also responded to a question from Major Matthews about the Musqueam assertions that the Squamish never lived in False Creek and English Bay before non-Indian settlement. He said that the Squamish were the only Indians to establish a permanent presence on the False Creek Site. Major Matthews wrote:

August Jack (smiling): 'Musqueam's got no claim. They claim Snauq[32], but they've got no

rights. They not build a house there; Squamish build house there. Musqueams just come round from North Arm to fish on the sandbar (Granville Island) and up False Creek, and then go away again, but Squamish build house. (CB1222-29)

10. Chief George **-** *his evidence was recorded by an Indian agent at a False Creek Reserve band council meeting*

[217] On January 4, 1904, the Indians at the False Creek Reserve (the "False Creek Band")[33] met to discuss a proposal to surrender and sell the Reserve. Chief George expressed opposition to the proposal and emphasized his personal and family ties to the Reserve. Indian Agent R.C. McDonald recorded the following:

Chief says that he does not want to sell the land because it belonged to his Grandfather... He didn't want to leave this place where he was borne and it is the place where his dead relatives are buried -- none of the men on the place want to sell it -- the Queen give him and his people the land. (CB529)

This statement is significant because it links Chief George's family to the False Creek Site at a time prior to non-Indian settlement of the area. Chief George was born circa 1830[34], and it is reasonable to infer that his grandfather used the site before that date. Chief George does not say whether his family used the site seasonally or lived there permanently at the time of his birth, but he clearly expressed a sense of entitlement to the site when he indicated that it "belonged" to his grandfather. However, Chief George did not say that his ancestors were Squamish Indians. His tribal affiliation is disputed and is discussed more fully in the Profiles Section.

11. Squamish Charley - *his evidence was recorded in a letter he wrote to the Department*

[218] In the aftermath of the 1913 Sale, an elderly Squamish man named Squamish Charley made a claim to proceeds from the sale, and, in his letter to the Department in 1913, he provided some information about who was resident on the False Creek Site before 1869. He said:

I was born on the Kitsilano Indian reserve, can remember CHIEF ANDREW[35] when he was a little boy, this reserve has always been my home. My father's name was Peter he was buried in Squamish, my mother's name was SAH-WALD-NAH; she had no other name, she also buried at Squamish.

I originally belonged to that reserve, my wife was a sister of Chief George's wife. We were partners in the house we lived in, Chief George wanted to own the largest share in the house, he paid $200 towards the building, I paid $50. After Chief George died I took possession of the house in which we had both been living, we had always lived together after the house had been built...

I belong to the Reserve, and am a Squamish Indian, if any one should get money I should.

.....

I knew James Douglas at the time the Reserves were given to the Indians, my father and mother were then living on the Kitsilano Reserve... . (CB 740)

[219] According to Dorothy Kennedy, Squamish Charley was born circa 1853. Based on this evidence, he would have been 16 at the time of the allocation of the Reserve, and it is likely that his Squamish family was part of the group of 42 Indians who petitioned Magistrate Ball for the Reserve. Squamish Charley was not living on the Reserve when it was sold to the Province in 1913. Nevertheless, the Department recognized the validity of his claim (CB668).

12. George Johnny - *his evidence was recorded in his letter to the Department*

[220] George Johnny was another Squamish man who claimed an interest in the Reserve at the time of the 1913 Sale. In so doing, he commented on his family's connection to the Reserve in colonial times, and mentioned Chief George's background. In a letter to the Department dated April 28, 1913, he wrote:

Chief George was the first Indian Chief of the Kitsilano Indian Reserve, he was there when Sir James Douglas came to B.C. Chief George was my father's brother, my father and mother died when I was young, before Sir James Douglas came to British Columbia. So Chief George adopted me as his son, and raised me until I became a man.

.....

...I cannot understand why Chief Andrew kept me my two sons and Squamish Charlie from receiving any money from the sale of the Kitsilano Indian Reserve, we were the original owners, and are still part owners of this property, so that I must be paid for my rights to this Reserve the same as any other Indian. (CB733)

[221] George Johnny was born circa 1856 and was probably also a member of the group which petitioned colonial officials for the Reserve. The Department endorsed his claim for membership in the False Creek Band and added his name, and those of his two sons, to the final pay list of persons interested in the Reserve (CB802, 668).

13. David Jacobs - *he was a Squamish lay witness at trial*

[222] Squamish lay witness David Jacobs is an elder of the Squamish people. He gave evidence in which he described his ancestry, and he demonstrated familial connections to Supple Jack, August Jack and Chief George. Mr. Jacobs testified that all three men were Squamish Indians. He also testified that Squamish elders August Jack, Dominic Charlie (August Jack's half-brother and also a former False Creek Reserve resident) and his grandfather told him stories about Squamish Indians living at the False Creek Site and about the longhouse that once existed there. August Jack told Mr. Jacobs that he lived at the Reserve until the 1913 Sale and that his (August Jack's) grandfather Khahtsalano was Chief George's brother. As earlier noted, August Jack said that his grandfather had also lived on the Reserve.

14. Louise Williams - *she was a Squamish lay witness who gave pre-trial commission*

evidence

[223] Louise Williams gave commission evidence in 1993 when she was 76 years of age. Mrs. Williams was born in 1917 and was the daughter of August Jack. She testified that her grandmother, Xwaywat, who was August Jack's mother, was also a Squamish person. Xwaywat lived in a large house at the False Creek Reserve and was buried there. Her remains were moved to a cemetery in the Squamish River valley after the 1913 Sale.

15. Allen Francis Lewis Louis - *he was a Squamish lay witness who gave pre-trial commission evidence*

[224] Mr. Louis gave commission evidence in 1993 at age 67. He testified that his grandfather, Captain Louis, lived at the False Creek Reserve and that his sister was born there in 1912. He said that his family left the Reserve after the 1913 Sale and went up to the Squamish River area. Mr. Louis identified several other people on the final pay list for the 1913 Sale (CB802, 668) as Squamish people, including Chief Andrew, his father Jacob Louis, his uncle Christopher Paul Louis, his grandfather, Peter Pettel, Jim Watson (who signed as "Old Jim"), Jimmy Jimmy, Denny Mack and his wife Sophie, Willie Jack, brother of August Jack, Billy William (who signed as "William) and Piell Jim.

[225] In addition to demonstrating his family's connection to the False Creek Reserve, Mr. Louis also testified about Squamish oral history which says that the Squamish People traditionally used the False Creek Site seasonally as a place where they fished, hunted ducks, and harvested clams.

16. David George Williams - *he was a Squamish lay witness who gave pre-trial commission evidence*

[226] Mr. Williams gave commission evidence in 1993 at 76 years of age. His mother, Monica Williams, was born on the False Creek Reserve, and her father was Old Man Williams. He owned two houses on the Reserve. Old Man Williams later moved to the Squamish Chuckchuck reserve in the Squamish River valley. Mr. Williams was told that the Squamish had lived at the False Creek Site before the arrival of the "white man", and that no other tribes had used the site. Mr. Williams described the False Creek Site as a "supermarket" for wildlife, and testified that his grandfather Old Man Williams had used the site seasonally to harvest fish and ducks prior to moving there on a permanent basis.

[227] Mr. Williams also identified other False Creek Reserve residents as Squamish Indians, most notably Chief George, who was his mother's uncle. He stated that Chief George's ancestors came from Chuckchuck, as did those of his grandfather Old Man Williams. Further, Mr. Williams identified Chief Andrew and his brother Kronie as Squamish Indians. He noted that, after the 1913 Sale, the residents of the Reserve moved to Squamish reserves located in the Squamish River area and on the north shore of Burrard Inlet.

17. Jimmy Frank - *an informant for anthropologist Homer Barnett, who interviewed Squamish and Musqueam Indians in 1935 and 1936*

[228] Mr. Frank was a 60-year old Squamish man and Capilano reserve resident when he advised Homer Barnett, in the mid-1930s, that his father and uncle had owned a longhouse on the False Creek Reserve (EX-S43, p. 32). Barnett's research uncovered Squamish oral history to the effect that certain families living in winter villages on the Squamish River habitually came to the False Creek Site on their seasonal rounds. In particular, Jimmy Frank told Barnett that related families from three upper Squamish River villages came to the site every summer to harvest berries, clams, smelt, sturgeon and other fish (EX-S43, pp. 57-58). According to the Squamish experts, at some point before the 1860s, this seasonal use of the False Creek Site by those Squamish families became permanent year-round occupation[36].

Conclusions about the Oral History Evidence

[229] Musqueam oral history evidence was generally not date-specific. Rather, it included broad statements about where Musqueam people lived and how they behaved. As well, while some of the oral history of the Musqueam People could be substantiated by reference to other evidence, most of their oral history evidence lacked such corroboration.

[230] In contrast, much of the Squamish oral history evidence consisted of statements by Squamish Band members who asserted genealogical ties to individuals who were identified as False Creek Reserve residents by other independent evidence. In particular, the Squamish presented oral history evidence from people who actually lived on the Reserve prior to the 1913 Sale. For example, Louis Miranda and August Jack participated in the 1913 Sale and were recognized as members of the False Creek Band. As well, the Squamish offered evidence about Chief George, who was born on the Reserve and was recognized as its leader from at least 1869 until his death in 1907. It was Chief George's tenure as leader of the Reserve through this time period which provided the strongest evidence of continuity and stability in the membership of the Band. Chief George's "tribal" identity is therefore important, and will be discussed more fully below in the Profiles Section.

[231] I have concluded that the oral history of the Squamish People is more helpful than the Musqueam oral history for the purpose of determining the identity and ancestry of the residents of the Reserve in 1869 and thereafter. It specifically identifies numerous individuals who can be found listed in the documentary record as False Creek Reserve residents. The Squamish oral history evidence corroborates their identity as Squamish Indians.

The Documentary Evidence about the Reserve and its Residents

[232] The documentary record relating to the identity of the Indians residing at the False Creek Site and at the Reserve is sparse, at least prior to the Joint Indian Reserve Commission's visit to the Reserve in the fall of 1876. The record is somewhat more comprehensive in the period from 1876 to 1913, when the Reserve was administered by the Department under the *Indian Act*. The following is a list of the evidence which will be discussed:

a. The Breakenridge Map

b. The Crease Map

i. William Jemmett's Field Notes and Maps

j. The 1881 Canada Census

c. The Oblate Records

k. The 1892 Skinner Census

d. H.M. Ball's Record of Receiving

the Petition and J.B. Launders l. The 1901 Canada Census

Survey Materials

m. The 1904 Rat Porgage Lease

e. Reverend C.M. Tate's Recollections Agreement

f. The Edward Mohun Census* n. The 1911 Band List

g. The George Blenkinsop Census o. The 1913 Sale Document

h. The James Lenihan Report p. The Final 1913 Band List

* Documents f. through p. are described as the "Census Information".

a. The Breakenridge Map

[233] The first documentary reference to a permanent settlement at the False Creek Site is found on a map prepared in 1861 by A. Breakenridge, who was a sapper from New Westminster. The map identified an "Indian village" at the site at that time (CB53). However, no tribal affiliation was shown for the residents of the village.

b. The Crease Map

[234] In 1863, Attorney-General H.P.P. Crease made notations about the locations of native villages on a map of Burrard Inlet. The evidence suggested that Crease had pre-empted land in Burrard Inlet, and that he made the map of Indian settlements and pre-empted properties while on a ship sailing through the Inlet. However, the record did not reveal whether Crease was himself knowledgeable about the identities of the Indians he described or whether he relied on an informant.

[235] The Crease map was significant because, along with the Breakenridge map, it provided one of the earliest documentary references to a permanent village at the False Creek Site. On his map, Crease identified the False Creek Site as a "ranch". This term was derived from the Spanish word "rancherie" and was commonly used in the documents in the colonial era to refer to an Indian village. However, like the Breakenridge map, the Crease map did not provide a tribal affiliation for the Indians of the village at the False Creek Site.

[236] The Musqueam noted that the Crease map identified certain sites east of the First Narrows in Burrard Inlet as Squamish villages, but that the map was silent about the tribal affiliation of a number of Indian villages or camp sites in English Bay, including the False Creek

Site. The Musqueam suggested that Crease's failure to provide a tribal affiliation for those sites meant that they were Musqueam places. In my view, this submission is not persuasive. The fact that the tribal affiliations of the villages were not given may mean that Crease did not know them or may simply mean that they were not relevant to his purpose. However, it is unreasonable to conclude that, simply because no information was given about the sites, they were Musqueam villages.

[237] In conclusion, without any evidence about the source of Crease's information, I am not inclined to accord his map much significance, other than to accept that it confirms the existence of a permanent settlement at the False Creek Site in 1863.

c. The Oblate Records

[238] The first documentary reference to the Indian name for the False Creek Site, "Sen'aqw", accompanied by the first documentary clue about the "tribal" identity of its residents, appeared in the Oblate Records in an entry dated June 30, 1867 (EX-S31, pp. 61-62). On that date at the False Creek Site, Chief Snatt (who was Squamish) acted as a sponsor for the baptisms of the children of four families. The parents of the children being baptized were described in the Oblate Records as being associated[37] with Squamish villages on the upper Squamish River. That affiliation, and the presence of Chief Snatt, who lived with his Squamish followers at the site of the future Mission reserve, suggests that the four families which resided on the False Creek Site in 1867 were Squamish and were probably part of the group of 42 Indians who, two years later, petitioned Magistrate Ball for the Reserve.

[239] Dorothy Kennedy identified the parents of one of the children who was baptized as Captain Louis and his wife Martha. According to Ms. Kennedy, this family had a long association with the Reserve (EX-S31, p. 84). Captain Louis was born circa 1824 and died in 1909, and he was described by Squamish Band member Monica Williams (one of Ms. Kennedy's informants) as Chief George's first cousin. His wife Martha was still alive at the time of the 1913 Sale, and she received a payment from the Province.

d. H.M. Ball's Record of Receiving the Petition and J.B. Launders Survey Materials

[240] I have already discussed the documents which described the roles played by Magistrate H.M. Ball and J.B. Launders in the allocation of the False Creek Reserve in 1869. They may be summarized by saying that, in February 1868, Ball received a petition for a reserve from the Indians resident at the False Creek Site, whom he numbered as 14 men, 16 women and 12 children. Then, in September 1869, Launders surveyed the reserve and marked the location of a large "ranch" house and two smaller houses. He identified "Sh-praem" [Chief George] as "chief" of the Reserve.

e. Reverend C.M. Tate

[241] In 1932, Reverend C.M. Tate, a Methodist missionary, recalled visiting Chief George in the 1870s. His recollection was recorded by the historian Major Matthews, who wrote:

I often visited the Kitsilano Band in the '70s. They were a hospitable lot, and I was entertained by Chief George and his band in their community house. Old Chief George's community house

(potlatch house) was right under the present Burrard Bridge...There was quite a settlement at Chief George's False Creek Reserve, probably a dozen houses, built of split cedar, sawboards and slabs, and the big community house; a total population, perhaps, of fifty persons all told. It was a settlement of consequence. There were no Indians living further up the creek. (EX-S42, p. 67)

[242] As noted earlier, the documents discussed below are referred to collectively as the "Census Information".

f. The Edward Mohun Census

[243] When the Joint Indian Reserve Commission visited the False Creek Reserve in November 1876, two censuses were undertaken. One was written in field notes dated November 14, 1876 (CB241). Their author is unknown, but Squamish expert Dorothy Kennedy testified that, in her opinion, the author was the Commission's surveyor Edward Mohun. This suggestion is plausible and was not challenged at trial. This census, which I will refer to as the "Mohun Census", listed the head of each household and enumerated 42 people on the Reserve.

g. The George Blenkinsop Census

[244] The other census which was taken in 1876 was prepared for the Joint Indian Reserve Commission by George Blenkinsop and was entitled "Skwawmish Tribe False Creek Burrard Inlet" (the "Blenkinsop Census"). It enumerated 42 persons at the False Creek Reserve, including 15 male adults, 15 female adults, 3 male children and 9 female children, and it identified eight acres of partially cleared land, three quarters of an acre of cultivated garden and some livestock.

h. James Lenihan's 1877 Report

[245] Indian Superintendent James Lenihan visited the False Creek Reserve in June 1877 and confirmed in a report that its population remained at 42 people (CB314). He found five "frame" houses on the Reserve at that time.

i. William Jemmett's Field Notes and Maps

[246] When he surveyed the Reserve on September 13, 1880, William Jemmett wrote in his field notes: "Chief 'Shpraem' (William George) to the Skwawmish Indians - False Creek reserve". He noted the longhouse which had been mentioned by J.B. Launders in 1869, and wrote the word "chief" beside it. At least six smaller structures, together with orchards and gardens, were shown on Jemmett's rough map of the site (CB338). In that year, Jemmett also produced a map of the Squamish reserves in the New Westminster district. It included False Creek I.R. No. 6, which he identified as a Squamish place (CB339).

j. The 1881 Canada Census

[247] Indian Agent Peter McTiernan, who was the enumerator for the 1881 Canada census, identified 44 residents at "Sku.hu.a.mesh, False Creek, Burrard Inlet". The first name on the census list was "Chipwhaim" (Chief George), indicating that he was the leader of the community (CB353).

k. The 1892 Skinner Census

[248] Timber inspector J. Skinner prepared a census and village plan for the False Creek Reserve in 1892 on behalf of the B.C. Chief Commissioner of Lands and Works. His task was to identify the number of residents, any improvements they had made, and the number of cultivated acres. He identified 41 residents (13 men, 12 women, and 16 children) and five "non-residents". He noted the larger "feast house" belonging to Chief George together with a number of smaller single-family dwellings, and he calculated that approximately 24 acres of the Reserve were under cultivation (CB407).

l. The 1901 Canada Census

[249] In the 1901 Canada census all the Reserve residents were individually listed using their English names. At that time, the Reserve's population was 57 people. Chief George, then 70 years old, continued to be identified as the community's leader (CB448; EX-S31, p. 69).

m. The 1904 Rat Portage Lease

[250] By a resolution dated March 22, 1904, the 15 adult male members of the False Creek Band leased 11 acres of the Reserve to the Rat Portage Lumber Co. Chief George was the first name on the list of Indians who signed the surrender (CB534).

n. The 1911 Band List

[251] The Department's band lists also provided some information about the population of the False Creek Reserve. They were records of those residents who were interested in the Reserve and entitled to benefit from the proceeds derived from the sale or lease of Reserve land. However, the band lists did not purport to be accurate records for the purpose of showing which Indians were actually resident on the Reserve. Some people on the list did not ordinarily reside on the Reserve. Conversely, Indians living on the Reserve might not be listed if they were not considered to be members of the False Creek Band.

[252] Indian Agent Peter Byrne drafted the 1911 list for the False Creek Band. It included 51 band members (CB654), and it showed that Chief Andrew was recognized as the new leader of the Reserve after the death of Chief George in 1907 (CB654).

o. The 1913 Sale Document

[253] On March 11, 1913, H.O. Alexander, on behalf of the Province, signed an agreement with certain of the False Creek Reserve residents to purchase their interest in the Reserve. Twenty individuals, men and women, representing themselves and their families, signed the agreement (CB1922).

p. The 1913 Final Band List

[254] After the 1913 Sale, the Department received a number of petitions from Indians who had not received money from the Province in 1913 but who claimed an interest in the Reserve. At that time, the Vancouver Harbour Commissioners were planning to expropriate the Reserve and there was an expectation that further money would be paid to interested Indians. In 1914, in response to the various petitions, Indian Agent Byrne consulted with certain Squamish leaders to produce a final band list for the Reserve. It included 58 people: 23 men, 17 women, and 18 children (CB802, 668).

Conclusions About the Documentary Evidence

[255] From the Breakenridge Map in 1861 to the 1913 Sale, the documents showed that a stable and permanent community of Indians occupied the False Creek Site and later the Reserve. This was the community of 42 individuals which was described by Magistrate Ball when a delegation of its residents petitioned for a reserve in 1868. It was also the community which was enumerated by the Joint Indian Reserve Commission in 1876-77 and which sold the Reserve to the Province in the 1913 Sale. The record showed Chief George as the leader of the False Creek Band, at least from 1869, when Launders identified him as chief of the Reserve, until his death in 1907. Squamish oral history indicated that Chief George was one of the False Creek Band's original members, and this evidence was consistent with the documentary record. As well, the documentary evidence showed that four families who lived on the False Creek Site before 1869 were Squamish. This was consistent with the oral history evidence from Chief George, George Johnny and Squamish Charley, which showed that, before 1869, their families, which were Squamish, lived on the False Creek Site. Finally, from at least 1877 to 1913, the False Creek Reserve was consistently portrayed in the Departmental records as a Squamish reserve.

The Linguistic Evidence

[256] The Musqueam and Squamish each called an expert in linguistics to provide an etymological analysis of the Indian names for a number of locations around Burrard Inlet and English Bay, including the name "Sen'aqw" for the False Creek Site. Their objective was to determine whether the names were of Halkomelem or Squamish linguistic origin. The two experts, Dr. Wayne Suttles for the Musqueam and Dr. Brent Galloway for the Squamish, were in substantial agreement about the linguistic origin of most of the names. Unfortunately, one of the few names about which they disagreed was "Sen'aqw". Although neither expert could express an opinion about this place name with any certainty, Dr. Suttles testified that the name was likely Halkomelem in origin, while Dr. Galloway believed it to have originally been a Squamish name.

[257] Dr. Suttles also concluded that many of the place names used by Squamish speakers had originated from or had been influenced by the Halkomelem language. He therefore suggested that Halkomelem speakers preceded Squamish speakers in Burrard Inlet. Although Dr. Galloway agreed with Dr. Suttles' conclusion with respect to some of the place names they considered, he testified that, in his view, other names provided evidence of an earlier Squamish presence followed by a later Halkomelem presence. He further concluded that the mixture of

Halkomelem and Squamish place names in Burrard Inlet and English Bay suggested shared and mixed use of the area, as opposed to exclusive occupation by one group or the other.

[258] Generally, the linguistic evidence corroborated the anthropologists' understanding of the Central Coast Salish practice of using scattered resource sites on a seasonal basis. The Halkomelem and Squamish place names appeared to be clustered around sites which anthropologists have identified as seasonal or permanent campsites or villages. Although there was no agreement about the village of "Sen'aqw", it was agreed that the names for places clustered immediately around "Sen'aqw" were likely Squamish. The Squamish and Crown submitted that this corroborated Squamish oral history evidence, which said that, for some time prior to the establishment of a permanent Squamish village at the False Creek Site, Squamish families from the upper Squamish River visited the False Creek area on a seasonal basis.

[259] Both experts agreed that their respective conclusions could not be dated and neither expert could give the Court any idea of when the Squamish speakers might have supplanted the Halkomelem speakers, or vice versa. For this reason, apart from corroborating Squamish seasonal use of False Creek, the evidence was of little assistance. It did not address the question of which of the Plaintiff peoples were actually present or even likely to have been present at the False Creek Site in 1869.

Profiles of the Residents of the False Creek Reserve

[260] Squamish expert Dorothy Kennedy prepared a detailed profile of the False Creek Reserve community based on the Census Information, the Oblate Records, and other sources. In her expert report (EX-S31), Ms. Kennedy used two different approaches to identify a significant percentage of the False Creek Reserve residents whose names appeared from time to time in the historical record.

[261] The first of Ms. Kennedy's approaches was set out in Table 1 in her expert report (EX-S31). It listed all the False Creek Reserve residents identified in the Census Information. Using a number of sources, including the Oblate Records, oral history evidence and documentary evidence, she attempted to identify the residents in the Census Information and provide their "tribal" affiliation. By my calculation, her work revealed that, between 1876 and 1913, a total of 108 different individuals were enumerated at least once at the False Creek Reserve. I have concluded that these 108 people can be grouped as follows:

Squamish or part-Squamish residents	85
Non-Squamish spouses of Squamish residents	3
Spouses of Squamish residents (no affiliation given)	4
Non-residents (1892 Skinner census only)	2
Unidentified by Kennedy	14
Total	108

Total Residents	**106**[38]

According to Ms. Kennedy's analysis, 92 of the 106 residents were either Squamish, part-Squamish or married to a Squamish resident. Ms. Kennedy could not identify the other 14 residents. Significantly, she found no Musqueam people among the Indians described in the Census Information.

[262] Ms. Kennedy set out her second approach in Table 2 in her expert report. There she compared three maps or plans of the village on the Reserve. They were prepared independently and at different times (EX-S31, pp. 104-111). The first was made by timber inspector Skinner in 1892, the second by former Reserve resident August Jack for Major Matthews in 1937, and the third by former Reserve resident Louis Miranda for Ms. Kennedy in 1984. In spite of their different dates, the maps displayed significant similarities. They described a total of 49 people resident on the Reserve at some point, and, based on Ms. Kennedy's analysis, I have grouped them as follows:

Squamish or part-Squamish residents	36
Non-Squamish spouses of Squamish residents	2
Spouses of Squamish residents (no affiliation given)	3
Unidentified by Kennedy[39]	8
Total	49

According to Ms. Kennedy's analysis, 41 of the 49 residents were either Squamish, part-Squamish or married to a Squamish resident.

[263] Musqueam expert Dr. Kew submitted an expert report on the False Creek Reserve residents who could be identified from the documentary record when compared with information in the Musqueam archives. Dr. Kew's material included a series of genealogical charts showing the ancestors of current Musqueam Band members. These charts were derived from his own research, which was based largely on the genealogical work of Professor H.B. Hawthorn (who interviewed Musqueam informants in the 1950s), the work of Musqueam expert Dr. Suttles, and genealogies prepared by Musqueam Band members[40]. Collectively, these genealogical sources will be referred to as the "Musqueam Genealogies".

[264] Dr. Kew and the Musqueam lay witnesses identified a total of twelve Musqueam Indians who lived at the False Creek Reserve at some time prior to the 1913 Sale. Seven of those twelve Indians were mentioned in the Census Information and were identified as Squamish Indians by Dorothy Kennedy and other Squamish evidence. Those seven individuals were:

(i) Chief George;

(ii) Quotseemaitout (Mohun Census transcription);

(iii) Old Jim Salemton;

(iv) Pierre Jim;

(v) Susan Jim;

(vi) Kwe.sum.kin (Blenkinsop Census transcription); and

(vii) Sentqia (Blenkinsop Census transcription)

The Musqueam have not challenged Ms. Kennedy's identification of the other 78 Indians mentioned in the Census Information, whom she characterized as Squamish or part-Squamish, nor have the Musqueam provided evidence to give a "tribal" affiliation for any of the 14 unidentified residents of False Creek.

[265] The five remaining names on the Musqueam list of twelve Musqueam Reserve residents were not mentioned in the Census Information. However, with the exception of P'eliqwiye, the parties agreed that the others lived on the Reserve at some point in time between 1877 and 1913. The five individuals were:

(viii) P'eliqwiye;

(ix) Mary Jim;

(x) Gabriel Joe;

(xi) Alec Dan; and

(xii) Nelson Dan

[266] The following is a discussion of the evidence relating to the identity, residence and ancestry of each of the 12 individuals who were alleged by the Musqueam to have been Musqueam residents of the False Creek Reserve. As will be seen, with respect to some of the individuals the dispute was about whether they should be considered to have been Squamish or Musqueam Indians. In other cases, the individuals were indisputably Musqueam Indians who were present on the Reserve. However, there were questions about their reasons for being on the Reserve and, in particular, about whether they were ever accepted as members of the False Creek Band.

(i) Chief George[41]

[267] Chief George is central to the False Creek Reserve story because he was consistently identified as the Reserve's leader from at least 1869 until his death in 1907. At a meeting of the male members of the False Creek Band on January 4, 1904, Chief George stated that he was

born at the Reserve. He also said that the land "belonged" to his grandfather and that his relatives were born there (CB529). Dorothy Kennedy estimated his birthdate to be circa 1830 (EX-S31, p. 72), and George Johnny (a False Creek Reserve resident) stated, in 1913, that Chief George was the first chief of the Reserve and that he was present on the Reserve when Governor Douglas came to B.C. (CB733). These dates suggest that Chief George was the leader of the village at the False Creek Site as early as the 1850s.

[268] The Musqueam plaintiffs argued that Chief George was a person of mixed Musqueam and Squamish ancestry. The sole source for this view was Musqueam elder James Point who, in 1963, told Musqueam expert Dr. Suttles that:

There were no people on False Creek then[42]. People came only after Vancouver was established. Then there was only two there -- cepx'i'm[43], ***who was half Musqueam and half Squamish***, and JP's son's great-grand-father salémtan[44].(EX-B3, p. 9)

[*My emphasis*]

There was no corroboration for Mr. Point's description of Chief George's Musqueam ancestry, and it is noteworthy that Chief George's Indian name is nowhere mentioned in the Musqueam Genealogies relied upon by Dr. Kew. This suggests that Chief George's name is not a Musqueam name.

[269] There are a number of references in Squamish oral history and in the documentary record which indicate that Chief George had affiliations with Squamish places in addition to the False Creek Reserve. For example, when the Joint Indian Reserve Commission visited the Reserve in 1876, Chief George was absent in Howe Sound and the commissioners resolved to consult with him at that location (CB272-11). George Blenkinsop, in his 1876 census of the Chuckchuck reserve on the Squamish River, noted that Chief George was away "up the river" but enumerated him in connection with both the Chuckchuck reserve and the False Creek Reserve (CB327-18). Earlier, in a petition to Governor Douglas, circa 1864, Chief George was identified as "Schpreme", chief of the "Tchertcherks" (Chuckchuck) village in the Squamish River area (CB77-7). Another petition, this time from local chiefs to Governor Seymour dated February 19, 1867, again identified "Chprem" with the "Tekertekerk" (Chuckchuck) village (CB102-3). A June 6, 1873, report of Indian Commissioner I.W. Powell referred to a letter welcoming him to his new position. It was signed by a number of chiefs, including "Chpeame" of "Chakchak" (CB196-4). Finally, when the False Creek Reserve residents removed their dead from the Reserve at the time of the 1913 Sale, Chief George's remains were reburied at the Squamish cemetery at Yekw'ts on the Squamish River (EX-S31, p. 72).

[270] With regard to Chief George's ancestry, Squamish elder August Jack Khatsalano told Major Matthews that Chief George was the brother of his grandfather and that their father was a Lillooet (Interior Salish) Indian married to a Squamish woman (CB1222-111). August Jack stated that Chief George was originally "from the far end of Squamish river", where he lived in the Squamish village of "Took-tpaak-mik". He also said that Chief George was the first "chief" to establish a permanent residence at the False Creek Site (CB1222, pp. 9-10). He pointedly distinguished Chief George from the Musqueam People, noting the latter used the False Creek

Site occasionally to fish, but never established a permanent residence there (CB1222-10).

[271] The Oblate Records did not record a baptism for Chief George or for his children. However, the baptismal records for his grandchildren identified his daughter Emily as a Squamish person (EX-S31, p. 58).

[272] This evidence, taken as a whole, leads to the conclusion that Chief George was reputed to be and identified himself as a Squamish man. There is certainly no record that he contested the consistent association of the False Creek Reserve with the Squamish People after its allocation to the Squamish in 1877. James Point considered Chief George to be half-Musqueam, but this conflicted with August Jack's information which gave him some Interior Salish blood. Either version of Chief George's ancestry is plausible. But I am satisfied that, regardless of whether he was of mixed heritage, Chief George was a Squamish person because he identified himself as Squamish and because he was accepted as a Squamish person. He lived in and led two Squamish communities, and he was laid to rest in a Squamish cemetery.

(ii) Quotseemaitout

[273] Dr. Kew testified that, primarily because of the phonetic similarities between the names in the Blenkinsop and Mohun censuses and names in the Musqueam Genealogies, a Musqueam man identified as "Xweltsi'meltxw" in the Musqueam Genealogies lived at the Reserve in 1876, and was enumerated as a resident there. In the Mohun Census he was listed as "Quotseemaitout" (CB241) and in the Blenkinsop Census he was enumerated as "Kwaut.se.mi.toot", "Kwhat.se.mi.toot", or "Kwaul.se.mit.toot" (CB328; CB327; CB270). Dr. Kew's assertion was controversial. The Squamish questioned whether the man enumerated at the Reserve was the same person as the man who was described as Xweltsi'meltxw in the Musqueam Genealogies.

[274] According to the Musqueam Genealogies, Xweltsi'meltxw and another Indian man called Tichuxi'nem had become brothers-in-law by marrying sisters who were Musqueam women and members of the Capilano lineage group. Dr. Kew supported his opinion that Xweltsi'meltxw was the man enumerated in the Mohun Census by also identifying his brother-in-law, Tichuxi'nem, as a resident of False Creek Reserve in 1876. Dr. Kew said that the brother-in-law Tichuxi'nem was the man enumerated as "Tchewainum" in the Mohun Census (CB241). Dr. Kew further submitted that the Mohun Census confirmed the information in the Musqueam Genealogies to the effect that the two men were brothers-in-law and said that, in Central Coast Salish culture, it would not be unusual for the husbands and families of two sisters to live in the same longhouse.

[275] The Mohun Census did indicate that a familial relationship existed between Xweltsi'meltxw ("Quotseemaitoot") and Tichuxi'nem ("Tchewainum"), but it did not show them to be brothers-in-law as suggested by Dr. Kew. Instead, the Mohun Census showed that Quotseemaitoot (Xweltsi'meltxw) and Tchewainum (Tichuxi'nem) were brothers. The Mohun Census also mentioned two other individuals, "Hainenkan" (Quotseemaitoot's father) and "Quainankan" (his other brother). Dr. Kew was unable to find a match in the Musqueam Genealogies for those names. In contrast, as discussed below, Dorothy Kennedy showed that

all four men were related and that they were Squamish Indians.

[276] A further difficulty with Dr. Kew's identification of Quotseemaitoot as Xweltsi'meltxw is that other information from the Musqueam Genealogies conflicted with the Mohun Census. The Genealogies described Xweltsi'meltxw as a Musqueam man and Tichux'nem as a Squamish person and said that they were brothers-in-law. On the other hand, the Mohun Census indicated that Quotseemaitoot and Tchewainum were brothers. If the Mohun Census was correct and the men were brothers, it is unlikely that they had different "tribal" affiliations.

[277] Dorothy Kennedy offered an alternative identification of Quotseemaitoot in the Mohun Census. She testified that he was a Squamish man, one Charles Leon, who was described as "Koutsemetsout" at the time of his baptism just prior to his death in 1887. Ms. Kennedy demonstrated that Charles Leon was the son of a Squamish man named "Xinexatn", whom she identified as Chief George's brother-in-law and as the father listed as "Hainankan" in the Mohun Census. Ms. Kennedy also demonstrated that Charles Leon's brothers were Chief Andrew "Kwenaxtn" ("Quainankan" in the Mohun Census) and Old Croney "Tech'unxanm" ("Tchewainum" in the Mohun Census). As noted earlier, Chief Andrew replaced Chief George as the leader of the Reserve. Old Croney was recognized by the Department as a long-time resident of the Reserve and someone who should have been paid in the 1913 Sale (CB668). Ms. Kennedy's evidence to the effect that these were related Squamish men was unchallenged at trial.

[278] I have concluded that there is no reason to believe that either the censuses or the Musqueam Genealogies are incorrect. It is more likely that Dr. Kew erred when he relied on the phonetic similarities between the names, and thus associated Xweltsi'meltxw, a recognized figure in the Musqueam Genealogies, with names in the 1876 Blenkinsop and Mohun censuses of the False Creek Reserve. He provided no other documentary or oral history corroboration for this identification. Although Ms. Kennedy also relied, in part, on phonetic similarities between names, she was able to supplement her conclusions about the identity of Quotseemaitoot with other evidence in the record that indicated a familial bond between this man and other residents enumerated in the Mohun Census. I have therefore concluded that the Musqueam man Xweltsi'meltxw, who was listed in the Musqueam Genealogies, did not live at the False Creek Reserve with his brother-in-law and their Musqueam wives and was not the man who was enumerated in the Mohun Census as Quotseemaitout.

Old Jim Salemton and his Children

[279] Dr. Kew and Dorothy Kennedy agreed that Old Jim and his three children lived on the Reserve. However, Dr. Kew said they were Musqueam and Ms. Kennedy identified them as Squamish people. The experts also disagreed about which names on the censuses referred to Old Jim and his son Pierre Jim. However, I have not dealt with this controversy as it did not relate to the family's "tribal" affiliation.

(iii) Old Jim Salemton

[280] Both the Musqueam and Squamish plaintiffs agreed that a man named Old Jim Salemton was enumerated by Blenkinsop and Mohun at the False Creek Reserve in 1876, and that he lived there until the 1913 Sale. Old Jim told Indian Agent Peter Byrne in 1913 that he was the Reserve's "oldest settler" and that he had lived there "every day in each year" (CB691). He was also paid by the Province in the 1913 Sale. A newspaper account of that sale suggested that Old Jim initially intended to join the group of the False Creek Reserve residents on the barge heading north to the Squamish River, but, on the advice of his son, he moved instead to the Musqueam reserve to live in the care of his granddaughter Martha Point (CB725). She was not Musqueam by birth but lived at Musqueam because she had married Musqueam band member James Point.

[281] According to Dr. Kew, Old Jim Salemton is the direct ancestor of a number of the present-day Musqueam Band members, including some members of the Point family. The identification of Old Jim as a Musqueam or part-Musqueam man was supported by documentary and oral history evidence. The 1927 petition for an interest in the False Creek Reserve claimed Musqueam ancestry for Old Jim. It stated:

Some of the Musquiam Indians lived on the Kitsalano Reserve all the year round, Chief Tsemlano as their leader, Old Jim Salemton and his family lived there, these people mentioned were born and raised as Musquiams...(CB1050)

This petition was signed by a number of Musqueam elders, including Chief Jack Stogan and James Point. In 1968, James Point told Dr. Kew that he remembered Old Jim holding a potlatch at the False Creek Reserve. He described Old Jim as being half-Musqueam, half-Squamish and bilingual[45] (CB1240-8). Arnold Guerin described Old Jim as "at least part Squamish" and also suggested that he had a dual Musqueam-Squamish ancestry (EX-M12, p. 2). However, at the baptism of his son Pierre in 1889, Old Jim was identified as "Satlamten", a Squamish man (CB34-57).

[282] Other evidence suggested that Old Jim had a recognized interest in many Squamish reserves. Despite moving to the Musqueam Reserve after the 1913 Sale, he apparently retained an interest in Capilano Reserve I.R. No. 5. Both before and after the 1913 Sale, he signed band resolutions at I.R. No. 5 (CB555, 561, 779). He also signed the surrender of Squamish River valley reserve lands to the Pacific Great Eastern Development Company in September 1913 (CB767-4). Further, he was enumerated, with his children Pierre and Mary, as a member of the Squamish Poyam reserve in Howe Sound in 1915 (CB818), and in that year he also appeared on the Squamish Stawamus reserve pay list (CB1584).

[283] I have concluded that the 1927 Musqueam petition, which described Old Jim as a Musqueam person, is not reliable when measured against other evidence. For example, it is inconsistent with other Musqueam oral history, which gives Old Jim mixed ancestry, and with the large body of evidence which shows his extensive and close ties to Squamish reserves.

[284] Although Old Jim may have been part-Musqueam by blood, the evidence is overwhelming that he lived and self-identified as, and was widely accepted as and reputed to be, a Squamish person. This was confirmed as early as 1889 when, in the Oblate Record of his

son's baptism, he was identified as Squamish (CB34-57). In my view, his choice to live at Musqueam after the 1913 Sale was based only on the fact that his granddaughter lived there. It is most probable that, but for her, he would have moved to a Squamish reserve.

(iv) Pierre Jim

[285] Old Jim's son, Pierre Jim, was consistently identified as a resident of the False Creek Reserve. In the 1913 Sale, he also received a payment from the Province. After the 1913 Sale, he moved to a Coquitlam Indian reserve with his married sister Susan and her husband Dave Bailey, who was a Coquitlam Indian. Pierre Jim died in October 1918.

[286] Dr. Kew testified that Pierre Jim's name appeared on the Blenkinsop and Mohun censuses in 1876. However, in my view, this identification was incorrect. I have accepted Dorothy Kennedy's evidence that Pierre Jim's baptismal record shows that he was six years old in 1889 (CB34-57). This means that he had not been born at the time of the 1876 censuses.

[287] With regard to ancestry, Dr. Kew identified Pierre Jim, whose ancestral name was "T'halse'mqen", as a Musqueam man. He referred to a list of ancestral names prepared by Squamish elder Louis Miranda which identified Pierre Jim and/or his name "Ts'alsamkin" as Musqueam (EX-M13, p. 4). However, this evidence was seriously called into question when Musqueam elder James Point, in his conversation with Dr. Suttles, indicated that the ancestral name "Ts'alsamkin" -- which was given to James Point's son Tony -- was actually a Squamish name (EX-B3, p. 9).

[288] There was documentary evidence which indicated that Pierre Jim had associations with both the Squamish and the Coquitlam Indians. His 1889 baptismal record referred to his parents as Squamish people (CB34-57) and, after the 1913 Sale, he continued to be associated with two other Squamish reserves. In 1915, he was enumerated by the McKenna-McBride Royal Commission as a member of Poyam Reserve I.R. No. 9, and he appeared on the 1917 Cheakamus reserve voting list. However, his sisters Susan and Mary, in a letter to the Department in October 1918, in which they claimed to be his only heirs, described him as a former member of the "Coquitlam Tribe of Indians" (CB855). Departmental correspondence from 1918 also referred to him as a member of the "Coquitlam Tribe" (CB854). Based on this evidence, I have concluded that, although it is not clear whether Pierre Jim considered himself, or was considered by others, to be a Squamish or a Coquitlam Indian, it is clear that he was not a Musqueam person.

(v) Susan Jim

[289] Dr. Kew testified that Susan Jim was a Musqueam woman and said that this was demonstrated by her family ties to her father, Old Jim Salemton. However, the evidence indicated that Susan Jim associated herself with the Squamish and Coquitlam peoples. In 1901, she was enumerated in the Canada Census both at the False Creek Reserve and on a Coquitlam reserve, in the latter case with her husband, Dave Bailey. Neither Susan Jim nor her sister Mary received any money from the 1913 Sale. However, in November 1913, Susan Jim filed with the Department a claim for an interest in the Reserve. Describing herself as a member of the "Kitsilano Band of the Squamish Tribe of Indians", she declared that:

I am the daughter of Old Man Jim. My father and mother have lived on the Kitsilano Reserve all their lives. My father is an old man, the oldest living Indian belonging to the Reserve. I was born on the Kitsilano Reserve and lived there all my life, up to the time I got married, since then I live part of the time on the reserve taking care of my parents, taking a turn about with my other brother and sisters. (CB778)

[290] Susan and Mary Jim also joined a group of Squamish Indians that petitioned the Department for an interest in the Reserve after the 1913 Sale (CB844). There was documentary evidence showing that Mary Jim's claim was rejected by the Department because she had married a man belonging to a different band. It is likely that Susan Jim's claim was rejected for the same reason.

[291] Other evidence indicates that Susan Jim also affiliated herself with the Coquitlam Indians. Firstly, her husband, Dave Bailey, was a member of the Coquitlam Band, and the couple moved to live with the Coquitlam Indians after the Reserve was sold in 1913. Secondly, when Susan and Mary Jim petitioned the Department for the proceeds from Pierre Jim's estate, they indicated that their mother Sarah (or "Sally" in other documents) was also a Coquitlam Indian (CB855; EX-S31, p. 74).

[292] Based on this evidence, I can find no reason to conclude that Susan Jim was a Musqueam person.

[293] Susan Jim and Dave Bailey had two daughters who were Mary and Martha. Martha married James Point of Musqueam and moved to that Reserve. As noted earlier, it was with his granddaughter Martha Point (née Bailey) that Old Jim lived at Musqueam after the 1913 Sale (EX-S31, p. 74; CB1529).

[294] Mary Jim is another of Old Jim's daughters. However, because she was never enumerated at False Creek, she is discussed later in this section of the reasons.

(vi) Kwe.sum.kin

[295] The Blenkinsop and Mohun Censuses enumerated a man named "Kwe.sum.kin" and "Quesumkin", at False Creek in 1876 (CB328; 241). From the Musqueam Genealogies, Dr. Kew identified this man as "Quetse'mten", a Musqueam person and a son of Chief Capilano. Dorothy Kennedy, on the other hand, testified that this man was a Squamish person named Michael "Kwisemkren" or "Koetsenkren" (EX-S31, p. 74; EX-S32, p. 36).

[296] Dr. Kew said that Quetse'mten was a Musqueam man who lived on the False Creek Reserve. Dr. Kew relied on the phonetic similarity between the words "Quesumkin" and "Quetse'mten" for his identification, and no further corroborative evidence was offered. Under cross-examination, after considering other renditions of the "Quetse'mten" name, Dr. Kew conceded that his conclusion was "less likely". His conclusion that Quetse'mten was a Musqueam man also appeared weak because he acknowledged that, even according to the Musqueam Genealogies, "Quetse'mten" was the son of a Squamish man and a Musqueam woman, and his descendants are Squamish Indians living on the north shore of Burrard Inlet.

[297] Dorothy Kennedy suggested that "Kwe.sum.kin" was a transcription of the name

for Michael "Kwisemkren" and that this was the same person as "Michel Koetsenkren", whose baptism in 1878 was recorded in the Oblate Records. They indicated that he was the son of "Tsalthalthemot" and "Tarhlot" "d'origine Skromish". His baptism occurred just prior to his marriage to Harriet Askten (ancestral name "Skwetsiya"), whose parents were also described as Squamish. As I discuss below, Harriet Askten, or "Skwetsiya", lived at the False Creek Reserve and was enumerated in the Blenkinsop and Mohun censuses. Michael Kwisemkren died circa 1884.

[298] Dorothy Kennedy's identification of "Kwe.sum.kin" or "Quesumkin" as a Squamish man is more plausible than Dr. Kew's admittedly weak linkage of these names to "Quet'se'mten". The name "Kwisemkren" or "Koetsenkren" is a reasonable phonetic match, and his marriage to Harriet Askten, who also lived at the False Creek Reserve in 1876, provided some corroboration for Ms. Kennedy's conclusion that the man she identified as Michael "Kwisemkren" was a Reserve resident.

(vii) Sentqia

[299] The Blenkinsop and Mohun Censuses for the False Creek Reserve enumerated a woman named "Skut.se.ah" and "Sentqia", respectively (CB328, 241). She was described as a widow with one son. Dr. Kew compared this name to those in the Musqueam Genealogies and found that it was similar to the Musqueam name "SxE'xlie" (EX-M3, p. 59). Dr. Kew admitted in his report that this identification was "uncertain", and, at trial, he noted that his identification was "very tentative". No other evidence supports his conclusion.

[300] Dorothy Kennedy testified that the 1876 census references were to a Squamish woman named Harriet Askten (or "Hakstn" or "Haxten") whose ancestral name was "Skwetsiya". She first appeared in the Oblate Records in 1868, identified as "Lekout-sia" of the Squamish Yekwaupsum reserve and wife of "Koua-ildou" of the Squamish Stawamus reserve. She was recorded there as the mother of a son, Joseph. In 1878, she married Michael Kwisemkren who, according to Dorothy Kennedy, was also a False Creek Reserve resident.

[301] After Michael Kwisemkren died, circa 1884, Harriet Askten married her third husband, George Kwalken. The couple lived at the Squamish Mission reserve in North Vancouver (CB34-416). Later in 1895, Harriet married George Johnny, another False Creek Band member, and the couple made their home on the Mission reserve (CB416-8). After this marriage Harriet was known as Mrs. Harriet George (CB1222-114). She died in 1940, when she was more than 100 years old (CB1222-129).

[302] The only evidence which suggested a Musqueam affiliation for Harriet Askten came from a statement August Jack made to Major Matthews. August Jack told Matthews that his grandmother, who was the mother of Harriet Askten and Sally Xwhaywhat[46], had lived at Musqueam (CB1234). This evidence suggested that Harriet Askten and her sister may also have had Musqueam ancestry. However, there is no evidence to show why or in what circumstances their mother lived at the Musqueam reserve. She may have been a Musqueam person or she may have married a Musqueam man.

[303] There is also evidence about Harriet's sister Sally Xwhaywhat. August Jack told Major Matthews that his mother Sally Xwhaywhat was born on the Squamish Yekwaupsum reserve in

the Squamish River valley (CB1222-12). As noted earlier, Squamish witness Louise Williams provided evidence which stated that Sally "Xwaywat", her grandmother, was a Squamish person. However, Dominic Charlie's daughter (Sally's granddaughter) said that Sally came from the Chemainus-Kuper Island area on the east coast of Vancouver Island (CB1316). Considering these contradictory statements, I have decided that the oral history evidence about Sally's ancestry is inconclusive. Even so, it is relevant because, assuming Sally and Harriet had the same mother, it puts in doubt the evidence from August Jack which shows that Sally's, and therefore Harriet's, mother lived at Musqueam. On the whole, I must conclude that there is no reliable information about Harriet's ancestry.

[304] With regard to Harriet's descendants, August Jack identified Squamish Band members Lacket Joe and Andrew Paull as her son and grandson, respectively (CB1222, pp. 47, 91). As well, Harriet Askten was enumerated among the Squamish on both the Mission and Yekwaupsum reserves, and she signed the surrender of the Squamish Howe Sound reserve land to the Pacific Great Eastern Development Company in 1913 (CB746, 1518, 1521).

[305] I have concluded that Dorothy Kennedy's identification of "Skut.se.ah" and "Sentqia" in the 1876 censuses as Harriet Askten "Skwetsiya" is correct. The affiliation of this woman to the Squamish People is also apparent. Although some ancestral connection to the Musqueam People can be inferred from August Jack's evidence, the preponderance of evidence about her descendants and her reserve interests suggests that she was Squamish.

(viii) P'eliqwiye

[306] The Musqueam identified P'eliqwiye as a Musqueam woman who resided at False Creek. Musqueam elder Dominic Point testified that she was his paternal great-grandmother.

[307] Mr. Point never met P'eliqwiye; he learned about her in 1935 at his sister Bertha's naming ceremony when she was given the name P'eliqwiye. Unfortunately, Mr. Point's evidence about his great-grandmother P'eliqwiye was imprecise and internally inconsistent. He was unable to testify about when she lived at the False Creek Site or at the Reserve. At one time, he suggested that she lived at the site on a seasonal basis, but he also stated, at another point in his evidence, that she lived there year-round, but for only one year. He initially testified that she left the site to live at Coquitlam, but later stated that she went to the Langley area in the Fraser River valley. These are two completely different destinations.

[308] Musqueam elder James Point told Musqueam lay witness Delbert Guerin that he had watched the 1886 Vancouver fire from the False Creek Reserve in the company of his grandmother. However, James Point did not say which of his grandmothers he was with, did not name her, and did not describe her as a resident of the Reserve. Later, when Mr. Guerin asked Dominic Point for his opinion about this woman's name, he told Mr. Guerin that the woman "would have to be" P'eliqwiye.

[309] Mr. Point did not know the name or heritage of P'eliqwiye's husband (his great-grandfather) but he understood him to have been an Indian man. Mr. Point did, however, testify that P'eliqwiye's daughter's maiden name was Emily Couts. This suggests that P'eliqwiye's

husband's surname was Couts.

[310] The only document which may refer to P'eliqwiye was not mentioned until final argument. It was an 1865 Oblate Record for the baptism of a child of a Musqueam woman named "Pelerouya" (EX-B44). This woman was identified as being married to Charles Koots. However, the record did not say that either of the child's parents lived at the False Creek Site. Since P'eliqwiye's daughter's maiden name was Emily Couts, it is plausible that the aforementioned "Pelerouya" was indeed P'eliqwiye. However, there was no Census Information or other evidence linking Charles Koots or Pelerouya to the False Creek Site, or later to the Reserve.

[311] I accept Dominic Point's evidence that his great-grandmother was P'eliqwiye, and I find it possible that this was the same woman who was identified as "Pelerouya" in the 1865 baptismal record. However, Mr. Point could not say when or why P'eliqwiye lived at the False Creek Site or at the Reserve. As well, he could not be definitive about or whether she was a permanent or a part-time resident. Neither the name "P'eliqwiye" nor "Pelerouya" appeared in any of the records or correspondence relating to the False Creek Reserve. That was perhaps not surprising as often only men, as heads of households, were specifically identified in censuses or voting resolutions. However, there was no documentary or other record showing that a man who might have been her husband, either Charles Koots or a Mr. Couts, ever lived at the Reserve.

[312] In these circumstances, I have concluded that there is insufficient evidence of a nexus between the woman P'eliqwiye and the False Creek Site to justify considering her to have been one of the "Indians...residing thereon" in 1869, or to have been a member of the False Creek Band on the Reserve in or after 1877.

(ix) Mary Jim

[313] As noted above, Mary Jim was the daughter of Old Jim Salemton and the sister of Pierre and Susan Jim. Mary "Koniamtenate" was never enumerated in the Census Information as a resident of the False Creek Reserve. However, like her sister, she was part of the group of Squamish Indians that claimed an interest in the Reserve through membership in "the Kitsilano band of the Squamish tribe of Indians" (CB844; EX-S32, p. 40).

[314] Of all the members of her family, Mary, through her first marriage to a Musqueam man, Joe "Samia" (EX-S32, p. 40), and by reason of having lived at the Musqueam reserve, appears to have developed the most significant ties to the Musqueam Band. Musqueam elder Arnold Guerin, in an 1983 conversation with Dorothy Kennedy and Randy Bouchard, remembered Mary as being a Musqueam person, even though he acknowledged that her father (who was "Old Jim") was part Squamish. He said:

AG's older sister (81 yr. old now) attended an Indian dance (winter dance) here[47] when she was a little girl -- some of her relatives (they were Musqueam) were living here -- among them was Gabriel Joe's (from Musqueam) mother, Mary, whose father was at least part Squamish. (M12, pp. 2-3)

Gabriel Joe was the son of Mary Jim and Joe Samia, and was acknowledged by all the Plaintiffs as a member of the Musqueam Band. At his baptism in 1885, at the age of 11 years, Gabriel Joe's parents were listed as Joseph Samia and "Kouianenate", both "du village Muskoyem" (CB34-430). As well, in December 1886, at the baptism of their daughter Josephine, Mary and Joe were again described as being of the Musqueam village (CB34-487).

[315] On the other hand, other Oblate Records attest to Mary Jim's Squamish affiliation. The baptismal record for Mary and Joe's daughter Margarita in 1891, described Maria "Kouiaoutenate" as Squamish (CB388-83). She was also identified as Squamish on her son Gabriel Joe's marriage record of 1903 (EX-S32, p. 40).

[316] After her husband Joe died, Mary Jim left the Musqueam reserve to live with her parents on the False Creek Reserve (CB1561). She then married a man named Tommy Pielle (also known as Tommy Peter), of the Penelekut Band, and moved to Kuper Island (off Vancouver Island). She said that she returned to the False Creek Reserve every spring, where she maintained a house, fruit trees and raspberry bushes (CB1561; 794). This was the basis for her later claim to an interest in the Reserve. As I noted above, Mary Jim's claim was rejected because she lost her status as a Squamish Indian at the time of her marriage to a non-Squamish man. However, much later, she pursued her claim to an interest in the Reserve. In 1916, she claimed both as a Squamish person (CB844) as a signatory to the petition to the Department[48], and as a Musqueam person when she signed the 1929 Musqueam Band petition for an interest in the Reserve (CB1065).

[317] I have concluded that Mary was born a Squamish Indian. However, because of her first marriage, she was also accepted as a member of the Musqueam Band. What is significant is that there is no evidence that Mary Jim lived at the False Creek Reserve because of her Musqueam band membership. Rather, it is clear that she was accepted at the Reserve because she was Squamish by birth, because she had lived at the Reserve as a child, and because she returned to the Reserve to live with and care for her Squamish father.

(x) Gabriel Joe

[318] Gabriel Joe was the son of Mary Jim (who was Squamish by birth) and Joe Samia, her Musqueam husband. However, there is no doubt that, in spite of his mixed ancestry, Gabriel Joe lived as and was reputed to be a Musqueam man. Dominic Point testified that Gabriel Joe lived with one of his brothers, "T'hit'hqelten", at the False Creek Site prior to the creation of the Reserve. However, this evidence was undated and uncorroborated. There was no other evidence, even in Dr. Kew's compilation of the Musqueam Genealogies (EX-M3, p. 102), which showed that Gabriel Joe had any brothers. None of the Census Information indicated that either Gabriel Joe or any possible brothers ever lived at the False Creek Site or Reserve. It may be that Gabriel Joe periodically visited his mother Mary, but there is insufficient evidence to conclude that he was ever a False Creek Reserve resident.

(xi-xii) Alec Dan and his son Nelson Dan

[319] Alec Dan was a Musqueam man who was identified by Dr. Kew and lay witness Dominic Point as a resident of the False Creek Reserve at the time of the 1913 Sale. The evidence compiled by Ms. Kennedy suggested that Alec and Sophy Dan were not married, although

Sophy occasionally used the Dan surname. Alec Dan lived with Sophy in her deceased parents' house on the False Creek Reserve. Sophy's father had been Bill Yumk, a Squamish man and Reserve resident. Alec and Sophy had a son whom they named Nelson. He was born on the Reserve in 1910 and lived there until he was 3 years old.

[320] Alec and Sophy Dan moved to the Musqueam reserve after the 1913 Sale. Alec Dan received no money from the Sale, and his name did not appear on any related document. It appears that Sophy received her share of the 1913 Sale proceeds because she had not married Alec Dan. Had she married a Musqueam man, she would probably would have been disqualified as a member of the False Creek Band pursuant to the band membership rules in the *Indian Act*. Later, in about 1920, after Alec Dan died, Sophy Dan left the Musqueam reserve and returned to the Squamish River valley, where she married a Squamish man, one Patrick Charles (also known as Patrick Cells) (CB416-216; EX-S32, p. 47). Sophy was enumerated with Patrick "Cells" on the Mission reserve in the early 1920s (CB368-15). It is clear that Sophy Dan was a Squamish woman and a Reserve resident. I have also concluded from all this evidence that Alec Dan and his infant son Nelson were never considered to be members of the False Creek Band.

Conclusions About the Identity of the Residents of the Reserve

[321] In 1868, an Indian delegation asked Magistrate Ball for a reserve for the 42 residents of a community at the False Creek Site. Of that number 30 were adults. Eight years later, the Mohun and Blenkinsop censuses identified 42 people at the False Creek Reserve and, again, 30 were adults. Over the years that followed, the numbers varied only slightly. In 1892, 41 residents were identified and 25 were adults. In 1901, there were 57 residents. This was the maximum population and, by 1911, that number had dropped to 51. The evidence indicates that there were no major changes in the size of the community on the Reserve between 1868 and the 1913 Sale.

[322] Based on all the evidence, and particularly in light of Ms. Kennedy's largely uncontested expert evidence, I have concluded that, by 1869, the False Creek Reserve was a permanent community populated overwhelmingly by Indians who were Squamish by ancestry or repute. It was a Squamish community of Squamish Indians under the leadership of Chief George, who was a Squamish man. The evidence does not disclose the presence of any Musqueam people on the Reserve at the time it was first allocated in 1869, or when it was re-allocated by the JIRC in 1877.

[323] Of all the Indians who lived on the Reserve over the years, I have found only three whom I would describe as Musqueam people. The first two were Alec Dan and his infant son Nelson who lived on the Reserve only because Sophy Dan, who was Squamish, was a member of the False Creek Band. Alec Dan was undoubtedly a Musqueam man and his son, Nelson, though of mixed Squamish and Musqueam heritage, lived as and was reputed to be a Musqueam man. The third person was Mary Jim. She was Squamish by birth but also Musqueam by repute due to her marriage to a Musqueam man and the fact that she lived for some years on a Musqueam reserve. However, after her marriage ended and she no longer lived at Musqueam, Mary Jim lived on the False Creek Reserve on a part-time basis. She took up residence there because the Reserve was her Squamish father's home and because she

agreed to take partial responsibility for her parents' care. She did not live on the Reserve because of any rights derived from her Musqueam associations.

[324] The evidence about these three individuals does not alter my conclusion that the Reserve was a Squamish community. All their presence tells me is that some Musqueam or part-Musqueam Indians, either because of kinship or because of a relationship which was akin to marriage, chose to live on a Squamish reserve.

THE PRESENT MUSQUEAM BAND'S CLAIM

[325] The present Musqueam Band claims that it holds a continuing interest in the Reserve because current band members can trace their ancestry to Musqueam Indians who lived on the Reserve. However, even if there had been evidence which showed that any Musqueam Indians acquired an interest in the Reserve when it was allocated in 1869 (and I have concluded that there was no such evidence), the Reserve was allocated to its residents as a collectivity. In these circumstances, the ancestral affiliations of individual Reserve residents to particular "tribes" in 1869 cannot translate into a reserve interest in the hands of the modern-day bands which are the descendants of those "tribes". In other words, even if the Musqueam had shown that some Musqueam Indians were resident on the Reserve in 1869, the present Musqueam Band would not have an interest in the Reserve.

[326] The Musqueam also say that, as owners and/or users of the False Creek Site, the Musqueam People generally, represented today by the Musqueam Band, were considered to be "residents" and therefore were beneficiaries of the colonial allocation in 1869. I have, for the reasons given earlier, concluded that, even if the False Creek Site was in traditional (albeit shared) Musqueam territory, colonial policy only involved reserve allocations to actual permanent residents. Further, I have concluded that, even if they had been proven, neither seasonal use nor control without permanent residence would have been sufficient under colonial policy to have entitled the Musqueam People to a reserve allocation in 1869.

[327] Finally, the Musqueam plaintiffs said that the present Band's entitlement should be based on a broad and liberal interpretation of the phrase "Indians...residing thereon" in the Gazette Notice. However, for the reasons already discussed, I have concluded that this is not a proper case for such an interpretive approach.

PART III - THE JOINT INDIAN RESERVE COMMISSION'S

ALLOCATION: 1877 (1889)

THE MUSQUEAM SUBMISSIONS

[328] The Musqueam took the position that, upon British Columbia's entry into Confederation in 1871, the Crown owed a fiduciary duty to the Indians residing on the Reserve (whom they alleged were, or included, Musqueam Indians) not to divest them of their interest in the Reserve without their consent. They said that the fiduciary duty arose from the "trust" language of the *British Columbia Terms of Union*[49] (the "*Terms of Union*"), from the provisions of the *Indian Act*

and from the historical relationship between the Crown and Indian peoples.

[329] The Musqueam also challenged the work of the Joint Indian Reserve Commission (the "JIRC") and its allocation of the Reserve in 1877 to the "Skwawmish Tribe". The Musqueam pleaded that the JIRC's allocation was a mistake. They argued that the JIRC's first minute of decision showed that it intended to allocate the Reserve to the Musqueam People. They said that the mistake was made when the JIRC issued its second minute of decision, which allocated the Reserve to the "Skwawmish Tribe". This minute, they said, was wrong because the JIRC's true intention had been to allocate the Reserve to the Musqueam People.

[330] In the alternative, the Musqueam said that, if the JIRC did intend to allocate the Reserve to the Squamish, then the JIRC made that decision in error because it failed to appreciate that Musqueam People had been included in the class of Indians who were allocated the Reserve in 1869. They said that those Musqueam People retained their interest in the Reserve, and the JIRC therefore made a mistake when it allocated the Reserve only to the Squamish in 1877.

[331] In the further alternative, in the event that they did not demonstrate that the JIRC's allocation to the Squamish was a mistake, the Musqueam challenged the authority of the JIRC to "re-allocate" the Reserve from the "Indians...residing thereon" to the "Skwawmish Tribe". They stated that the JIRC's authority did not extend to re-allocating reserves which were established in the colonial period and which, at the time British Columbia entered Confederation in 1871, became "lands reserved for the Indians" within the meaning of ss. 91(24) of the *Constitution Act, 1867.* The Musqueam submitted that Article 13 of the *Terms of Union* did not apply to colonial reserves, and that the purpose of the Terms of Union was only to establish a process for creating and allocating new post-Confederation reserves in the Province.

[332] The Musqueam noted that the JIRC conducted its work under the Royal Prerogative, based on authority granted by the Federal Government and the Province under Orders in Council 1088 and 1138, respectively. The Musqueam stated that this delegation of prerogative power was flawed because the discretion of both levels of government was fettered by existing legislation. The Federal Government was bound by section 4 of the *1876 Indian Act*, while the Province's authority to set aside land for Indian reserves was subject to the provisions of the *Land Act, 1875*.[50] The Musqueam also stated that a conveyance was required to create the Reserve and bring it under federal jurisdiction.

[333] The Squamish, Burrard and Crown were *ad idem* in their rejection of the Musqueam submissions. They argued that, at Confederation in 1871, the Reserve became "lands reserved for the Indians" within the meaning of ss. 91(24) and that the Reserve was administered for the "Indians...residing thereon", who became known as the False Creek Band under the *1876 Indian Act*. They also argued that the JIRC was expressly empowered to review the reserve requirements of all the Indian bands in the province, and that it was expressly contemplated that existing reserve lands, including those reserves set aside in the colonial era, could be re-allocated or diminished in size or even abolished. The Squamish, Burrard and Crown denied that the *Indian Act* or the provincial *Land Act* in any way fettered the authority of the JIRC to set aside and allocate (or re-allocate) reserve lands in the Province. Lastly, they submitted that the JIRC made no mistake and intended to allocate the Reserve to the "Skwawmish Tribe".

THE ISSUES

[334] Two questions are fundamental in the sense that they have an impact on the approach to be taken to many of the issues. They are:

I. When did the Reserve become "lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*?

This topic requires an understanding of:

- the impact of Confederation on the Reserve
- the mandate and work of the JIRC
- the impact of the *Land Act*
- the importance of a conveyance of the Reserve from British Columbia to the Federal Crown

II. Did a fiduciary duty exist in connection with the Crown's creation and management of the False Creek Reserve and, if so, was it breached by the JIRC's allocation of the Reserve?

Each question will be considered in turn.

WHEN DID THE RESERVE BECOME "LANDS RESERVED FOR THE INDIANS" UNDER SECTION 91(24) OF THE *CONSTITUTION ACT, 1867*?

BACKGROUND

[335] As described in Part II, the Reserve was created in 1869 by the exercise of the Royal Prerogative. According to the Gazette Notice of November 27, 1869 (CB158), it contained 37 acres and was created for the "use of the Indians...residing thereon". Where it is necessary to differentiate this 37-acre reserve from the larger reserve later allocated by the JIRC, this first version of the Reserve will be referred to as the "Colonial Reserve". It existed from 1869 until it was replaced in 1889 when the JIRC's decision to allocate the Reserve to the Squamish became effective[51].

THE IMPACT OF CONFEDERATION ON THE COLONIAL RESERVE

[336] In 1871, the Federal Government assumed exclusive legislative jurisdiction over the Colonial Reserve by reason of section 91(24) of the *Constitution Act, 1867*, which provided that:

s. 91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that

(notwithstanding anything in this Act)**the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say**, -- ...

(24) **Indians, and Lands reserved for the Indians.**

[*My emphasi*s]

[337] After 1871, the Colonial Reserve became provincial Crown land "burdened" with the Indian interest. Its status as provincial public land pursuant to section 109 of the *Constitution Act, 1867*, was unaffected by the Federal Government's assumption of legislative authority. In this regard, it is clear that federal legislative authority over lands reserved for Indians was validly exercised over such lands even though they were provincial public lands which had not yet been conveyed to the Federal Government.

[338] The situation was described by Teitelbaum J. in *Wewayakum Indian Band v. Canada and Wewayakai Indian Band* (1995), 99 F.T.R. 1 (T.D.) ("*Wewayakum*"), at para. 220. There he said:

It should be noted that there is a difference with respect to pre and post Confederation reserves. Reserves created at law prior to Confederation remained Indian Reserves at law after Confederation, since at Confederation legislative jurisdiction over the lands, namely the Indian interest in the lands, automatically became vested in Canada by virtue of s. 91(24) of the **Constitution Act, 1867.** Therefore, underlying title to the lands remained with the province. As a result, provincial title to the lands, federal legislative jurisdiction over the lands and the Indian interest in the land all co-existed after Confederation (*Ontario Mining Company v. Seybold* (1903), A.C. 73 (P.C.)).

[339] Confederation did not change the description of the Squamish Indian community interested in the False Creek Reserve. Before British Columbia joined Confederation, a group described as the "Indians...residing thereon" in the Gazette Notice had a communal right to use and occupy the Reserve. That remained the case after 1871.

[340] At Confederation, British Columbia made a commitment to convey to the Federal Government from time to time provincial public lands required by the Federal Government for the use and benefit of Indians. This commitment is found in Article 13 of the *Terms of Union*. It read:

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the DominionGovernment, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such a policy, **tracts of land** of such an extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, **shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in the case of disagreement between the two Governments respecting the quantity of such tracts of**

land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

[*My emphasis*]

[341] From 1871 until 1874, the Colonial Reserve was administered pursuant to the Federal Crown's prerogative powers. Then, on May 26, 1874, Canada's first *Indian Act*, the *1868 Indian Act*, became law in British Columbia pursuant to *An Act to Amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*, S.C. 1874, c. 21 (37 Vict.).

[342] Two years later, the *1876 Indian Act*, which came into force on April 12, 1876, made it possible for the first time to define the body of Indians who were the residents of the Colonial Reserve as a "band". At that time, the False Creek Band formally came into being (it was also sometimes referred to as the "Kitsilano Band"). The broad definition of band in section 3(1) read:

1. The term "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term "the band" means the band to which the context relates; and the term "band," when action is being taken by the band as such, means the band in council.

[343] "Reserve" was also a defined term for the first time in the *1876 Indian Act*. Section 3(6) provided that:

6. The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

[344] Section 26(1) of the *1876 Indian Act* gave adult male band members, who were both interested in and habitually resident on or near a reserve, the right to vote to approve or reject a surrender and the right, with other band members, to share in any distribution of proceeds from a reserve. These rights were thus accorded to the members of the False Creek Band at the Colonial Reserve. However, eight months later, the right to vote on a surrender was suspended by a proclamation made by the Governor in Council on December 15, 1876. This proclamation is discussed below in connection with the work of the JIRC.

THE MANDATE AND WORK OF THE JIRC

[345] As noted above, Article 13 of the *Terms of Union* provided that lands were to be reserved for Indians in British Columbia based on a policy that was as liberal as that which had been pursued in the colonial period. However, it quickly became apparent that British Columbia's colonial reserve policy as it related to the size of reserve allotments was not generous enough to satisfy the Federal Government.

[346] In colonial times, after the resignation of Governor Douglas in 1864, reserve allocations to British Columbia Indians, as a general rule, did not exceed ten acres per family of five persons (CB225-1). Elsewhere in Canada, 80 acres per family had been the standard. In 1873, in response to the Federal Government's request for an appropriation of 80 acres per family from British Columbia public lands, the Province suggested that 20 acres was a reasonable allocation. The documents disclosed that the Province believed that the larger allocations made on the prairies and in eastern Canada were not appropriate for British Columbia because the majority of Indians in the Province were not interested in cultivating land or raising livestock.

[347] Superintendent General David Laird addressed the severity of the problem created by the failure to allocate reserves in a report dated November 2, 1874 (CB225-1). It stated, in part:

... a cursory glance at these documents is enough to show that the present state of the Indian Land Question in our territory West of the Rocky Mountains is most unsatisfactory; and that **it is the occasion not only of great discontent among the aboriginal tribes, but also of serious alarm to the white settlers**. To the Indian, the Land Question far transcends in importance all others, and its satisfactory adjustment in British Columbia will be the first step towards allaying the wide-spread and growing discontent now existing among the native tribes of that Province.

[*My emphasis*]

The report also reproduced the following opinion expressed by Indian Superintendent Powell, who was the Federal Crown's representative in Victoria. He wrote that: "If there has not been an Indian war, it is not because there has been no injustice to the Indians but because the Indians have not been sufficiently united."

[348] The inter-governmental dispute about appropriate reserve acreage continued for five years after British Columbia joined Confederation. Not surprisingly, the Indian population became increasingly discontented. They had expected to receive reserve allocations based on 80 acres per family but nothing had been done. As JIRC Commissioner Malcolm Sproat noted in his memorandum to the Minister dated September 29, 1876, fifty percent of the British Columbia Indian population of between 30,000 and 50,000 people had no reserves (CB265-11). On the British Columbia mainland, no reserves had been allotted north of Burrard Inlet (except under Treaty 8 in northeastern B.C.) and there were no reserves on the west coast of Vancouver Island. In the result, Commissioner Sproat noted that the Indians were not in "good humour" (CB265-11).

[349] The impasse was resolved by the creation of the JIRC. Much of the credit for the resolution of the dispute creation can be given to William Duncan, who worked as a missionary among Indian people. He wrote to both the Federal and British Columbia governments suggesting that no fixed formula for acreage be used in the reserve creation process. He also suggested that applications for the approval of reserves should be submitted by resident Indian agents who would prepare a census for each proposed group and who would be well informed about the Indians' lifestyles and requirements. It was his view that reserve allocations should be made to groups of Indians who spoke the same language. He described such groups as "nations" (CB235, pp. 6, 9).

[350] British Columbia Attorney General George A. Walkem used Mr. Duncan's proposals as the basis for a report to his Executive Council (CB235). This report later became a recommendation made to Ottawa by way of British Columbia's Order in Council 1071. The Federal Government made a counter proposal in a memorandum (CB237) from Acting Superintendent General R.W. Scott. It was transmitted to British Columbia under cover of the Federal Government's Order in Council 1088 (CB240). Scott rejected British Columbia's suggestion that Indian agents should make applications for the approval of reserves. In view of what he described as the "urgency" of the situation, Scott suggested that commissioners be appointed who would have full authority to finally fix and determine reserves. When British Columbia accepted Scott's proposal on January 6, 1876, by means of British Columbia's Order in Council 1138 (CB246-1), the JIRC was established with clear authority to finally fix and determine reserves.

[351] In its acceptance, British Columbia re-wrote the mandate suggested by the Federal Crown in Scott's memo attached to Order in Council 1088. In its version, the Province added an extra numbered paragraph, but it simply corresponded to the final unnumbered paragraph at the end of Scott's memo dealing with how the commissioners would be paid. British Columbia's version did not otherwise differ from Scott's memo except in the first numbered paragraph where, before mentioning the appointment of commissioners, Scott had started with a statement in the nature of a recital which read, "that with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis...". British Columbia left the recital out of its version, but included the following passage:

... but regarding **a final settlement of the land question as most urgent and most important** to the peace and prosperity of the Province, they are of opinion and advise that all the proposals, numbered one to seven inclusive, should be accepted.

[*My emphasis*]

[352] In my view, this passage was the equivalent of the recital in Scott's memorandum and makes it clear that British Columbia accepted the finality of the JIRC's allocations. I have reached this conclusion because, as noted above, before the JIRC was created, Attorney General Walkem's report (CB235) had proposed a procedure whereby Indian agents would apply to the Province for reserves and, in so doing, would implicitly seek approval for the reserves they proposed. This procedure was not accepted by the Federal Crown or, ultimately, by the Province. This demonstrates that, although the possibility of a requirement for subsequent governmental approval of the JIRC's decisions was considered by the Province, it ultimately agreed to give the JIRC the right to finally fix and determine the location and extent of reserves.

[353] There is another reason to conclude that subsequent governmental approvals of the JIRC's allocations were not required. On January 27, 1877 (CB303), not long after the JIRC began its work, British Columbia proposed that it be dissolved after its second year of operation because its proceedings were clearly going to be slow and expensive. The Province suggested that, following the dissolution of the JIRC, lands for Indians would be allocated by sole reserve commissioners, who would be federal officials. The Province further proposed that their decisions would be subject to the approval of British Columbia's Chief Commissioner of Lands and Works and that disagreements would be settled by a court reference. The Federal Government ultimately accepted these proposals. It is clear from this exchange that British

Columbia wanted to depart from the régime established for the JIRC and create a different process which would give it the right to approve reserve allocations.

[354] Subsequent correspondence confirmed the Federal Government's understanding that the JIRC had final authority to create reserves, but that the subsequent work of the sole commissioners required Provincial approval (CB403).

JIRC Personnel

[355] Dominion Commissioner Alexander Anderson and British Columbia Commissioner Archibald McKinlay were former employees of the Hudson's Bay Company who, since the 1830s, had had extensive experience working with and travelling among Indian people in the interior of British Columbia. Commissioner Anderson had retired from the position of chief trader. The third commissioner, who was the joint appointee of both governments, was Malcolm Sproat. He had been the manager of a forest products exporting company on the west coast of Vancouver Island and, in 1868, had published a book based on his observations of the Island Indian population.

[356] George Blenkinsop accompanied the JIRC as its census taker. Like Commissioner Anderson, he had also retired from the Hudson's Bay Company as a chief trader. At each reserve site he was responsible for creating a census which recorded the names of household heads, the total number of family members, their religion, and their ability to speak English. The census also included a description of the Indians' residences and their occupations. It was clear from his letter of application of January 24, 1876, and his letter of reference from former Governor James Douglas of the same date, that Blenkinsop understood several native languages (CB248).

[357] The JIRC's interpreter was an Indian named Michel. He was a Halkomelem speaker with a strong knowledge of coastal Indian dialects. Commissioner Sproat's report to the Provincial Secretary, which covered the period from November 3, 1876, to March 11, 1877, described Michel in the following terms at CB304-2:

Michel, an interpreter recommended to the Commissioners by Mr. Superintendent Lenihan this last, a very intelligent Indian from Yale, conversant with all the varied dialects of the neighbouring Coast and talking English fluently, has given great satisfaction throughout and greatly aided the operations of the Commissioners.

[358] Commissioner Anderson agreed. His diary for the period November 3 to December 10, 1876, included the following comment about Michel's skills (at CB271-1):

The last (Michel) is an intelligent Indian who has attended on Mr. O'Reilly, T.M., and other officials at various times. He talks very good English, and comprehends well what may be said to him in that tongue. On the other hand he can render well into the native tongue our words.

[359] Finally, in the concluding paragraphs of his summary report of March 29, 1877, which covered the JIRC's first winter's work on the coast, Commissioner Sproat praised the

interpreter's contribution and made it plain that language difficulties were not a problem for the JIRC. He said (at CB309-25):

Having an excellent interpreter with us, who could speak in their own language to most of the tribes whom we visited, we were able to know their minds thoroughly, and to explain the wishes of the government and the reasons for our action, in a satisfactory manner.

[360] It is clear that the commissioners were well aware of the views of all the Indians. In his report to the Minister of November 27, 1876, Commissioner Sproat said (at CB287-40):

The Commissioners took pains to find out the real wishes of the people, but in formal conferences, they addressed themselves, especially to the chiefs or old men whom the Indians [had] appointed to speak for them.

[361] The last member of the party who worked on the JIRC's allotments was Mr. M.E. Mohun. He surveyed the reserves and, as mentioned in Part II, he prepared a census of the Indians at the False Creek Reserve.

The JIRC's Mandate and Instructions

[362] The Federal Crown's Order in Council 1088 set out the mandate of the JIRC (the "Mandate") in the following terms:

1. **That with a view to the SPEEDY AND FINAL adjustment of the Indian Reserve question in British Columbia on a satisfactory basis**, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and the Local Governments jointly.

2. That the said Commissioners shall, as soon as practicable after their appointment, meet at Victoria, and make arrangements to visit, with all convenient speed, in such order as may be found desirable,**each Indian nation (meaning by nation all Indian tribes speaking the same language)** in British Columbia, and, **after full enquiry ON THE SPOT into all matters affecting the question, TO FIX AND DETERMINE FOR EACH NATION, separately, the number, extent and, locality of the RESERVE OR RESERVES to be allowed to it.**

3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia, no basis of acreage be fixed for the Indians of that Province as a whole, but that each nation of Indians of the same language be dealt with separately.

4. The Commissioners shall be guided generally by the spirit of the Terms of the Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians, and, in the case of each particular nation, regard shall be had to the habits, wants and pursuits of such nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers.

5. **That each Reserve shall be held in trust for the use and benefit of the nation of Indians to which it has been allotted**, and, in the event of any material increase or decrease

hereafter of the numbers of a nation occupying a Reserve, such a **RESERVE SHALL BE ENLARGED OR DIMINISHED, as the case may be, so that it shall bear a fair proportion to the members of the nation occupying it**. The extra land required for any Reserve shall be allotted from Crown Lands, and any land taken off a Reserve shall revert to the Province.

6. **That so soon as the Reserve or Reserves for any Indian nation shall have been fixed and determined by the Commissioner as aforesaid, the existing Reserves belonging to such nation, so far as they are not in whole or in part included in such NEW RESERVE OR RESERVES so determined by the Commissioners, shall be surrendered by the Dominion to the Local Government** so soon as may be convenient, on the latter paying to the former, for the benefit of the Indians, **such compensation for any clearings or improvements made on any Reserve so surrendered** by the Dominion and accepted by the Province, as may be thought reasonable by the Commissioners aforesaid.

[*My emphasis*]

[363] The Mandate was explained in instructions given to the commissioners by the governments they represented. Alexander Anderson, as the Dominion Commissioner, received his instructions from the Minister in a memorandum dated August 25, 1876 (CB260). Among other things, Anderson was told that:

... you should bear in mind that the Dominion Government think it very important that in the settlement of the land question nothing should be done that could interfere with or militate against the establishment of friendly relations between the Dominion Government and the Indians of British Columbia. **You should therefore, endeavour to allay the fears existing among the Indians in reference to land matters**, and in all your subsequent dealings with them you should carefully avoid anything which might be calculated to alarm or disturb the Indian mind.

[*My emphasis*]

[364] Commissioner Anderson also received guidelines about the number and size of reserves that should be allocated, although no formula for determining acreage was provided (CB260). He was encouraged to create a small number of large reserves, but it was recognized that this would not always be possible. The instructions said, in part:

... while it appears theoretically desirable as a matter of general policy to diminish the number of small reserves held by any Indian nation, and when circumstances will permit to concentrate them on three or four large reserves, thus making them more accessible to missionaries and school teachers, you should be careful not even for this purpose to do any needless violence to existing tribal arrangements, and especially not to disturb the Indians in the POSSESSION of any villages, fishing stations, fur-trading posts, settlements or clearings, which they may OCCUPY and to which they may be specially attached, and which may be to their interest to retain. Again it would not be politic to attempt to make any violent or sudden change in the habits of the Indians, or that those who are now engaged in fishing, stock-raising, or in any other profitable branch of industry should be diverted from their present occupations or pursuits, and in order to induce them to turn their attention to agriculture. They should rather be encouraged to persevere in the industry or occupation they are engaged in, and with that view should be secured in the possession of the

villages, fishing stations, fur-posts, or other settlements or clearings which they occupy in connection with that industry or occupation,

unless there are some special objections to so doing, as for example, where the Indian settlement is in objectionable proximity to any city, town, or to a village of white people.

[*My emphasis*]

[365] The Federal Government's memorandum of instructions was also given to Commissioner Sproat as the joint commissioner and to British Columbia's Commissioner McKinlay for his information. In addition, Commissioners McKinlay and Sproat were given oral instructions by British Columbia and, in later written instructions dated October 23, 1876 (CB269), Commissioner McKinlay was advised that it was:

... incumbent to point out to you as the Representative of the Province the necessity for extreme care and for the exercise of the mature and unbiased judgment in the carrying out of this arrangement so that while you endeavour in all cases to act with a liberal spirit toward the Indians, you do not imperil the progress of white settlement by conceding unnecessarily large reserves... You will report your proceedings from time to time and communicate any action on the part of the Commission which in your opinion may tend to militate against the interest of the province or may require remedying.

[366] The Musqueam submitted that the above instruction not to "do any needless violence to existing tribal arrangements" required the JIRC to "respect the long association Indian people may have had with areas when setting aside [r]eserve lands". The Musqueam relied on this excerpt as support for their submission that the JIRC intended to, or should have, considered the Musqueam People's ancestral use of the Reserve and included the Musqueam "tribe" as a recipient of an interest in the Reserve.

[367] The instructions were issued partly in response to protests which had been made by the commissioners and others about the provisions of the Mandate which had proposed the allocation of reserves to "nations" of "tribes" speaking the same language. This provision originated with missionary William Duncan, who had envisioned a future in which Indians who spoke the same language would reside on large reserves and there engage in agricultural pursuits and religious worship. However, the Indians in British Columbia at this time spoke a variety of different languages, lived in small, scattered communities, and were not necessarily interested in farming. In these circumstances, the commissioners were opposed to a Mandate which required them to make drastic changes to the living arrangements of the Indian population. The instructions were therefore issued to permit the commissioners to maintain the status quo.

[368] The JIRC's Mandate and instructions required the JIRC to make inquiries on the spot and to have regard for the Indians' occupation of the land when creating reserves. Accordingly, the JIRC's decisions were made without regard for any seasonal or ancestral use of a site. Although the commissioners occasionally reported about the history of the Indians they met, it is plain that their allocations were not based on historical use. In speaking of the Squamish

People in his report to the Minister of the Interior of November 27, 1876, Commissioner Sproat observed that (CB287-36):

The general public opinion in the neighbourhood now appears to be that the claims of the Skwawmish Indians to land at Burrard's Inlet are not founded upon ancient occupancy or use. I do not think they have old associations with the place. They probably came to the Inlet and took up residence there at a

comparatively late date for the legitimate purpose of endeavouring to make money out of the sawmill owners established in business at that place. They now form the principal resident (Indian) population of the Inlet.

[369] Whether Commissioner Sproat was right or wrong about the relatively recent arrival of the Squamish in Burrard Inlet is not the point here. What is clear is that, even though the commissioners believed that the Squamish occupation of Burrard Inlet was not of long standing, they allocated all the populated Burrard Inlet reserves to Squamish People based on their occupation of those sites in 1876 and 1877.

[370] It is also noteworthy that, according to paragraph 6 of the Mandate, if the JIRC did not allocate all or part of an existing colonial reserve, then the unallocated reserve land was eliminated in a process of Federal Government surrender to the Province. Existing colonial reserves were not, as the Musqueam suggested, outside the Mandate. Indeed, according to the Mandate, the JIRC had the power to reduce or completely eliminate a colonial reserve.

[371] As well, according to paragraph 6 of the Mandate, lands which had been part of colonial reserves, if allocated by the JIRC, were included in "new Reserves". This paragraph is the basis for my conclusion that the Colonial Reserve was replaced by a new reserve in 1889 when the JIRC's decisions became effective. By confirming the Colonial Reserve in 1877, the JIRC included it as part of the new and larger Reserve.

[372] In my view, three significant conclusions can be drawn from the JIRC's Mandate and the instructions which were issued to the commissioners:

i) The JIRC was given final authority to fix and determine reserves. No subsequent governmental approvals were required for these reserves to become "lands reserved for the Indians" pursuant to s. 91(24) of the *Constitution Act, 1867*.

ii) The JIRC had the authority to allocate multiple reserves to the "tribes" of one "nation".

iii) The JIRC was directed to review all the colonial and post-Confederation reserve allocations, as well as the current needs of the Indians and, where necessary, it was empowered to diminish or eliminate reserves.

The 1876 Proclamation

[373] The surrender provisions in sections 25 to 28 of the *1876 Indian Act* provided that the sale, alienation or lease of reserve land could only be undertaken with the consent of those voting band members who were habitually resident on and interested in a reserve. As it was thought that these surrender provisions conflicted with the JIRC's Mandate, which allowed it to reduce or eliminate reserves without the consent of the Indians, a proclamation was issued by the Governor in Council pursuant to section 97 of the *1876 Indian Act*. It was dated December 15, 1876, and was published in the Canada Gazette on December 30, 1876 (CB8104-1) (the "1876 Proclamation"). By its terms, the Federal Crown exempted reserves and Indian lands in British Columbia from the operation of sections 25 to 28 of the *1876 Indian Act*.

[374] Section 97 of the *1876 Indian Act* provided that the 1876 Proclamation would remain in force until removed by further proclamation. No such further proclamation appears to have been issued. However, in this case, nothing turns on the lifespan of the 1876 Proclamation. All parties agreed, and I accept, that it applied to the reserve creation process and was in force on June 15, 1877, which was the date of the JIRC's minute of decision allocating the False Creek Reserve to the Squamish. None of the parties have relied on the 1876 Proclamation after 1877.

The JIRC's Work Among the Plaintiffs

[375] The three commissioners met in Victoria. From there, Commissioners McKinlay and Anderson travelled to New Westminster. They then headed westward out the north arm of the Fraser River to the Musqueam colonial reserve. They made camp at noon on November 6, 1876, and spent four full days at Musqueam. Commissioner Sproat was delayed in Victoria (CB273-6) and did not participate in the work at the Musqueam reserve (CB273-6). He joined the JIRC in Burrard Inlet on November 12, 1876, before all the commissioners visited the Colonial Reserve in False Creek.

[376] On November 7, the JIRC dealt with a Musqueam complaint concerning a settler who had taken land they claimed on nearby Sea Island (CB271-3). The commissioners went over to the island to see whether there was any unsettled meadow land which could be given to the Musqueam People. On November 8, they sent Mr. Mohun back to New Westminster to check the title documents for Sea Island and the next day he returned to report that two lots with a total area of 80 acres were available. It appears from Commissioner Anderson's diary that the allocations at Musqueam were settled on November 10, 1876 (CB271-2).

[377] The JIRC told the Musqueam People of its decision to confirm their existing reserve, which would be called Musqueam Indian Reserve No. 2, and to allocate an additional 80 acres of meadow land on Sea Island to replace the land taken by the settler. This property would be known as Musqueam Indian Reserve No. 3. Commissioner Anderson noted in his journal entry of November 8, that "all that the Indian's desire in addition to their present reserve of some 342 acres, is a portion of the meadowland for the purpose of haymaking etc." (CB271-2). Commissioner McKinlay's journal entry for November 9, 1876, recorded the grateful reaction of the Musqueam to the reserve allocation they received (CB273-4), and his entry of November 11, 1876, showed that, just prior to leaving the Musqueam reserve, Commissioners McKinlay and Anderson were invited to the home of "second chief Charlie" where they met with him and with the "head chief". Both chiefs said they were "fully satisfyed [*sic*]" (CB273-5). This impression was confirmed in a report dated November 17, 1876, to Superintendent of Indian

Affairs Lenihan signed by the three commissioners. The report referred to Musqueam Chief Tsemlano ("Simlahnook") and noted that "We left him and his tribe pleased with their Reserves as determined by the Commissioners" (CB276-1).

[378] It is of importance that there is no contemporaneous record of any Musqueam person claiming an interest in the Colonial Reserve in False Creek. The absence of any such claims to the JIRC was confirmed in a report made to the Minister by Commissioner Sproat on November 27, 1876. He noted that the Indians of the lower Fraser River (which would include the Musqueam) made no claims for reserves in Burrard Inlet (CB287-37). In 1876, Commissioner Sproat clearly viewed Burrard Inlet as a Squamish place. He said "the Muskweam Indians live at the mouth of the north arm of the Fraser river. The Skwawmish Indians inhabit Burrard's Inlet and also the Skwawmish river at Howe Sound" (CB287, 30-31)[52].

[379] On November 11, the two commissioners left the Musqueam reserve. They travelled by boat around Point Grey, across English Bay and through the First Narrows where they made camp on the north shore of Burrard Inlet. According to Commissioner McKinlay's diary entry for November 13, 1876, a meeting was held with about one dozen Squamish "chiefs" (CB273-7). After this meeting, the JIRC allocated the following reserves to the "Skwawmish Tribe". The reserves are all located in the section of Burrard Inlet lying at and to the east of the First Narrows:

Mission IR No. 1 (38 acres) Residential

Seymour Creek IR No. 2 (109.5 acres) Residential

Burrard IR No. 3 (275 acres) Residential

Inlailawatash IR No. 4 (33 acres) Non-residential - allocated jointly to the Squamish and Musqueam[53]

Capilano IR No. 5 (518 acres) Residential

[380] The location of these reserves is shown on a map which is derived from exhibit OC5. It is found herein as Schedule B. Seymour Creek, Burrard, and Capilano were all colonial reserves which were confirmed by the JIRC and increased in size. Mission IR No. 1, which was also a colonial reserve, was confirmed by the JIRC but no acreage was added as no land was available for that purpose.

[381] Commissioner Sproat's report to the Minister dated November 27, 1876, advised that, pursuant to its Mandate, the JIRC had considered the allotment to the Squamish of one large reserve on the north shore of Burrard Inlet (CB287-42). However, such an allotment was not made because both the Squamish and the non-Indian settlers opposed the idea and because there was insufficient available land. It was understood by the commissioners and the Squamish chiefs that the former would allot land north of Howe Sound to compensate for their inability to provide the Squamish with sufficient reserve land in Burrard Inlet. This was accomplished with the later JIRC allocation to the Squamish of a property of several thousand acres known as Cheakamus Indian Reserve No. 11 in the Squamish River valley.

[382] On November 14, 1876, mid-way through their work in Burrard Inlet, the JIRC travelled west out the First Narrows and south across English Bay to the Colonial Reserve at the entrance to False Creek. The commissioners found that the chief (Chief George) was not present, and they were told that he had travelled up to Howe Sound. However, Commissioner Anderson's diary noted that a substitute had been appointed to meet with the commissioners. He was prepared for the meeting and produced a sketch of the Colonial Reserve which had been signed in the colonial period by Chief Commissioner of Lands and Works Joseph Trutch.

[383] The Indians at the Colonial Reserve were asked what lands they wanted. Commissioner Anderson reported in his diary (CB271-4) that:

The Inds. did not care for any extension of their Reserve backward, where the woods are very dense, but wished to have a little more frontage on the water. We accordingly extended the western boundary till it strikes the water; an insignificant extension as regards acreage; but valuable for the purposes of the Inds., and comprised indeed all the land so ... available in the vicinity.

Commissioner McKinlay's diary indicates that the "Indians were exceedingly well satisfied" (CB273-8) with the allocation which was made on November 14, 1876. The new reserve included the acreage of the Colonial Reserve (37 acres) and added the land and waterfront the Indians requested to create a new reserve of approximately 80 acres.

[384] After their visit to the Reserve, the commissioners spent several more days in Burrard Inlet. In that time, they met with Supple Jack and a group of 30 or 40 Indian people who were living with him on the Government Military Reserve (now Stanley Park). Because the Department considered Supple Jack and his people to be "squatters" on military land, the JIRC did not allocate them a reserve. However, as will be discussed, the commissioners told Supple Jack that he and his group could live on any Squamish reserve. After quitting Supple Jack, they proceeded north where they allocated 18 reserves to the Squamish in Howe Sound and in the Squamish River valley. The JIRC decided on those allocations on November 28, 1876, and described them in a minute of decision dated April 26, 1877 (CB311-17) (the "Northern Minute of Decision"). Schedule C herein is a map derived from Exhibit OC5 which shows the locations of the northern reserves of the Squamish "tribe".

[385] Following their work in Howe Sound and in other locations, the commissioners returned to Burrard Inlet in June 1877. At that time, they made some amendments to their allocations on the north shore of the Inlet in order to settle disputes which had arisen between Indians and non-Indian settlers (CB320-11).

The JIRC's Minutes of Decision

Were Mistakes Made?

[386] CB283-1 is a minute of decision signed by all three commissioners on November 27, 1876 (the "First Minute"). The First Minute was prepared at the commissioners' camp near the mouth of the Squamish River as they completed their work in Howe Sound and the Squamish River valley. It was signed just after the JIRC's initial work at Musqueam and in Burrard Inlet and, for this reason, the Musqueam argued that it is the most reliable evidence of the JIRC's

reserve allocations.

[387] The relevant portions of the narrative section of the First Minute read as follows:

Minute of Decision

In virtue of Commissions and instructions issued by the Governments of Canada and British Columbia, empowering us to fix and determine the number, extent and locality of the Reserve or Reserves to be allowed to the Indians of British Columbia, We the undersigned having made full inquiry at the undermentioned places into all matters affecting the question Hereby declare the following to be the reserves for the Muskweam and Skwawmish Indians

Muskweam

Original reserve as per Official map confirmed and an addition made of lots eight and nine northwest corner of Sea Island

False Creek

Original reserve confirmed and increased by running true north from the north west post to sea thence following shore line to north east post of original reserve. Addition subject to rights of timber lessee.

Kah-pil-lah-no Creek

Burrards Inlet

Original reserve as per Official map confirmed.

...

[388] The Musqueam said that, because "False Creek" was not described as a Burrard Inlet reserve, and because the Indian band name immediately above it was "Muskweam", it is reasonable to conclude that the Reserve was allocated to the Musqueam and that later documents which indicate an allocation to the Squamish were mistaken. This view, the Musqueam said, is supported in part by the last paragraph of the First Minute, which suggested that the Squamish reserves were only in Burrard Inlet. It read:

The foregoing completes the reserves at Muskweam and Burrards Inlet. As the Skwawmish Indians live at Howe Sound as well as at Burrards Inlet, we laid off the following reserves at the Skwawmish river Howe Sound. No reserves had been laid off there.

[*My emphasis*]

The Musqueam argued that, if the False Creek Reserve was not in Burrard Inlet, it must by inference have been a Musqueam reserve.

[389] However, the schedule to the First Minute clearly included "False Creek" in the list of Burrard Inlet reserves. It provided that:

Muskweam, Burrard Inlet, and Howe Sound

Reserve		estimated at acres	
Muskweam		342	422
Addition on Sea Island		80	
Burrard False Creek		**37**	
Inlet	**Addition**	**30**	**67**[54]
Kapilano Creek		500	
Mission Reserve		37	
Seymour Creek		50	
Addition		60	110
Reserve near North Arm		112	
Addition		120	232
Fishing Station North Arm "Tselailawatash"		8	
Poyam		1	
Chuck chuck		1	
Skowishin		40	
Skwoishin graveyard		1	
Howe	Che-ah-kamist (say about)		2000
Sound	Yook wits		5
Wai wa kem		20	
Poh kwiosin [...] Ska main		100	
Se-aich-em [...] Island		30	
Kow tain		42	

Ye-Kwaupsum	100
[...] Graveyard	1
Small Island	15
Staw-a-mus island	1200 to 1400
Skwul waitem Island [...] Ship	250
Staw-a-mus	80
Ka ka-la-hun	20
Chek-whelp	20
Graveyard in on Keat Island	1
	5503

[*My emphasis*]

[390] The Crown noted that, in a subsequent report, the JIRC described the Musqueam reserves as encompassing 422 acres (CB306-7). This was the same acreage that was given for the Musqueam I.R. No. 2 and the Musqueam Sea Island I.R. No. 3 in the schedule to the First Minute, and it therefore indicates that the allocation to the Musqueam did not include the False Creek Reserve. The JIRC report also said that the total Squamish reserve acreage was 5,081 acres. The report gave the acreages allocated by the JIRC to the Musqueam and the Squamish (422 and 5,081 respectively). When they are added together they total 5,503 acres, which is the same total as the one listed on the schedule to the First Minute. Therefore, when the report and the schedule are read together, there is no doubt that the False Creek Reserve was considered by the JIRC to be a Squamish reserve when the First Minute was drafted. I say this because the numbers in these two documents correspond only if the False Creek Reserve is treated as a Squamish reserve.

[391] I should also observe that, in my view, the Musqueam were wrong when, looking at the First Minute, they described Musqueam as a band name and False Creek as a place name. In my view, each heading is both a place name and a band name. As earlier discussed, in 1874, with the adoption of the *1868 Indian Act* in British Columbia, the Musqueam, False Creek and Capilano "bands" came into existence. Accordingly, as I read the First Minute, the colonial reserve at Musqueam was confirmed for the Musqueam Band with an addition. Similarly, the Colonial Reserve at False Creek was confirmed for the False Creek Band and increased in size.

[392] For all these reasons, I have concluded that the First Minute did allocate the False Creek Reserve to the Squamish. However, the First Minute was withdrawn in writing (at CB320-11) and replaced by minutes of decision dated June 15, 1877 (the "Second Minute"). The Second Minute was also signed by all three commissioners (CB320-12, 13). In my view, it is the

authoritative minute of decision.

[393] The Second Minute, while not stating that "False Creek" was in Burrard Inlet, made it clear that it was allocated to the Squamish. The pertinent sections read:

Minute of Decisions

In minutes of commission and instructions issued by the Governments of Canada and British Columbia, empowering us to find and determine the number extent and locality of the Reserve or Reserves to be allowed to the Indians of British Columbia, *We*, the undersigned, having in each case made full enquiry on the spot into all matters affecting the question *hereby declare* the following to be the reserves for the undermentioned Indian tribes respectively

Muskweam

(Muskweam Tribe)

Original reserve as per official map confirmed and an addition made of lots eight and nine north west corner of Sea Island.

FALSE CREEK

(SKWAWMISH TRIBE) [*My emphasis*]

Original reserve confirmed and increased by running line north from the north west post to sea thence following shore line to north east post of original Reserve. Addition subject to *rights of* timber lessee.

Kah.pil.lah.no Creek

Burrards Inlet

(Skwawmish Tribe)

Original Reserve confirmed, and increased by the addition of a tract of land bounded as follows from the north west corner of Lot 264 by a line running true north to its intersection with Kahpillahno Creek thence down the left bank of creek to northern boundary of original Reserve, thence easterly along said Boundary to its intersection with the western boundary of Lot 264 thence north of said boundary to initial point.

Mission Reserve

Burrards Inlet

(Skwamish Tribe)

Original reserve as per official map confirmed.

Seymour Creek

Burrards Inlet

Skwawmish Tribe

Original Reserve confirmed and increased by running from the north west corner true north twenty chains, thence true east to Seymour Creek, thence down Creek to north east post of present Reserve. Addition subject to right of timber lessee.

[394] Another JIRC minute of decision which dealt with the False Creek Reserve was dated January 15, 1877 (CB301). It appears to be a typed transcription of the Second Minute and is identical in every respect except its date. I have concluded that the January date on this version of the Second Minute is a typographical error. I say this because the document refers to boundary changes made to certain reserves inside the First Narrows, which were not made by the JIRC until its second visit to Burrard Inlet in June 1877. Accordingly, it will be the Northern Minute of Decision and the Second Minute which will together be referred to as the "Minutes of Decision".

[395] Throughout these submissions the Musqueam took the position that False Creek was not part of Burrard Inlet. They relied on the following statement by Commissioner Sproat to the Minister in a letter dated December 7, 1876, (CB287, pp. 30-31) in which he spoke about the Squamish living in Burrard Inlet but said nothing about who lived at False Creek. Sproat wrote:

Since leaving New Westminster on the 6th inst, the land claims of over 700 Indians of the Muskweam and Skwawmish fn people have been dealt with to their satisfaction. The interests of white settlers, also, have been duly considered.

The Muskweam Indians live at the mouth of the north arm of the Fraser river.

The Skwawmish Indians inhabit Burrard's Inlet and also the Skwawmish river at Howe Sound.

[*My emphasis*]

[396] The Musqueam said that this passage indicated that the Squamish were living only in the portion of Burrard Inlet to the east of the First Narrows and not in False Creek, and that, therefore, an error was made in the Second Minute when it allocated the False Creek Reserve to the Squamish. They say, based on the above quotation, that the JIRC knew that the False Creek Reserve residents were Musqueam and that the Reserve should have been allocated, in whole or in part, to the Musqueam People.

[397] The historical evidence is inconsistent on the issue of whether False Creek was considered to be part of Burrard Inlet. Captain Vancouver named Burrard Inlet in 1792, and he clearly showed that its western boundary was a north-south line between Point Grey and Point Atkinson. As well, a map prepared by one of Captain Vancouver's lieutenants described both the area outside the First Narrows and the waters inside the First Narrows to the head of Indian Arm as "Burrard's Channel" (EX-S42, figure 3). These documents clearly included False Creek

in Burrard Inlet. However, a map prepared by Attorney General H.P.P. Crease in 1863 described only the water inside the First Narrows as Burrard Inlet. The area outside the narrows, which includes False Creek, was unnamed except for a reference to the "outer anchorage" (EX-S42, figure 7 or CB63). These materials illustrate the inconsistencies which appear in the documents. Sometimes the area to the west of First Narrows is called "English Bay", sometimes it is unnamed, and sometimes it is described as "Burrard Inlet". Depending on the context, False Creek may be included in either the Burrard Inlet or the English Bay references. As well, sometimes "False Creek" stands alone as a geographic reference. However, what is clear is that there is never any confusion between these three bodies of water (Burrard Inlet, English Bay, and False Creek) and the Fraser River to the south of Point Grey.

[398] The evidence is clear that the JIRC included False Creek in Burrard Inlet. I say this because, in addition to the schedule to the First Minute which, as indicated above, places False Creek beside the heading "Burrard Inlet", the Blenkinsop Census (CB242-2 and 15) was entitled "Skwamish Tribe False Creek Burrard Inlet". These two documents provide compelling evidence that the JIRC considered False Creek to be part of Burrard Inlet.

[399] Accordingly, I have no doubt that the term "Burrard Inlet" was used in Sproat's report (CB287) in its broader sense to distinguish the body of water on the north side of Point Grey from the water in the north arm of the Fraser River on the south side of Point Grey. Burrard Inlet, so used, would include the site of the False Creek Reserve. I therefore do not accept the Musqueam submission that the passage in Sproat's report indicated an error made by the JIRC when it allocated the False Creek Reserve to the Squamish.

[400] The next question is whether, even if the Second Minute was correct in its allocation of the Reserve to the Squamish, the JIRC was mistaken when it looked at and listened to the residents of the Reserve and identified them as Squamish Indians. On this matter, I have concluded that the JIRC made no mistake. It is clear that the JIRC was well acquainted with the Squamish People and their language by reason of their work in Burrard Inlet. It must have been obvious to the commissioners themselves and to their interpreter Michel that the residents of the Reserve were Squamish-speaking people. As well, there was no evidence that any of the residents of the False Creek Reserve complained about being described as Squamish people. In all these circumstances, and because I determined in Part II that no Musqueam people were using or were present on the Reserve in 1876, I cannot conclude that the JIRC erred when it identified the Colonial Reserve as a Squamish place or when it allocated it to the Squamish.

[401] The evidence is also clear that, through their interpreter Michel, the JIRC had excellent communication with the Musqueam people. The Musqueam were prepared for the JIRC's visit, understood its purpose, and made a claim to land beyond their reserve where such a claim was considered proper (ie. to farm land on Sea Island). Yet, they made no claim to the False Creek Reserve and made no complaint when it was allocated to the Squamish. These facts reinforce my conclusion that the JIRC's allocation to the Squamish was not a mistake.

The Effects of the JIRC Allocation on the False Creek Reserve

[402] The False Creek Band which existed under the *1876 Indian Act* before the JIRC made its allocation, continued to exist after the JIRC allocation. No Indians who had rights at the Colonial Reserve under the *Indian Act* before the JIRC's allocation lost them by reason of that allocation. Indeed, as a result of the JIRC's work, which roughly doubled the size of the Colonial Reserve, those rights arguably increased in value because they applied to a larger reserve. What changed was that the JIRC's allocation had the effect of identifying the False Creek or Kitsilano Band as a Squamish band and the Reserve's residents as Squamish People. The allocation also meant that other Squamish People could take up residence at the False Creek Reserve. However, the evidence shows that this did not occur in any appreciable numbers. On the other hand, the residents of the False Creek Reserve also acquired the right to live on other Squamish reserves. This right was exercised after the 1913 Sale when most of the residents of the False Creek Reserve moved to other Squamish reserves.

CHALLENGES TO THE EFFECTIVENESS OF THE JIRC'S ALLOCATIONS

[403] The Musqueam submissions challenging the effectiveness of the JIRC's allocations raised the general issue of when the lands for the False Creek Reserve were actually or finally "reserved" for Indians as that term is used in section 91(24) of the *Constitution Act, 1867*. In discussing this issue, two questions must be asked:

Re: The *Land Act* - Could the lands set aside by the JIRC be "reserved" under section 91(24) without compliance with the *1875 Land Act*?

Re: A Conveyance - Could the lands allocated by the JIRC be considered "reserved" under section 91(24) when they had not been conveyed by the Province to the Federal Crown?

[404] The Musqueam submitted that the gazetting and notice requirements of the Province's *1875 Land Act* fettered the prerogative power delegated by the Province to the JIRC. They said that the failure of the Province to observe the requirements of the *Land Act*, in effect, prevented the provincial Crown lands set aside by the JIRC from becoming "lands reserved for the Indians" pursuant to section 91(24) of the *Constitution Act, 1876.*

[405] The Musqueam endorsed the position of the trial judge in *Wewayakum*. He ruled that the Federal Crown did not obtain the management and control of post-Confederation Indian reserves in British Columbia (at least those purportedly created from provincial Crown land) until such time as the land was formally conveyed to the Federal Crown. For most Indian reserves in British Columbia, this occurred in 1936 pursuant to British Columbia Order in Council 1036, but for the False Creek Reserve conveyance did not take place until later with the passage of British Columbia Order in Council 374 on March 4, 1947. According to the Musqueam position, the Federal Government could not implement the JIRC's "re-allocation" of the Reserve until such time as the Province formally conveyed the Reserve's land to the Federal Crown.

[406] The Musqueam argued that, even if the Reserve was not validly created due to a failure to comply with the *Land Act*, or due to a failure to convey, the Crown was nevertheless subject to a fiduciary duty to hold the new lands allocated by the JIRC "in trust" for the Indians interested in the Colonial Reserve.

[407] These questions were not raised in the pleadings. Indeed, the Musqueam pleaded that the Reserve was always a valid reserve "in law". It was not until closing argument in Phase I that the Musqueam took the position that the absence of *Land Act* compliance and the lack of a conveyance meant that the JIRC's reserve allocation did not have the legal effect of setting the Reserve apart for the Squamish. The Squamish and Burrard objected and said that the Musqueam should not have been entitled to contradict their pleadings in closing submissions. However, since I considered the issues to be important, all counsel made submissions about the applicability of section 60 of the *1875 Land Act* and about the need for a conveyance.

THE EFFECT OF THE *LAND ACT*

[408] Section 60 of the *1875 Land Act* applied at the time of the JIRC's allocation of the False Creek Reserve in 1877. It provided that:

The Lieutenant-Governor in Council shall, at any time, by notice, signed by the Chief Commissioner of Lands and Works and published in the British Columbia Gazette, reserve lands notlawfully held by record, pre-emption, purchase, lease, or Crown grant, **for the purpose of conveying the same to the Dominion Government, in trust, for the use and benefit of the Indians**, or for railway purposes, as mentioned in Article 11 of the Terms of Union, or for such other purposes as may be deemed advisable.

[*My emphasis*]

[409] According to this section, British Columbia reserved land by: (1) preparing a notice which described the land; and (2) having the notice properly signed and published. These steps were never taken by the Province in respect of the Reserve.

[410] In 1888, the *1884 Land Act* was materially changed with the passage of the *Land Act*, S.B.C. 1888, c. 16 (the "*1888 Land Act*"). In section 86 of that act, the mandatory requirement for notice was deleted when the opening passage was changed to read: The Lieutenant-Governor in Council "may" (rather than "shall") publish a notice etc. The *1888 Land Act* received Royal Assent on February 7, 1889.

[411] Under the *1888 Land Act*, the reservation of land for conveyance to the Federal Government in trust for the use and benefit of Indians was a process of appropriating lands from the public lands of British Columbia with the object of removing them from the pool of land available for other purposes, including pre-emption by settlers. However, the process of reserving lands in this manner did not create Indian reserves. I say this because, as earlier discussed, "reserve" is a defined term in the *1876 Indian Act*. According to that act, reserves were lands which were "set apart" for "particular bands". As it was not within British Columbia's jurisdiction to assign lands to particular bands, British Columbia could not create Indian reserves. Rather, it reserved lands for Indians.

[412] I have made this point because section 91(24) of the *Constitution Act, 1867*, does not mention "Indian reserves". It gives the Federal Government exclusive legislative authority over a broader class of property which is described as "lands reserved for Indians". This language

would certainly include Indian reserves but, in my view, it also includes provincial lands once they have been reserved for Indians. The question then becomes: when were the lands so reserved? Or, put another way, was an allocation by the JIRC sufficient, or was something more, such as the publication of a notice under the *Land Act*, required to reserve the lands?

The Cases

[413] *British Columbia (Attorney General) v. Andrew and Mount Currie Indian Band* (1991), 54 B.C.L.R. 156 (C.A.) ("*Mount Currie*") was heard by the British Columbia Court of Appeal as an appeal from an interlocutory injunction which had been granted to the Province to end an Indian blockade of a road which the Indians said was part of their reserve. During the appeal, the creation of the reserve was discussed.

[414] Southin J.A. wrote a judgment which was a dissent in the sense that, while the other members of the court felt that there was insufficient material on the record to permit a determination of any of the issues, Her Ladyship decided that the record was sufficient to allow her to deal with questions about whether and when the lands at issue had been reserved for Indians. Madam Justice Southin rejected the appellant's argument that the lands had been "reserved" by the combined acts of Indian reserve commissioner Peter O'Reilly on one hand, and British Columbia's Chief Commissioner of Lands and Works on the other. O'Reilly was appointed a sole commissioner by reciprocal Federal and British Columbia orders in council in 1880. He set aside the land in 1881 and, in 1882, the proposed reserve was surveyed. It was then approved by the Province's Chief Commissioner of Lands and Works in June 1884. However, Justice Southin decided that, since compliance with the *1875 Land Act* was mandatory, and since the required notice had not been signed and published, the lands in issue had not been reserved in 1884 as the appellants suggested.

[415] In *Wewayakum*, Ashdown Green, a surveyor, was sent to determine the extent and boundaries of the reserves in question. He was asked to undertake this task because sole commissioner O'Reilly had fallen ill. Green sent a report to the Minister in Ottawa dated May 28, 1888, enclosing a minute of decision dated May 7, 1888. He also sent a sketch to the Chief Commissioner of Lands and Works for the Province's approval. Provincial approval for the identified lands was given in a letter of May 20, 1889.

[416] The complicated problem in *Wewayakum* concerning which reserves were allocated to which Indian bands need not concern us here. What is of relevance, however, is the question of whether lands were reserved for the Indians within the meaning of section 91(24) of the *Constitution Act, 1867,* by the Province's approval of Green's minute of decision.

[417] The trial judge considered the *Land Act* and indicated *in obiter* that, had he been required to consider the situation at the time of the Province's approval of Green's allotment in 1889, he would have followed Southin J.A.'s decision in *Mount Currie* and concluded that the failure to comply with the notice and gazetting provisions in the *Land Act* in 1889 was fatal[55].

[418] The requirement for the publication of a notice was also considered in the much earlier case of *Gosnell v. Minister of Lands (B.C.) and Attorney General (Canada),* (February 26, 1912)

B.C.S.C. (unreported)[56]. The trial transcript of the evidence of the petitioner Mr. Gosnell reveals that he took steps in July of 1911 to pre-empt land which was part of a reserve on Vancouver Island. The transcript also states that the reserve had been set aside by the JIRC in 1878 and had been surveyed, but no notice had been prepared or gazetted pursuant to the mandatory requirements of the *Land Ordinance, 1870*, No. 144, R.S.B.C. 1871[57]. The notice and gazetting requirements in that ordinance were similar to those in the *1875 Land Act*.

[419] Mr. Gosnell argued unsuccessfully that, because there had been no compliance with the statutory requirements for reserving land, the land in question was not an Indian reserve but, rather, was unreserved Crown land which was available for his pre-emption.

[420] Chief Justice Hunter's entire decision read as follows:

There has been a working out of the segregation of the lands reserved for Indians by means of a commission; these lands reserved by the commissioners have been recognized as properly reserved by successive representatives of the Crown, from the date of their reservation, and have not at any time been occupied by the Dominion representatives and so far as I can see, **it would be virtually a trespass upon the lands for the Provincial Government to accept any pre-emption record. No formal transfer or conveyance was necessary to effectually segregate these lands. This was a transaction altogether outside the regular course which is provided for in the local statutes. These reserves, segregated under the Terms of Union, I think were well reserved without any formal notice in the Gazette.**

I am unable to see that the Petitioner is entitled to any relief. Petition dismissed.

[*My emphasis*]

The Chief Justice clearly had no patience for Gosnell's technical argument and viewed him as someone who was improperly trying to acquire Indian reserve land.

[421] The *Gosnell* decision, to the effect that neither a conveyance nor compliance with the *1870 Land Ordinance* were required to protect reserve lands from pre-emption, was upheld by the British Columbia Court of Appeal without reasons, and Mr. Gosnell's appeal to the Supreme Court of Canada was dismissed for want of jurisdiction without any discussion of its merits. *Gosnell* does not appear to have been before Southin J.A. in *Mount Currie*, and it was not referred to in the decision in *Wewayakum*.

[422] However, for the reasons discussed below, even if *Gosnell* had been considered, I do not think that the judges in *Mount Currie* and *Wewayakum* would have felt bound by a decision which did not address the issue of whether the *Land Act* imposed a statutory restraint on the Crown's prerogative power. Accordingly, I do not think that *Gosnell* can be said to reliably state the law on the applicability of the *Land Act*.

Discussion

[423] The important question is whether, given section 60 of the *1875 Land Act*, British

Columbia could legally agree with the Federal Government to reserve lands through the work of the JIRC without complying with the notice requirements in the *Land Act*.

[424] I have no hesitation in concluding that British Columbia did not intend the *Land Act* to affect the finality or validity of the JIRC's work. I say this for two reasons. Firstly, British Columbia, like the Federal Government, was well aware of the urgency of the situation and wanted speedy and final decisions. Attorney General George Walkem's report dated August 17, 1875, said:

It is almost needless to state that the Local Government have been keenly alive, not only to the advantages, but to the absolute necessity and urgent importance of a speedy settlement of all questions connected with the Reserves. The favorable influence which it would exert in the future cannot be overrated. Peace would be ensured, and prosperity would not fail to follow the improved condition and social elevation of the Indian.

(CB235-5)

Secondly, the Mandate, which the Province accepted, provided that the JIRC's work would be final.

[425] However, in spite of the Province's intention, the fact remains that, in June of 1877, when the JIRC issued the Second Minute which allocated the False Creek Reserve, the *1875 Land Act* was in force and no other legislation (such as the *Indian Affairs Settlement Act*, S.B.C. 1919, c. 32, which was referred to in *Mount Currie* and *Wewayakum*) had been passed which could be said to have superseded the *Land Act*.

[426] The general principles concerning the fettering of the Crown's prerogative by legislation were discussed by the House of Lords in *Attorney General v. De Keyser's Royal Hotel, Limited* [1920] A.C. 508 (H.L.). In that case, the War Office took possession of the respondent's hotel to accommodate certain personnel of the Royal Flying Corps. The respondents were denied compensation. The issue was whether the Crown could proceed as a matter of prerogative and ignore the statute that required a compensatory payment. In a unanimous decision, in which five law lords wrote concurring reasons, it was held that there was no room for the operation of the Royal Prerogative and that the legislation governed and compensation was payable. In addressing the interaction between the Royal Prerogative and legislation, Lord Atkinson had this to say at pages 539-40:

... I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think the same -- namely, **that after the statute has passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.**

[*My emphasis*]

When applied to the case at bar, this decision means that British Columbia could not authorize the JIRC to reserve lands for Indians without the publication of a notice in the Gazette.

[427] It next falls to consider whether the notice requirement in section 60 of the *1875 Land Act* can be disregarded because it is properly characterized as a secondary requirement. The notice was the vehicle which disclosed the Province's decision about the existence and location of reserved lands and indicated under which statute those lands had been reserved. It allowed members of the public and those managing public lands on the Crown's behalf to know which lands were no longer available for purposes such as settler pre-emption. In these circumstances, although I have considered the reasoning set forth by Iacobucci J. in *Re An Act Respecting the Vancouver Island Railway*, [1994] 2 S.C.R. 41, and the approach to a secondary requirement taken by Madam Justice McLachlin in *Apsassin*, both seem to me to be inapplicable. They might apply if a notice had been prepared and published, but had not been duly signed. However, in my view, the preparation and publication of the notice were substantive requirements related to the management of Crown land which could not be ignored. I have therefore concluded that, in requiring lands to be reserved by notice, the *1875 Land Act* did not leave any residual prerogative in the Crown in right of British Columbia to reserve lands without notice.

[428] I have also concluded that the JIRC's Mandate involved the exercise of two distinct prerogative powers. The Province gave to the JIRC the power to reserve lands for Indians, and the Federal Government gave the JIRC the power to create Indian reserves from those lands. However, British Columbia lacked the authority to delegate the power to the JIRC to reserve lands unless notice was given while the *1875 Land Act* was in force. To effectively reserve land for Indians, British Columbia was required either to pass legislation which suspended or overrode the *Land Act*, or to prepare and publish notices of the JIRC's decisions in compliance with the *Land Act*.

[429] As neither event occurred, I must conclude that the JIRC's Second Minute of Decision dated June 15, 1877, did not reserve lands for the False Creek Reserve at that time. However, according to the *1875 Land Act*, the notice did not necessarily have to be published at the time a decision was made about which lands would be reserved. Section 60 provided that it could be published "at any time". Accordingly, it was open to British Columbia at any time to make the JIRC's decisions effective by publishing notices under the *1875 Land Act*. As already mentioned, the mandatory requirement to publish such notices at any time ended in 1889, when notice became an optional matter. Although I was not referred to any cases on this point, it seems to me that, after the amendment in 1889, the Crown prerogative was once again available to reserve lands without giving notice under the *Land Act*. This change allowed the Second Minute to take effect.

[430] In reaching the conclusion that the *1888 Land Act* changed the situation and eliminated the notice requirement for the Reserve, I was influenced by the fact that the Crown did not default under the *1875 Act*. Although it was required to publish a notice, it was not required to do it in any time frame such as "promptly" or "forthwith". It was expressly entitled to publish it "at any time". Accordingly, the Province was not in default when, in 1888, the notice remained unpublished.

[431] I have therefore concluded that the land for the False Creek Reserve allocated by the JIRC actually became land reserved for Indians within the meaning of section 91(24) of the *Constitution Act, 1876* when Royal Assent was given to the *1888 Land Act* on February 7, 1889. Only then did the Colonial Reserve cease to exist because only then could the Federal Government implement the JIRC's decision to create the new Reserve and set it apart for the Squamish.

[432] In the interval between 1877 and 1889, the Colonial Reserve (ie. the first 37 acres) continued to be administered by the Federal Government for the "Indians...residing thereon". Until 1889, the Federal Government technically had no jurisdiction under the *Constitution Act, 1867*, over the larger new reserve which had been allocated by the JIRC. In spite of this lack of jurisdiction, the fact is that, prior to 1889, the Federal Crown actually did administer the Reserve allocated by the JIRC under the *Indian Act.* This period of de facto administration had no impact on the facts of this case. In the period from 1877 to 1889, the only event which affected the Reserve was the CPR expropriation in 1888, which was formally completed on June 6, 1899. By that date, the Federal Crown had lawfully assumed jurisdiction over the Reserve.

THE REQUIREMENT FOR A CONVEYANCE

[433] The term "conveyance", in the context of the transfer of Crown land from one level of government to another, is not analogous to a fee simple transfer of real estate between private parties. A conveyance of Crown-owned public land may involve the transfer of legislative and administrative control over a property, or it may involve only a transfer of a reversionary interest. In either case, title is not transferred between governments, it always remains in the Crown, *St. Catharine's Milling and Lumber Company* v. *The Queen* (1888), 14 A.C. 46 (P.C.) at 56 ("*St. Catharine's Milling*").

The Cases

[434] In *Mount Currie*, Southin J.A. concluded that a formal conveyance of lands from British Columbia to the Federal Government was not required to reserve lands for Indians. It was her view that, once British Columbia: (a) enacted the *Indian Affairs Settlement Act,* S.B.C. 1919, c. 32, which provided for the full and final adjustment and settlement of all differences over reserve lands with the Federal Government; (b) issued Order in Council 911, which also spoke of final settlement, and; (c) agreed to the conveyance to the Federal Government of identified reserve lands, all that was required to legally reserve the lands in question was accomplished.

[435] However, in *Wewayakum*, the trial judge concluded, at paragraph 260, that post-Confederation Indian reserves in British Columbia did not actually become Indian reserves and fall under the Federal Government's legislative jurisdiction until the conveyance from the Province to the Federal Government. He reached this conclusion because he decided that, after Confederation, federal legislative jurisdiction over provincial public lands was incompatible with the *Constitution Act, 1867*. He said this at paragraph 224:

[224] Therefore, the Crown in the right of Canada could not and cannot exercise legislative jurisdiction over the public lands of a province until such time as control and administration of

those lands was or is formally transferred to it, because under s. 92(5) of the **Constitution Act, 1867** only the province has jurisdiction over the management of public lands belonging to the province. Similarly, the Crown in the right of a province could not by its own action create an Indian interest in public lands, since under s. 91(24) of the **Constitution Act, 1867**, only the federal Parliament has jurisdiction over "Indians, and Lands reserved for the Indians".

[436] The trial judge's conclusion in *Wewayakum* was upheld by the Federal Court of Appeal, (1999) 247 N.R. 350, but only in general terms and without discussion, when it said at paragraph 83:

The allocation of reserves as described in the 1913 schedule of reserves was adopted in Orders-in-Council P.C. 911, 1265 and 1036. These Orders-in-Council had the legal effects of (1) finally and conclusively creating reserve lands in British Columbia for the benefit of the Indian bands as described in the 1913 Schedule; and, (2) vesting the underlying title to these reserve lands in the federal Crown to be held in trust for said Indians.

[437] Unfortunately, the conclusions of the Federal Court of Appeal do not directly address the problem in this case. The issue here is whether lands can be "reserved for the Indians" under section 91(24) before those lands have been conveyed.

[438] The False Creek Reserve was not conveyed until March 4, 1947, with the passage of British Columbia Order in Council 374. This conveyance occurred after the Reserve had been surrendered in a vote taken on April 17, 1946, but before the surrender was accepted on April 29, 1947. In *Wewayakum*, the trial judge concluded that a post-Confederation Indian reserve did not come under the Federal Government's legislative jurisdiction until it was conveyed to the Federal Government. If that reasoning were to be applied in this case, it would mean that the Federal Government did not legally acquire the power to control or manage the Reserve, or dispose of it on behalf of the Squamish until after its surrender vote was taken. It would also mean that, before the surrender, the lands set apart by the JIRC were never an Indian reserve, but rather existed in a kind of legal limbo in which the Indians were merely protected administratively from pre-emption in their use of the land[58].

Discussion

[439] The starting point is section 91(24) of the *Constitution Act, 1867.* It provides for exclusive federal jurisdiction over Indians and lands reserved for the Indians. As noted earlier, it does not mention "Indian reserves" but rather speaks of "lands reserved for the Indians". I assume there is significance in the language used and that it means, in the context of this case, that regardless of whether underlying title to Indian reserves has been formally conveyed by a province to the Federal Crown, federal jurisdiction to control and manage under the *Indian Act* attaches whenever lands are reserved for Indians by a province and set apart for a particular band by the Federal Crown.

[440] As noted above, the trial judge in *Wewayakum* (at para. 260) concluded that post-Confederation Indian reserves were not legally and finally created until conveyance, and that conveyance was the last step in the process of Indian reserve creation. He also held that federal legislative jurisdiction under section 91(24) of the *Constitution Act, 1867*, could not attach until conveyance.

[441] However, it has been recognized that, when an Indian interest is involved, there is nothing offensive, from a constitutional point of view, about having federal jurisdiction under section 91(24) over provincial public lands. In *St. Catharine's Milling*, the Federal Crown argued, in respect of a post-Confederation reserve which had been created by treaty, that such a situation was contrary to the constitutional division of powers and the Privy Council responded thus:

Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 92*(sic)*(24). There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. **The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.**

[*My emphasis*]

[442] The *Terms of Union* imposed on British Columbia a constitutional obligation to convey tracts of land to the Federal Crown for the use and benefit of the Indians. This was agreed to be done from time to time when the Federal Crown applied for a conveyance. If there was disagreement about the size of a tract to be conveyed, then the *Terms of Union* provided that the Secretary of State for the Colonies in Great Britain was to decide the matter. However, I have already concluded that, by accepting the JIRC's Mandate, the Province agreed to accept its allocations as final. Accordingly, the provision for dispute resolution in the *Terms of Union* did not apply to JIRC reserve allocations and nothing further was needed to be agreed or settled prior to conveyance. It is nevertheless clear that the process of conveyance was seen as one which would occur in stages and therefore as one which could take some time.

[443] In the context of British Columbia's entry into Confederation, I cannot conclude that section 91(24) was intended to apply only to Indian reserves created after a formal conveyance of provincial public land. It was in neither party's interest to have the Federal Government purporting to control and manage provincial Crown lands if such control or management was *ultra vires* its constitutional authority. Accordingly, I think it reasonable to assume that the words which allowed the federal legislative power to take hold once lands were "reserved" were chosen to avoid the delays foreseen in the conveyance process.

[444] I prefer the approach to the requirement for a conveyance taken by Southin J.A. in *Mount Currie*. In addressing the question of when lands became lands reserved for Indians under section 91(24), Her Ladyship looked for the point at which all agreements had been reached which were necessary to so reserve the lands. She did not require a completed conveyance to conclude that lands were reserved for Indians.

[445] In line with the reasoning of Southin J.A., I have concluded that in 1889, at the time the *1875 Land Act* ceased to apply and the JIRC's decision became effective, a situation existed in which nothing remained to be agreed in respect of the False Creek Reserve. In 1889:

- The JIRC had allocated the False Creek Reserve to the Squamish. This had the combined

effect of reserving the land for the Indians on the part of British Columbia, and of creating an Indian reserve under the *1886 Indian Act* on the part of the Federal Crown.

- The JIRC's work was final.

- The JIRC's work was not conditional on a conveyance but, even if a conveyance had been required to create Indian reserves (and I conclude that it was not required), British Columbia had a constitutional obligation to convey land under the *Terms of Union* and there was nothing further to be agreed prior to a conveyance[59].

[446] I should note that the conveyance, when it eventually occurred in 1947, was not without importance. Although, in my view, it did not involve a transfer of administration and control over the Reserve (because the Federal Government took jurisdiction when the lands were reserved in 1889), the conveyance did involve a transfer to the Federal Crown of British Columbia's right to claim a reversionary interest in the property once the Indian interest was surrendered. This meant that the Crown could accept the surrender and deal with the surrendered land for the benefit of the Squamish Band.

DID A FIDUCIARY DUTY TO OBTAIN THE MUSQUEAM'S CONSENT OR TO PROTECT THEIR INTEREST IN THE COLONIAL RESERVE ARISE ON CONFEDERATION AND, IF SO, WAS IT BREACHED BY THE JIRC?

[447] The Musqueam said that the Crown breached its fiduciary duty to the Musqueam residents of the Colonial Reserve when the JIRC allocated it to the "Skwawmish Tribe" in 1877 without the consent of the Reserve's Musqueam residents or the Musqueam People. They also said that, because of the allocation to the Squamish, the current Musqueam Band wrongfully lost its interest in the Reserve. The Musqueam acknowledged that the 1876 Proclamation suspended the surrender provisions of the *1876 Indian Act* but said that the consent of the Colonial Reserve's Musqueam residents was nevertheless required because a fiduciary duty on the part of the Federal Crown arose or "crystallized" pursuant to Article 13 of the *Terms of Union*, which spoke of "trusteeship", and by reason of section 91(24) of the *Constitution Act, 1867*. They said that the language of Article 13 demonstrated the fiduciary or "trust-like" nature of the Crown's duty to Indian people in respect of their reserve lands, and they asserted that the interests of the Musqueam People in the Colonial Reserve became "legally and constitutionally protected" from that time forward. Finally, the Musqueam said that the Crown's fiduciary obligations were recognized in section 4 of the *1876 Indian Act*, which was not suspended by the 1876 Proclamation.

[448] Before turning to the Musqueam arguments, it is useful to consider, by way of background, whether, in colonial times, the Crown owed Indian people a duty to obtain their consent before reducing or eliminating non-treaty reserves for Crown purposes, and whether the Crown owed Indian people a duty to protect their interests in non-treaty reserves from Crown policies and objectives. For the colonial era, the Royal Proclamation of 1763 (the "1763 Proclamation") serves as an important source of information. It has often been examined from the point of view of the rights it recognized for Indian people and, in that regard, has been described as an "Indian Bill of Rights" and as the "Magna Carta of Indian Rights"[60]. As well, the

rights it recognizes are specifically referred to in section 25(1) of our *Charter of Rights and Freedoms*[61].

[449] However, in addition to recognizing rights for Indian people, the 1763 Proclamation also reserved rights for the Crown. In Part IV, certain lands were reserved for hunting purposes and for the use of Indian people, and were made the subject of a surrender requirement on alienation to "private persons". But, those lands were reserved only "for the present, and until our further Pleasure be known". This meant, in my view, that the Crown retained the absolute discretion to reduce or eliminate a non-treaty reserve for its own purposes while, at the same time, protecting reserved land from third party encroachment.

[450] There is no evidence that, in colonial times, the consent of Indian people was required before lands which were reserved for Indians without treaties could be repossessed by the Crown for its own purposes. Indeed, it is clear that, in British Columbia, the colonial authorities diminished reserves without the consent of the Indians when they concluded that a reserve was too large for its native population. In such cases, the officials unilaterally took back reserve land and opened it for pre-emption by settlers without regard for its reserve status, its ancestral ownership or any seasonal use. For example, Joseph Trutch, who was the colony's Commissioner of Lands and Works, reduced the Kamloops, Shuswap and Okanagan reserves without consent, and these lands, once unburdened of the Indian interest, were opened for settler pre-emption[62]. As well, reserves that had been set aside during Governor Douglas' era for Indian bands in the Okanagan valley and South Thompson River region (in B.C.'s southern interior), were later reduced[63]. Colonial officials also reduced the size of reserves previously set aside for Indian groups in the lower Fraser River valley. Colonial Secretary W.A.G. Young wrote Trutch on November 6, 1867, about these reserve reductions. He said:

All of those reserves that have been laid out of excessive extent should be reduced as soon as may be practicable. The Indians have no right to any land beyond what may be necessary for their actual requirements, and beyond this should be excluded from the boundaries of the Reserves. They can have no claim whatever to any compensation for any of the land so excluded, for they really have never actually possessed it... (CB108, pp. 5-6; CB1374-27).

The revised boundaries of these reserves were published in the British Columbia *Government Gazette*, and the land which had been part of the reserves was made available for pre-emption (CB1374-88).

[451] Clearly, in colonial times, non-treaty reserve interests were diminished without consent to reflect changes in the Imperial Crown's policy about the appropriate ratio between the Indian population and the extent of reserve land. Further, there was no evidence from the colonial era which suggested that consent was required or was customary for the elimination of a non-treaty reserve. In the absence of any such evidence, and because of the wording of the 1763 Proclamation, it is my conclusion that the Crown had the power to reduce and eliminate non-treaty reserves for its own purposes without consent because they existed only "at pleasure"[64]. It is against this background that consideration must be given to the question of whether a fiduciary duty to obtain consent, or to protect reserve interests when the Crown wished to take back a non-treaty reserve, "arose" or "crystallized" at Confederation as the Musqueam have

suggested.

[452] For ease of reference, the provisions on which the Musqueam rely are reproduced here:

Terms of Union, 1871, Article 13

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such a policy, **tracts of land** of such an extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, **shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in the case of disagreement**

between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

[*My emphasis*]

Constitution Act, 1867 - s. 91(24)

s. 91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act)**the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say**, -- ...

(24) **Indians, and Lands reserved for the Indians.**

[*My emphasi*s]

1868 Indian Act - s. 6

6. All lands reserved for Indians or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.

1876 Indian Act - s. 4

4. All reserves for Indians or for any band of Indians, or held in trust for their benefit, shall be

deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions.

[453] At Confederation, the responsibility for the management of lands reserved for Indians passed from the Imperial to the Federal Crown. The *Terms of Union* said that the trusteeship and management of such lands, which had previously been the responsibility of colonial authorities, would be "assumed" by the Federal Crown. The Musqueam argued that the purpose of Article 13 of the *Terms of Union* was to transfer the "trusteeship" and control of colonial reserves to the Federal Crown. But they also said that this transfer "crystallized" the Crown's fiduciary duty to the Indians interested in the Colonial Reserve and placed it "beyond the authority" of the JIRC. They said that the Federal Crown and, by extension, the JIRC, could not alter colonial reserves without consent and that the JIRC was, therefore, restricted in its work to setting aside additional reserve lands in British Columbia.

[454] In my opinion, article 13 of the *Terms of Union* appears to be directed to two different topics. The opening paragraph confirmed that the Federal Crown would assume jurisdiction over lands reserved for Indians in the Province. The second paragraph appeared to look to the future and require that past policies about the size of reserves would apply to the conveyance of such lands in the future. The Musqueam said that this second paragraph should be read to suggest that the Crown's jurisdiction in section 91(24) was limited to the creation of new reserves, and that reserves created in colonial times could not be altered or eliminated without consent.

[455] I am unable to accept this submission. The *Terms of Union* must be read in context. Section 91(24) of the *Constitution Act, 1867*, gave the Federal Crown unrestricted power over all lands reserved for Indians and the Musqueam acknowledged that this grant of jurisdiction included colonial reserves. In these circumstances, there is no basis for reading the general language in Article 13 as a limitation or restriction on section 91(24). All Article 13 does is continue a previous policy regarding the amount of land to be conveyed in the future.

[456] As well, I am not persuaded that the *Terms of Union* crystallized a fiduciary requirement for consent as suggested by the Musqueam. Since non-treaty reserves existed "at pleasure", no such requirement existed in colonial times which was capable of being "crystallized". The *Terms of Union* only transferred the Imperial Crown's existing commitments to Indian people to the Federal Crown to enable it to fulfill its mandate under section 91(24) of the C*onstitution Act, 1867*. Article 13 did not create commitments where none previously existed. In these circumstances, I can find no basis in logic or in the language used to support the conclusion that a fiduciary duty "arose" from the language of Article 13.

[457] As well, I do not accept the Musqueam submission that, in spite of the 1876 Proclamation, section 4 of the *1876 Indian Act* should be read to include a general requirement that consent be obtained from an interested Indian community before the elimination or reduction of a non-treaty reserve. In my view, the purpose of the first part of section 6 of the *1868 Indian Act* and section 4 of the *1876 Indian Act* was only to ensure that no provisions in the new legislation would be interpreted in a manner which would reduce or eliminate existing reserves. The sections were merely holding provisions to ensure that no loss of pre-existing rights or interests would occur as a result of the passage of the new legislation. They did not

introduce new requirements for consent.

[458] In summary, I have concluded that neither the *Terms of Union* nor the *Constitution Act, 1867*, nor the provisions in sections 6 and 4 of the *1868* and *1876 Indian Acts*, provide that the Federal Crown or, by extension, the JIRC owed any fiduciary duty which required them to obtain the consent of any Indian people to reallocate the Colonial Reserve. In my view, given the 1876 Proclamation, the JIRC had the power to reduce or eliminate the Colonial Reserve without consent.

[459] However, if my decision on this issue is incorrect, and some evidence of communal consent was required for the JIRC's allocation, I have concluded that the JIRC had the actual consent of all the residents of the Colonial Reserve. As described earlier, the commissioners' diary entries make it clear that the False Creek Band Indians were very pleased with the JIRC's work, which doubled the acreage of the Reserve exactly as they had requested. There was no evidence of minority, or even individual, dissent and no suggestion that any Reserve residents, even those who may have had no or only partial Squamish ancestry, left their homes after the JIRC's allocation of the Reserve to the Squamish. In addition, even though I have concluded that the Musqueam People collectively had no interest in the Reserve, and that no people of Musqueam ancestry were living on the Reserve in 1877, I would infer the consent of the Musqueam People from their failure to make a claim to the JIRC for the False Creek Reserve and their failure to complain in a timely manner once the Reserve was allocated to the Squamish.

[460] The Musqueam have also alleged that, apart from a fiduciary requirement to obtain consent in 1877, the Crown had a fiduciary duty to protect the interests of the residents of the Colonial Reserve and the broader interest asserted by the Musqueam People in the Reserve, and that the JIRC's reallocation of the Reserve to the Squamish breached that duty.

[461] Again, the position of the Imperial Crown was most clearly set forth in the 1763 Proclamation. It illustrated the Crown's dual position, which was to protect the interests of Indian people in reserves from unauthorized encroachment and purchase by third parties, but not to protect those interests from its own policies or requirements. If the Crown wanted to take back reserved land it had the unfettered right to do so.

[462] It is noteworthy that even the *Indian Act* did not protect non-treaty reserves from the requirements of the Crown. Until 1952, the *Indian Act* provided that its surrender provisions could be suspended by proclamation. Both before that provision was eliminated in 1952, and thereafter, at all times relevant to this case, the Federal Crown was also entitled to pass separate legislation which provided for the elimination of reserves. The *Oliver Act*[65] and the *Songhees Indian Reserve Act*[66] were examples of such legislation. For these reasons, I can find no fiduciary obligation to protect the interests of the Reserve's residents or the Musqueam People from the Crown.

[463] In conclusion, it is important to recall that, in the case at bar, the land which comprised the Colonial Reserve was not diminished or eliminated by the JIRC. When the JIRC allotted the Reserve, it created a "new reserve" (to use the language of the Mandate) which was twice as large as the Colonial Reserve. In my view, the proper characterization of the JIRC's allocation is to say that the Reserve was enlarged and that the Indian people who were interested in the

Reserve all retained their interest. However, if the ancestral affiliation of those interested was other than Squamish, those Indians became members of the Squamish "tribe" and the False Creek Band for the purposes of the administration of the Reserve under the *Indian Act*.

PART IV - THE PRE-SURRENDER FIDUCIARY DUTY

INTRODUCTION - THE PARTIES' POSITIONS

[464] The foundation for the Plaintiffs' claims against the Crown in the pre-surrender period was an all-encompassing fiduciary duty which was said to apply, in all circumstances, to every aspect of the Crown's relationship with the Plaintiffs in the administration of the False Creek Reserve. The Plaintiffs said that the source of the fiduciary duty was the Crown's historical undertaking to protect the Indians' interests in their lands, and that the Crown's duties and responsibilities under the *Indian Act*, as they related to their interests in land, were governed by a Crown-Indian "fiduciary relationship".

[465] The Squamish submitted that the Crown breached its fiduciary duty to them on many occasions during the pre-surrender period[67]. As well, the Burrard said that the Crown breached its fiduciary duty to them by permitting the Amalgamation to proceed in 1923 without the informed consent of the Burrard People. Further, the Burrard and the Musqueam, on the basis of their alleged entitlements to an interest in the Reserve, each claimed a right to participate in any remedies available to the Squamish by reason of the Squamish plaintiffs' allegations of breach of fiduciary duty in the pre-surrender period.

[466] Due to the applicable statutory limitation periods, all Plaintiffs' counsel acknowledged that no causes of action, other than those for breach of fiduciary duty, could be advanced in respect of pre-surrender matters. While the Crown denied the existence of a fiduciary duty to the Squamish plaintiffs in the pre-surrender period, it agreed that their action for breach of fiduciary duty was not barred by limitations legislation. However, the situation was different for the Musqueam and Burrard. The Crown's position was that, even if a fiduciary duty existed, their claims were statute-barred.

[467] The merits of these submissions are not discussed at this time because limitations were dealt with during the trial's second phase. Limitations are mentioned here only to make the point that the only claims which were available to the Plaintiffs in the pre-surrender period were claims for breach of fiduciary duty. Accordingly, in this case, it has been important to draw a clear distinction between statutory and fiduciary duties.

[468] Against this background, the issue was whether, in its pre-surrender administration of the Reserve, the Crown owed a fiduciary duty of any description to any of the Plaintiffs under the *Indian Act* or otherwise. I say "or otherwise" to refer to the possibility that a fiduciary duty could arise in special circumstances. As well, I have spoken of a fiduciary duty of "any description" because I will be considering the existence of both a private law fiduciary duty, which the Plaintiffs say was applicable, and the *sui generis* fiduciary duty described in *R. v.*

Guerin, [1984] 2 S.C.R. 335 ("*Guerin*").

[469] The Plaintiffs said that the Federal Crown (including all the Cabinet ministers and all the public servants in all departments of the Federal Government), in its administration of the Reserve, continuously owed the Plaintiffs the full panoply of fiduciary duties traditionally owed in private law trust situations.

[470] The Plaintiffs said that, at all times, the Crown was required to act in a completely selfless manner for their sole benefit[68]. The fiduciary duty so described will hereafter be referred to as the "Private Law Fiduciary Duty". The Plaintiffs alleged, *inter alia*, that the Crown had a fiduciary duty of consultation, a fiduciary duty to preserve them in possession of the Reserve, a fiduciary duty to obtain the best price for a licence or permit to use the Reserve, a fiduciary duty to minimally impair their interest in the Reserve and a fiduciary duty to manage the Reserve with skill and competence.

[471] In the Plaintiffs' submission, the Private Law Fiduciary Duty was recognized by the language of the *Indian Act*, which referred to the Crown's responsibility to hold reserves for the benefit of the Indians. Until 1952, the *Indian Act* stated that all lands reserved for Indians, or held in trust for their benefit, were deemed to be reserved and held for the same purposes as before the passing of the Act. Then, in the 1952 *Indian Act*, section 18(1) first appeared. It has not materially changed since then. It read:

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

[472] Based on the Federal Court of Appeal's decision in *Kruger v. The Queen*, [1986] 1 F.C. 3 (*"Kruger"*)[69], the Crown acknowledged that it had a limited *sui generis* fiduciary duty to obtain fair compensation for expropriated Reserve land in the pre-surrender period. However, apart from that exception, the Crown denied that it owed a fiduciary duty of any description under the *Indian Act* or otherwise to any of the Plaintiffs in respect of any of the events that took place prior to the surrender of the Reserve in 1946.

THE NATURE OF FIDUCIARY DUTY

[473] At trial, all parties agreed that *"sui generis"* meant "unique". In my view, there are two aspects to the uniqueness of the fiduciary duty identified in *Guerin*. Firstly, the fiduciary duty is unique because it arises outside its traditional private law context. Secondly, it is unique because it is more flexible in its requirements than the traditional Private Law Fiduciary Duty. The content of the *sui generis* fiduciary duty may vary depending on the circumstances of the case. For example, circumstances may dictate that the *sui generis* duty will tolerate conflicts of interest. In this regard, Rothstein J. (now J.A.) had this to say in *Fairford Indian Band v. Canada*, [1999] 2 F.C. 48 (T.D.) (*"Fairford"*), at paragraph 67:

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.

[474] The case of *Semiahmoo Indian Band v. Canada* (1995), 101 F.T.R. 198 (T.D.); [1998] 1 F.C. 3 (C.A.) (*"Semiahmoo"*) illustrated the need for a *sui generis* approach to deal with conflicts of interest. In her trial decision, Reed J. found that the Crown was acquiring the reserve land for its own purposes for expanded customs facilities. Yet, she concluded at paragraph 11 that, when accepting the surrender, the Crown had dual duties. It had a duty to the public to make decisions in the public interest and a fiduciary duty to the band, to the extent possible, to protect its reserve interests. This reconciliation of conflicting interests would not have been possible if a Private Law Fiduciary Duty had been applied.

[475] As well, if the duty is *sui generis*, there is scope for the application of a limited duty rather than the full menu of obligations imposed on a classic private law fiduciary. For example, in *Kruger*, although a fiduciary duty was identified in connection with an expropriation of reserve land, the majority in the Federal Court of Appeal held that the duty was limited to obtaining adequate compensation.

[476] Based on this analysis, it is my conclusion that, if a fiduciary duty is found to apply in the pre-surrender period, it must be a *sui generis* duty which permits a balancing of the conflicting interests which arise in the public law context and which can be limited to suit the requirements of a particular case.

THE EXISTENCE OF A FIDUCIARY DUTY

[477] In reaching a decision about the existence of a fiduciary duty in matters of reserve administration in the pre-surrender period, I have considered the following:

i) Decisions of the Supreme Court of Canada.

ii) Decisions of the Federal Court of Canada.

iii) The possibility of a fiduciary duty arising in special circumstances.

iv) The historical "fiduciary relationship" as the basis for a fiduciary duty.

i) DECISIONS OF THE SUPREME COURT OF CANADA

[478] In making their case for a fiduciary duty in the pre-surrender period, the Plaintiffs relied on statements made by the Supreme Court of Canada in decisions in which the Court concluded that a fiduciary standard of conduct applied (i) in post-surrender situations, and (ii) in aboriginal rights cases under section 35(1) of the *Constitution Act, 1982* ("Section 35"). The following are the oft-quoted passages from judgments of the Supreme Court of Canada which the Plaintiffs said supported the existence of a Private Law Fiduciary Duty in the pre-surrender period. I will discuss each in turn.

[479] The first passage is in *Guerin*, at pages 383-384, where Dickson J. said:

Through the confirmation in 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.

[480] In my opinion, the historic responsibility under discussion was the Crown's long-standing self-imposed obligation to interpose itself in transactions between Indians and third party purchasers or lessees of reserve land. The duty identified was found in a post-surrender situation in which the Indian band in question had surrendered its interest to the Crown so that a third party could lease part of the reserve. In that context, the Supreme Court of Canada found that the Crown owed a duty of utmost loyalty and that its failure to follow the Indians' oral instructions about the terms of the lease was unconscionable conduct. However, it is clear that, in *Guerin*, the Supreme Court was not concerned with issues of pre-surrender reserve administration.

[481] In *Guerin*, at page 384, Dickson J. also said:

I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

[482] In my view, His Lordship could not have intended this statement to suggest that everyone with discretionary power who was obliged to act for the benefit of another under legislation was, without more, a fiduciary. It seems to me that here must also be an expectation of loyalty based on a mutual understanding that the fiduciary has relinquished all other interests and has undertaken to act only in the beneficiary's interest. This was made clear by LaForest J. writing for the majority of the Supreme Court of Canada in *Hodgkinson & Simms, supra*, when he asked, at page 409, whether "...one party could reasonably have expected that the other party would act in the former's best interest with respect to the subject matter at issue."

[483] In *Guerin*, at page 385, Dickson J. affirmed the principle that a fiduciary duty is generally imposed only in a private law context. He then concluded that, even though it arises under the *Indian Act*, the post-surrender duty is "in the nature" of a private law duty. In discussing these matters he said:

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. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is none the less in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

[484] I do not think that His Lordship was indicating, as the Plaintiffs have suggested, that all obligations in Crown-Indian relations are "in the nature" of private law duties. Rather, he was referring only to the Crown's obligation to interpose itself between Indians and third parties when the Indians are alienating all or part of their interest in a reserve. In my view, a *sui generis* fiduciary duty was imposed in *Guerin* because, although the post-surrender management of the "surrendered lands"[70] continued to be a matter of public law under the *Indian Act*, the Indians had lost control over their interest in the land.

[485] I am supported in my conclusion, to the effect that *Guerin* said that a *sui generis* fiduciary duty exists only in post-surrender situations, by the fact that Madam Justice Wilson found it necessary to dissent in favour of a pre-surrender fiduciary duty under section 18(1) of the *Indian Act*. Had Dickson J. intended fiduciary obligations to apply to the administration of a reserve under the *Indian Act*, Wilson J.'s dissent, which is discussed below, would have been unnecessary.

[486] I am also supported in my conclusion by a statement made by Dickson J. He said in *Guerin*, at page 376, that:

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

[*My emphasis*]

[487] This passage suggests to me that the simple fact that there exists an Indian interest or Indian title in land does not, without more, give rise to a fiduciary duty. In my opinion, His Lordship was saying that, to attract a fiduciary standard, the Indian interest must have been in the process of post-surrender alienation.

[488] Counsel for the Squamish submitted that His Lordship's use of the word "distinct" towards the end of the above quotation suggested that other fiduciary obligations exist. However, I have not found this submission persuasive. In my view, the word "distinct" was used only to remind the reader that the obligation is *sui generis*.

[489] Wilson J., writing in dissent in *Guerin* for three judges of the Supreme Court of Canada, found a limited fiduciary duty under the *Indian Act* with respect to the use of reserve land. At

page 349, she said:

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.

[*My emphasis*]

[490] The Plaintiffs placed considerable reliance on this passage. However, I have found no cases in which Her Ladyship's view has been accepted as authoritative.

[491] In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("*Sparrow*"), at page 1108, Dickson C.J.C. and LaForest J. said:

... the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[492] The context in which this statement was made is significant. It was introduced with the observation that the Court was extending the fiduciary principle applied in *Guerin* as a "... general guiding principle for Section 35". Accordingly, in my opinion, the fiduciary responsibility mentioned in the first sentence of the quotation was a reference to the post-surrender fiduciary duty identified in *Guerin* in connection with the alienation of the Indian interest in reserve land. It is my conclusion that Their Lordships' reasons in *Sparrow* did not extend a general fiduciary duty to pre-surrender reserve management.

[493] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (*"Van der Peet"*), the Supreme Court was asked whether the accused's aboriginal rights included the right to sell fish and, if so, whether that right had been infringed by the relevant federal and provincial legislation. In that context, the Court considered what principle of interpretation should apply to statutes and treaties. At paragraph 24, Lamer C.J.C. said that the appropriate principle:

... arises from the nature of the relationship between the Crown and aboriginal peoples. **The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake**. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation.

[*My emphasis*]

[494] I recognize that the passage just quoted could be read to suggest that a broad fiduciary obligation covers all relations between Indians and the Crown, including the Crown's administration of the Reserve under the *Indian Act*. However, I have decided that it would be wrong to so interpret the statement for two reasons. Firstly, to read the passage broadly to cover all Crown-Indian relations would have the effect of overturning the decision reached by Dickson J. in *Guerin* and accepting Wilson J.'s dissenting opinion in that case. If that had been Chief Justice Lamer's intention, I am confident that he would have said so and would have discussed his conclusion. Secondly, it is possible to read the passage in a manner that is consistent with *Guerin* by assuming that the statutory provisions protecting the interests of Indians to which the Chief Justice referred were the surrender provisions in the *Indian Act*.

[495] In *R. v. Adams*, [1996] 3 S.C.R. 101 ("*Adams*"), which was decided after *Van der Peet*, Lamer C.J.C. said, at para 54:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for

the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. **In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties**, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

[*My emphasis*]

[496] *Adams* was a case which dealt with the aboriginal right to fish for food. The accused was charged with fishing without a license. The *Quebec Fisheries Regulations*, C.R.C. 1978, c. 852 and Section 35 were considered and the Court held that the accused's aboriginal right had not been extinguished. The Court then determined whether, contrary to Section 35, the right had been infringed. The passage quoted above appeared in the context of the Court's finding that the test for infringement under Section 35 was different from the test used under the *Canadian Charter of Rights and Freedoms*. I am therefore satisfied that the underlined text in the above quotation refers only to the fiduciary duty identified under Section 35 and does not extend the fiduciary obligation to pre-surrender reserve administration.

[497] In *Delgamuukw*, at paragraph 162, Lamer C.J.C. observed that:

The second part of the test of justification [of infringement of aboriginal rights or title] requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the "legal and factual context of each appeal..."

This statement was made in the context of the "special" fiduciary relationship present under Section 35 and did not, in my view, deal with reserve administration.

[498] Finally, in *Apsassin*, McLachlin J. (now C.J.C) spoke for the Court when she provided her analysis of the surrender of the reserve's surface rights in 1945. In that context, she considered the plaintiff's allegation that, prior to the surrender, the Crown had owed a fiduciary duty to "... ensure that the band did not enter into the surrender improvidently[71]. The plaintiffs argued that the fiduciary duty existed because of the nature of Indian title and that the duty was recognized in the paternalistic scheme for the management of Indian reserves under the *Indian Act.*

[499] Her Ladyship dealt with the existence of a fiduciary duty prior to surrender in two steps. She began by determining whether a fiduciary duty arose under the *Indian Act,* and then she considered whether there existed special circumstances in which she should "superimpose" (her word) a fiduciary duty on the *Indian Act*'s regime for the alienation of Indian lands.

[500] In her consideration of fiduciary duties under the *Indian Act*, Her Ladyship found that the fiduciary duty under the Act was to prevent exploitative bargains by refusing to consent to surrenders which were associated with improvident transactions. This was clearly a post-surrender fiduciary duty under the *Indian Act* which, on the facts of the case, Her Ladyship concluded had not been breached. Although invited to do so, McLachlin J. did not identify a pre-surrender fiduciary duty to ensure that the band did not enter into a surrender improvidently. Instead, she followed *Guerin* and limited her imposition of a fiduciary standard to the approval of the surrender in the post-surrender period.

[501] With regard to superimposing a fiduciary duty on the *Indian Act*, McLachlin J. addressed only the Act's regime for the alienation of Indian lands and concluded, at paragraph 40 that, because the band retained control over the decision to surrender, there was no basis for finding a fiduciary duty on the Crown "... prior to the surrender of the reserve by the Band".

[502] Justice McLachlin did not identify a pre-surrender fiduciary duty in connection with the management of reserve lands and she made no mention of the submission that the paternalistic provisions of the *Indian Act* gave rise to a fiduciary duty. That argument was clearly not persuasive.

[503] In conclusion, I have found no authority in the decisions of the Supreme Court of Canada to support the existence of either a private law or a *sui generis* fiduciary duty under the *Indian Act* in the Crown's pre-surrender administration of the Reserve.

ii) DECISIONS OF THE FEDERAL COURT OF CANADA

[504] *Kruger* was a case in which a limited pre-surrender fiduciary duty was imposed. The case involved the expropriation by the Federal Crown of two parcels of reserve land which were required for an airport. The Federal Court of Appeal concluded that an expropriation created a situation which was analogous to a post-surrender alienation. The Court held that the Crown

had a limited fiduciary duty which required it to obtain proper compensation for the occupants of the reserve.

[505] In *Fairford*, the Court was concerned about problems related to the construction of a dam on the Fairford River in Manitoba. The band had negotiated an agreement with the province of Manitoba under which the band was to receive approximately 5,800 acres of replacement land on the understanding that it would become reserve land to compensate the band for reserve land which had been being flooded. The band alleged breaches of fiduciary duty in respect of the acquisition of the replacement land because only the Federal Crown could take the transfer of the replacement land from the province and create the Indian interest by making the land an Indian reserve.

[506] Another allegation of breach of fiduciary duty related to 34 acres of reserve land which were needed by the province of Manitoba for highway purposes and taken pursuant to section 35 of the *Indian Act*. The band said that the Crown failed to secure the full amount owed to the band in a timely way. However, the trial judge held that this failure was remedied before trial by a payment with interest.

[507] The trial judge undertook a lengthy and detailed analysis of the case law in connection with the plaintiff's allegations of breach of fiduciary duty by the Crown under the *Indian Act* and concluded, at paragraph 30, that:

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) [of the *Indian Act*].

[508] However, the trial judge did find that the Crown's failure to consult with the band about the terms of the agreement for the acquisition of the replacement land was a breach of its fiduciary duty to protect the band in its dealings with Manitoba for the replacement land. He also concluded that the Crown's failure to obtain compensation in a timely way for the 34 acres of reserve land which had been expropriated had been a breach of fiduciary duty for the reasons identified in *Kruger*.

[509] Since His Lordship imposed a fiduciary duty only in relation to land which was not yet reserve land and to land which was being expropriated, it is my view that *Fairford* is not authority for the existence of a pre-surrender fiduciary duty in matters of reserve administration.

[510] In *Semiahmoo*, perhaps because it was not an important matter in that case, the distinction between pre- and post-surrender duties was somewhat blurred. The Federal Court of Appeal agreed with the trial judge's characterization of a pre-surrender duty. It said:

Having regard to the circumstances of this case, I am in respectful agreement with the Trial Judge's characterization of the respondent's pre-surrender fiduciary duty. I also agree with the Trial Judge's conclusion, based on the facts, that the respondent breached this duty when it consented to the 1951 surrender.

However, my review of her reasons shows that Reed J. did not mention a pre-surrender fiduciary duty.

[511] The Court of Appeal clarified the situation when it later said:

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.

The fiduciary duty ultimately found in *Semiahmoo* was the post-surrender duty to refuse to consent to an exploitative surrender. This was the duty which had been identified in *Apsassin*.

[512] In *Wewayakum* at both trial and appeal, the question of whether the Crown owed a fiduciary duty to the plaintiff bands in that case -- as opposed to a statutory or administrative duty -- was not directly before the Court. The Crown admitted a duty to balance the conflicting reserve interests of the plaintiff bands and, although the Crown did not specifically deny that it could owe a pre-surrender *sui generis* fiduciary duty to the plaintiffs, it concentrated its submissions on the question of whether it had breached its duty to balance the interests of the bands.

[513] One of the issues in *Wewayakum* was the legality of a 1907 resolution of the Cape Mudge (Wewaikai) Band, in which the band purported to relinquish its interest in the Campbell River Reserve to the Campbell River (Wewayakum) Band. The Cape Mudge Band argued that its band council resolution had been inadequate to relinquish its interest and that the Crown had breached its fiduciary duty to the band by failing to obtain a formal surrender.

[514] In dealing with these allegations, Teitelbaum J. followed the Crown's lead and focused his attention on whether there had been a breach of duty rather than on the specific nature of the duty. He found no breach and, even though he was dealing with submissions about breaches of fiduciary duty, he did not use the word "fiduciary" in his conclusions about the Crown's (see paragraphs 493-501). He simply held that the Crown had a duty to balance the interests of the two bands without specifying the nature of the duty. However, the trial judge did make it clear, at paragraphs 498 and 501, that he did not consider that the Crown's duties to correctly interpret the *Indian Act* or to use reasonable care in providing advice to Indians were fiduciary in nature. In this regard, he said at paragraph 498:

... I am of the opinion that a breach of the Crown's duty to use reasonable care in advising the plaintiffs on these issues cannot be construed as a breach of fiduciary duty.

In these circumstances, I have concluded that the trial decision in *Wewayakum* should not be treated as authority for the existence of a pre-surrender fiduciary duty in the management of reserves under the *Indian Act*.

[515] The Court of Appeal upheld the trial judge's finding that there had been no breach of duty. In addition, the Court appears to have assumed that the trial judge concluded that the duty in question was fiduciary and, like the trial judge, it concentrated on the content of the duty rather than on the nature of the duty. In these circumstances, it is my conclusion that the Court

of Appeal's decision cannot be treated as authority for what would be a new proposition to the effect that there exists a pre-surrender fiduciary duty under the *Indian Act*.

[516] Most recently, in *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2000] 2 F.C. 314 (C.A.) ("*Tsartlip*"), the Court dealt with a decision by the Minister to lease reserve land under section 58(3) of the *1970 Indian Act*. That section entitled the Minister to lease reserve land which was lawfully possessed by a band member. In the case, the band member had a certificate of possession and wanted to lease trailer park sites on his land to non-Indians. The Minister leased the sites over the band's objections. In those circumstances, the Court found that the Minister owed no fiduciary duty either to the band member or to the band as a whole. Instead, the Court resolved the matter by applying principles of administrative law to determine: (i) the standard of deference to be accorded the Minister; and (ii) the applicable standard of review. Using the factors outlined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Court concluded that the appropriate standard of review was one of reasonableness.

[517] When the reasonableness of the decision was assessed, the Court considered whether there were factors which should have caused the Minister to exercise his or her discretion in a particular way. The Court looked at the *Indian Act* and concluded that the Act did not endorse the long-term use of reserve land by non-Indians. Accordingly, the Court found that the Minister's decision to grant the lease had been unreasonable.

[518] It is worthy of note that, in *Tsartlip*, in reaching the conclusion that no fiduciary duty was owed in a matter of reserve administration, the Court of Appeal followed an earlier decision in *Boyer v. Canada*, [1986] 2 F.C. 395 ("*Boyer*"). In *Boyer*, the Federal Court of Appeal had also concluded that no fiduciary duty was owed under section 58(3). At pages 405-406, Marceau J.A. had commented on *Guerin* and had said:

But in any event, I simply do not think that the Crown, when acting under subsection 58(3), is under any fiduciary obligation to the Band. The Guerin case was concerned with unallotted reserve lands which had been surrendered to the Crown for the purpose of a long term lease or a sale under favourable conditions to the Band, and as I read the judgment it is because of all of these circumstances that a duty, in the nature of a fiduciary duty, could be said to have arisen: indeed, it was the very interest of the Band with which the Minister had been entrusted as a result of the surrender and it was that interest he was dealing with in alienating the lands. When a lease is entered into pursuant to subsection 58(3), the circumstances are different altogether: no alienation is contemplated, ...

[519] In conclusion, I have found nothing in the decisions of the Federal Court to suggest that an all-encompassing fiduciary duty of any kind applied to the management of reserves in pre-surrender circumstances under the *Indian Act*. However, as noted, it is clear from the decisions in *Kruger* and *Fairford* that a limited *sui generis* fiduciary duty to obtain proper compensation and to consult may apply in expropriations.

iii) A FIDUCIARY DUTY IN SPECIAL CIRCUMSTANCES

[520] In its decisions in *Frame and Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; and *Hodgkinson and Simms, supra*, the Supreme Court of Canada developed certain tests and criteria for determining whena

fiduciary duty arises[72]. The Plaintiffs have relied on these cases even though the principles they established were developed in the private law context. The question for this case is how to apply those principles in the public law context of reserve administration under the *Indian Act*. In my view, the proper approach is to apply the principles only after discounting the situation created by the legislation. For example, under the *Indian Act,* the Reserve was managed by the Crown for the Squamish. Thus, the legislation created a situation in which the Crown had considerable discretion over a variety of matters and the Indians were vulnerable to that exercise of discretion. However, in my view, the discretion and vulnerability created by the *Indian Act* are insufficient by themselves to justify the existence of a fiduciary duty.

[521] It cannot be the case that each time legislation gives the Crown discretion to act, a Private Law Fiduciary Duty or even a *sui generis* fiduciary duty applies. This must be so because, in matters of public law, there will generally not be a reasonable expectation that the Crown is acting for the sole benefit of the party affected by the legislation. For this reason, it is my conclusion that, in matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard. There would have to be special circumstances, other than those created by the legislation, to justify the imposition of a fiduciary duty on the Crown.

[522] Special circumstances were discussed by Rothstein J. in *Fairford* at paragraphs 54 and 150. He concluded that a fiduciary duty could be based on an agreement, a unilateral undertaking, a special statute or a course of conduct, including a ceding of the Indians' power of decision[73]. It seems to me, that to find a pre-surrender fiduciary duty in the management of non-treaty reserve land under the *Indian Act*, special circumstances must exist in which an acknowledged Indian interest in land is under the Crown's rather than the Indians' control. This could occur because the land is in the process of being acquired, as was the case in *Fairford*, or because it has been surrendered, as happened in *Guerin*, or because it has been expropriated, as in *Kruger*. Whatever the cause, the circumstances must be such that the Indians are especially vulnerable by reason of having no actual interest in, and therefore no control over, land in which they had or were acquiring an interest.

[523] In the case at bar, the Plaintiffs have not alleged any special circumstances, such as those described above, to justify the imposition of a fiduciary duty on the Crown's actions in the pre-surrender period. Nevertheless, as I deal with the events which are alleged to have been breaches of fiduciary duty in that period, I will consider whether a *sui generis* fiduciary duty should be imposed by reason of any special circumstances.

iv) THE HISTORICAL RELATIONSHIP AS THE BASIS FOR A FIDUCIARY DUTY

[524] As mentioned in the introduction to this part of the reasons, the Plaintiffs have alleged that the Crown's historical undertaking to protect the Indians' interests in their reserve lands serves as the foundation for a fiduciary relationship which, in turn, creates fiduciary duties in connection with the management of reserves under the *Indian Act*.

[525] It is my conclusion that the Crown's historical responsibility may not have been as broad as the Plaintiffs suggested. It may have been limited to protecting Indians from losing their reserves to non-Indians in exploitative transactions. This responsibility was translated into a

statutory obligation in the surrender provisions of the *Indian Act*. I am not certain, on the record before me, that there was a historical responsibility on the part of the Crown to manage non-treaty reserve lands so as to protect them for the use and benefit of Indians. However, this responsibility was undertaken by the Crown when it enacted the *Indian Act* and took upon itself the statutory duties described therein.

[526] While there is no question that the provisions in the *Indian Act* for the management and surrender of Indian lands have created a relationship between the Crown and the Indians which has variously been described as "trust-like" or "fiduciary" or paternalistic", it is my view that this relationship, however described, does not automatically give rise to fiduciary duties on the part of the Crown in all facets of its administration of non-treaty reserves. Statutory duties are owed but, for the reasons given earlier, it is my view that fiduciary duties will arise only in the special circumstances described above.

CONCLUSIONS ABOUT A PRE-SURRENDER FIDUCIARY DUTY

[527] • There is no general all-encompassing Private Law Fiduciary Duty or general *sui generis* fiduciary duty which automatically arises under or is automatically superimposed on the *Indian Act.*

• There is the possibility that a *sui generis* fiduciary duty could be superimposed on the actions of the Crown during reserve administration, but only in special circumstances.

• There is no possibility that a Private Law Fiduciary Duty could arise in connection with the administration of reserves, even in special circumstances. In my opinion, any fiduciary duty found to be owing by the Crown would always be *sui generis*.

PART V - THE PRE-SURRENDER PERIOD

INTRODUCTION

[528] The following matters were at issue in the pre-surrender period:

• The propriety of the expropriations which, according to the Squamish, either should not have occurred at all, or should have involved less land than was actually taken and more compensation than was actually paid.

• The Crown's alleged failure to collect adequate revenues from the lease of Reserve land to the Rat Portage Lumber Company.

• The 1913 Sale, which the Squamish characterized as a fundamental breach of the Crown's fiduciary duty to protect the Squamish "tribe" in its possession of the Reserve. The Squamish said that the Federal Crown should have prevented British Columbia from completing the sale and should have ensured that the residents did not leave the Reserve.

• The propriety of the Vancouver Harbour Commission's expropriation and its subsequent

abandonment of the Reserve. The Squamish said that the expropriation was not *bona fide* and that it should not have been abandoned after ten years without any compensatory payment.

- The Crown's method of reserve administration which the Burrard and Squamish characterized as illegal "misadministration".

- The validity of the 1923 Amalgamation which the Burrard said deprived them of their interest in the False Creek Reserve.

- The propriety of the agreement made between the Crown and the Province in 1927 respecting a proposed surrender and sale of the Reserve, and the related band council resolution. The Squamish said that they were based on the Crown's improper acknowledgement of British Columbia's reversionary interest in the Reserve, and the Crown's acceptance of British Columbia's request for a payment from the proceeds of the sale of the Reserve. The Squamish also said that the payment would not actually be made on account of British Columbia's reversionary interest but was really intended to reimburse the Province for the money it paid to the residents of the Reserve in the 1913 Sale.

- The propriety of the wartime permits granted to DND for the RCAF storage depot and other military purposes and the adequacy of the compensation paid under those permits.

- The Crown's alleged failure to actively pursue the leasing of Reserve lands.

PART V (A) - PHASE ONE ISSUES

THE 1923 AMALGAMATION

[529] The Amalgamation in 1923 was not the first event in the pre-surrender period. However, because it concerned the Burrard Band's entitlement to an interest in the Reserve, and because it was dealt with during Phase I of the trial, the 1923 Amalgamation together with the related issue of reserve "misadministration" will be considered in these reasons. The evidence dealing with the balance of the matters listed in the preceding paragraph was heard during the trial's second phase and is therefore not discussed at this time.

[530] Amalgamation was initiated and pursued by the Squamish People through a series of petitions and resolutions directed to the Department in the period from 1913 to 1923. Before 1923, the Department administered the individual reserves of the Squamish "tribe" separately for the benefit of a number of Squamish "bands", composed of those Squamish Indians who were considered to be resident on and interested in the particular reserve in question. Amalgamation involved a change from the administration of separate reserves for separate bands to a unified administration of all the reserves and bank accounts of the Squamish "tribe" for the equal benefit of all the Squamish People. As well, after Amalgamation, all the separate bands of the Squamish "tribe" (except the Burrard Band) became one band under the *Indian Act*. The new amalgamated band was called the "Squamish Band" and was led by a council of Squamish chiefs. As will be seen, the Burrard Band which, until 1923, was considered for administrative purposes to have been one of the bands of the Squamish "tribe", asked to be excluded from Amalgamation.

[531] In broad terms, the Burrard plaintiffs alleged that the Crown breached its fiduciary duty to them by assenting to the Amalgamation without a formal surrender or comparable consent from the entire Squamish "tribe". They also said that the Crown failed to protect their interests in the False Creek Reserve and other reserves of the Squamish "tribe", and in all its bank accounts.

[532] The Squamish and the Crown rejected the Burrard's allegations. They said that no fault can be found with the implementation of the Amalgamation, and that the Burrard Band had no post-Amalgamation interest in any of the reserves (including the False Creek Reserve) or funds of the Squamish Band. The Musqueam plaintiffs took no position on these matters.

THE ISSUES

[533] In order to deal with the Burrard's case, it was necessary to address the following topics:

- the legality of the Crown's method of administering the reserves of the Squamish "tribe"
- the facts relating to the proposal for and approval of the Amalgamation
- the Burrard allegations of breach of fiduciary duty in connection with the Amalgamation

THE LEGALITY OF RESERVE ADMINISTRATION

Introduction

[534] All the parties (except the Musqueam) acknowledged that the JIRC allocated 28 separate reserves to the Squamish "tribe". However, the meaning and legal effect of that allocation were matters of controversy. The Squamish and the Burrard said that paragraph 5 of the JIRC's Mandate (CB240-8), which provided that "each Reserve shall be held in trust for the use and benefit of the Nation of Indians to which it has been allotted", meant that the JIRC's allocation entitled all of the Squamish People (which at that time included the Burrard People) to use and benefit from all 28 reserves. In their submission, the legal effect of the JIRC's allocation of 28 reserves to the Squamish "tribe" was the creation of one large Squamish band under the *Indian Act*. They also said that the members of that band had an equal interest in common in all the Squamish reserves. This meant that the Department was required to give all Squamish men a vote on all surrenders regardless of which individual reserve was affected. Further, it meant that the proceeds of any surrenders should have been placed in one bank account for the equal benefit of all the Squamish and that any post-surrender distributions should have been made for the benefit of all members of the Squamish band. To summarize, the Squamish and Burrard said that the JIRC's reserve allocations created one Squamish band and that its members had indivisible interests in all Squamish reserves and funds.

[535] However, contrary to the Squamish and Burrard submissions about what should have happened, the uncontested evidence disclosed that the administration of the separate reserves of the Squamish "tribe" was, for the most part, actually conducted in the following manner:

- Surrenders were taken for the individual reserves, or groups of reserves, which were affected by a proposed post-surrender transaction, and only Squamish men of voting age who were considered to be resident on and interested in those reserves voted on such surrenders.

- Bank accounts were established for individual post-surrender transactions for the benefit of those who had voted on the related surrender.

- Post-surrender distributions were made only to those who had voted on the related surrender.

[536] The Crown rejected the argument that the Department was obliged to administer all the Squamish reserves for the benefit of all the Squamish Indians in common. The Crown said that its method of reserve administration was lawful under the *Indian Act*. The Crown agreed that the JIRC's allocation had created the reserves of the Squamish "tribe", but said that the question of which Indian bands and individual band members were interested in and resident on those reserves was a matter entirely within the authority of the Superintendent General, pursuant to section 2 of the *1876 Indian Act*. It provided that:

The Minister of the Interior shall be Superintendent-General of Indian Affairs, and shall be governed in the supervision of said affairs, and in the control and management of the reserves, land, moneys and property of Indians in Canada by the provisions of this Act.

[537] The Crown argued that section 2 delegated the Crown's prerogative powers over Indians and lands reserved for Indians to the Minister. The Crown acknowledged that the Minister's discretion was limited by the provisions of the *Indian Act*, but said that, where the Act was silent, the Minister's discretion remained intact. It was this discretion, the Crown said, which allowed the Department to administer the reserves for separate bands of Squamish Indians. The Crown also noted that the provisions of the *Indian Act* which governed reserve administration -- such as the definitions of "band" and "reserve" and the rules governing surrender votes -- were written using broad language which gave the Minister the discretion to establish reserve administration policies and practices which were responsive to the politics of and demographic changes in the Squamish "tribe".

[538] The Crown submitted that the Department's administration of the Squamish "tribe's" reserves was guided by the principle that the Squamish People themselves should decide who was resident on and interested in a particular reserve. Those Indians would then vote on surrenders and be entitled to distributions of proceeds from post-surrender sales or leases of that reserve's surrendered lands. However, the question about which Squamish Indians were interested in and resident on a particular reserve proved to be complex because, in the relevant period, the Squamish People were migrating from their Squamish River valley and Howe Sound reserves to their Burrard Inlet reserves (and to the Mission reserve in particular). Many Squamish Indians who were primarily resident in Burrard Inlet nevertheless still considered themselves to be residents of, and interested in, their former reserves in the north. The Crown stated that, rather than impose rigid residency requirements on a shifting Squamish population, the Department deferred to the Squamish Indians' decisions about who was entitled to vote on surrenders for particular reserves.

[539] The Squamish and Burrard countered by saying that the Crown's method of reserve administration was illegal and in breach of the Crown's fiduciary duty to the Squamish because it violated or derogated from what they described as the JIRC's allocation of all the reserves to the Squamish "tribe" in common. The Burrard also alleged that the Crown's "misadministration" confused the Burrard People about the true extent of their interests in all of the Squamish reserves (including the False Creek Reserve). The Burrard said that, due to the Crown's misadministration, the Burrard Band did not realize in 1923 that it had an interest in all the reserves of the Squamish "tribe" in common which it would forfeit when it asked to be excluded from Amalgamation. The Burrard submitted that the Crown was under a fiduciary duty to advise the Burrard Band of the practical and legal consequences of Amalgamation and to protect and preserve its interest in the False Creek Reserve. Accordingly, it must be determined whether, in 1923, the Burrard Band actually had an interest in reserves other than Burrard I.R. No. 3 and Inlailawatash I.R. No. 4[74].

[540] There was no dispute of any consequence about the specific details of the Department's administration of the Squamish reserves and no claims were made based on specific incidents of alleged misadministration. Accordingly, I do not propose to discuss the Crown's management of the Squamish reserves in detail. However, I will address the dispute about its proper characterization. That is, whether it was an *ad hoc* and confused "misadministration", as submitted by the Squamish and Burrard, or whether, as submitted by the Crown, it was a flexible but principled response by the Department to the requirements of the Squamish "tribe".

[541] In dealing with reserve administration, the important task has been to decide how the JIRC's allocation of 28 separate reserves for the use and benefit of a language group or nation it called the "Skwawmish Tribe" related to the mandate given to the Department to manage those reserves "in trust" for the benefit of the Squamish "tribe" under the *Indian Act.*[75] In this regard, it has been instructive to consider: (i) the distribution of the Squamish population and the internal politics of the Squamish People in the late 1800s and early 1900s, (ii) the documents written by the JIRC commissioners about the meaning of their reserve allocations, and (iii) the relevant provisions of the *Indian Act*.

The Squamish Population and Its Politics

[542] The JIRC's allocation of 28 reserves meant that 15 existing Squamish communities were given reserve status for the first time. As well, the five communities in Burrard Inlet, which had been made reserves in colonial times, had their reserves confirmed[76]. By the fall of 1876, when the JIRC began its work, the residents of those reserves had already been identified as bands pursuant to section 3(1) of the *1876 Indian Act*. Further, by that time, many of the Squamish communities had already developed longstanding, complicated and interconnected affiliations, and men from influential families had become the leaders of one or more communities. I will refer to those leaders as "chiefs", as this was the term used by both the JIRC and the Department.

[543] In 1877, the Blenkinsop Census (CB286 and 243) listed the residents of the 20

Squamish communities on reserves and indicated that each had a chief[77]. There was considerable information in the trial record about the Squamish chiefs. For example, it showed that:

- Eight Squamish chiefs and "head men" were presented to the Governor-General in 1874 (CB274).

- Twelve Squamish chiefs met with the JIRC in Burrard Inlet in 1876 (CB273-7).

- Seven Squamish chiefs were identified by Indian Agent Devlin in 1890 (CB395).

- Eight Squamish chiefs were listed in the Department's annual report of 1897 (CB430-24).

- Nine Squamish chiefs made speeches about amalgamation in January of 1923 (CB928).

In the period from 1869 until 1923, the chiefs on the five Burrard Inlet residential reserves were:

Mission I.R. No. 1: Chief Joseph and later Chief Harry, who was known as "Government Chief" Harry, and then Chief Moses Joseph

Capilano I.R. No. 5: Chief Lawa and later Chief Mathias Joe

Seymour Creek Chief Big George and later Chief Jimmy Harry

I.R. No. 2:

Burrard I.R. No. 3: Chief James Sla-hult and later Chief George Sla-hult

False Creek I.R. No. 6: Chief George Chepxim and later Chief Andrew

[544] It is clear that, in 1876, the JIRC's commissioners were aware that the Squamish people were split into "sections" under "chiefs" who were appointed by the Indians and who exercised *de facto* authority. It is also clear that the JIRC considered it essential to deal with those chiefs. In this regard, Commissioner Sproat's letter of November 27, 1876, to the Minister (CB287-40) said:

The Skwawmish people appear to be split up into sections. Their broken residence between Howe Sound and Burrard Inlet; the action of the clergy; the high wages enjoyed by many of the Indians who work at the Mills; the decay of the custom of "potlaches", and other circumstances have given a blow to chieftainship among them. **The so-called chiefs, who exercise defacto, and in some instances effective, authority over sections of the people are Indians of some force of character**, but not necessarily of good birth, who receive the support of the clergy of the different churches engaged in missionary work among the Indians. **The Commissioners took pains to find out the real wishes of the people, but in formal conferences, they addressed themselves, especially to the chief or old men whom the Indians {had} appointed to speak for them**.

[*My emphasis*]

[545] An example of the type of formal conference described by Commissioner Sproat was found in an entry in Commissioner McKinley's diary, which recorded a meeting in the autumn of 1876 between the JIRC and twelve Squamish chiefs on the north shore of Burrard Inlet (CB273-7).

[546] With regard to the migration of the Squamish population, the Blenkinsop Census showed that, in 1877, the occupied reserves in Howe Sound and in the Squamish River valley were each home to approximately 20 residents. In contrast, the reserves in Burrard Inlet (including the False Creek Reserve) were each occupied by approximately 40 residents. The exception on the high side was Mission I.R. No. 1 with 130 residents and, on the low side, Seymour Creek I.R. No. 2, which had only 22 residents. This demographic profile changed dramatically over the years as the Squamish continued to leave their northern reserves. Most migrated to the Mission reserve and, for this reason, the population of the other Burrard Inlet reserves, including the False Creek Reserve, remained relatively stable. However, by 1913, the population at the Mission reserve had become 226, or nearly two-thirds of the total Squamish population (CB826-68). As well, the population of the northern reserves had dropped from 367 people in 1883 to only 33 people by 1913 (CB773).

[547] A review of the surrender documents and pay lists in evidence has shown that many Squamish Indians, including four members of the Burrard Band, were accepted as members of the Mission Band and therefore had interests in Mission I.R. No. 1. It is clear from the evidence that Mission I.R. No. 1 was unique among the reserves of the Squamish "tribe", in that, by 1900, it had become the most populous reserve and a gathering point for the "tribe". The reserve was the location of the Catholic church and the boarding school for the Squamish People and other Indian groups. The reserve was also close to the sawmills and docks on the north shore of Burrard Inlet, which were important places of employment for Indian people. For these reasons, the Mission reserve became the full-time or part-time home of many Squamish Indians, and particularly of those who had formerly resided on the Squamish reserves in Howe Sound and in the Squamish River valley. As well, some Squamish Indians who lived elsewhere in Burrard Inlet maintained homes on Mission I.R. No. 1.

The JIRC's Decision and Correspondence

[548] As noted above, the Squamish and Burrard argued that the JIRC's Minutes of Decision allocated all 28 reserves to the Squamish "tribe" in common. However, the Minutes of Decision did not use the words "in common". They simply allocated 28 separate reserves to the "Skwawmish Tribe". This method of allocation was in accordance with the Mandate. It provided, in paragraph 2, that the JIRC could allow multiple reserves to one Indian "nation", but it did not specify that such allocations were to be made "in common". In 1876, the words "in common" appeared in only two documents. One was an item of JIRC correspondence (CB284-1) and the other was a JIRC journal entry (CB1373-1).

[549] CB284-1 was a letter of November 27, 1876, which was written by all three JIRC commissioners to Indian Superintendent[78] James Lenihan of the New Westminster Agency. In their letter, the commissioners spoke of the squatters on the Military Reserve who were led by Supple Jack and said:

They, **in common** with the Squamish people generally, may share in the reserves allotted by us

at Burrard's Inlet and Howe Sound in such manner as you may think fit after consultation with Col. Powell.

[*My emphasis*]

At that time, Colonel I.W. Powell was the Department's B.C. Indian Superintendent[79] in Victoria. This passage made it clear that the commissioners understood that the Department, acting under the *Indian Act*, would decide how the reserves would be shared.

[550] CB1373-1 was an excerpt from the JIRC's journal of November 15, 1876. It included the following entry regarding the commissioners' work at Seymour Creek I.R. No. 2 on the north shore of Burrard Inlet and their contact with Chief Big George at that reserve.

There being no more available land, suitable for agriculture, hereabout, George was informed that any deficiency will be made up to the tribe, **in common**, on the shores of Howe Sound, their original residence, which is so far unoccupied by settlement.

[*My emphasis*]

It was clearly contemplated that, if Squamish Indians in Burrard Inlet wanted to cultivate land, they could do so only if they moved north to the reserves in Howe Sound.

[551] Concerning the meaning of the JIRC's allocation, Commissioner Sproat reported to the Minister in a letter of November 27, 1876, that the lands were allocated for the Squamish People generally (CB287-40). He said:

The Commissioners were careful to explain to the Indians that all the lands confirmed by them, or given by them as reserves, were for the people generally, not for any particular chiefs or individuals.

[552] In his diary entry for the JIRC's visit to the Capilano reserve on November 14, 1876, Commissioner McKinlay expressed a similar view when he wrote about the Capilano reserve and noted at CB273, pp. 8-9, that:

After putting the False Creek reserve in right order we went to Kulolans Creek, here the reserve is very large so we made no change further than showing them that any one of the other bands who had not land enough might come and settle here if they felt so inclined.

[553] Three days later, on November 17, 1876, Commissioner McKinlay had a discussion with Supple Jack on the Military Reserve. McKinlay recorded the following exchange, at CB273, pp. 11-12, in which Supple Jack was told that he and his group could take up residence on other Squamish reserves. McKinlay said:

I lectured Supple Jack, told him he was wrong in squatting on the Govt Reserve knowing it to be such when he did so. He admitted his knowledge of the fact but said White men had done the same thing and he hoped the Prov. Govt would allow him the site of his village and enclosures. This would not exceed from six to 8 acres. I explained that I telegraphed to Mr. Vernon and that owing to the wire being down was unable to obtain an answer consequently **that we could not give him papers for that particular place but that he had a full right to settle with the rest of his tribe on the reserves already made.**

[*My emphasis*]

The JIRC clearly understood that its allocation gave to all Squamish Indians the right to reside on any of the reserves allocated to the Squamish "tribe".

[554] The Mandate instructed the JIRC to allocate reserves to "nations" of Indians, and it is clear from the JIRC's correspondence, reports and diaries that the commissioners had neither the time nor the inclination to involve themselves in the internal politics of each "nation". Rather, they focused on the important aspects of their work which involved setting aside reserves which suited the population of each nation and settling land disputes between Indians and non-Indians. The commissioners were aware that the Department would be responsible for the administration and possible "subdivision" of the reserves. I have concluded that, in this context, subdivision meant, firstly, a determination about which groups of Indians were entitled to which reserves under the *Indian Act* and, secondly, a determination under the Act about whether individual Indians were entitled to lots on a reserve.

[555] In this regard, in a letter to the Provincial Secretary in Victoria dated November 27, 1876, the commissioners stated at CB282-4:

We explained that the land was given for the Indians generally and not for any particular Chiefs or individuals, and that **if any subdivision were found necessary, it would be in the hands of the Superintendent of Indian Affairs**.

[*My emphasis*]

[556] The JIRC was also in direct contact with the Department's officials about "subdividing" the reserves. In this regard, the JIRC reported to Indian Superintendent Lenihan on November 17, 1876 (CB276), that:

Burrards Inlet being a special case likely to entail upon you some difficulty in subdividing the reserves, we have informally, at your request, lent you the aid of our authority in placing matters on a suitable footing by conversation with the various chiefs, but, at the same time, we have explained that the sections of land given, though scattered and disconnected, are for the use of the tribes generally, to whom they are assigned, irrespective of individual claims.

[*My emphasis*]

[557] Against this background, the question was what kind of interest was created by the JIRC's allocation of 28 reserves for the "use and benefit" of a language group described as the "Skwawmish Tribe"? Given that the phrase "in common" was used in neither the JIRC's Minutes of Decision nor in its Mandate, I have decided that the JIRC's use of those words only twice (once in its journal and once in correspondence) did not have any legal consequences. In my view, the JIRC's reserve allocation did not grant to all Squamish People an Indian interest in common in all the reserves. Rather, the JIRC's allocation gave to all people who spoke the Squamish language exactly the interest described by the JIRC. That interest was a right to reside on any of the reserves allocated to the "tribe"[80].

The *Indian Act*

[558] The *Indian Act* established the parameters for the Department's administration of the reserves and finances of the Squamish "tribe". In so doing, it also delineated the rights of Squamish Indians to the reserves which had been allocated by the JIRC. The relevant provisions of the *Indian Act* will be referred to collectively as the "Provisions"[81]. They were the general provisions about reserve management found in sections 4 and 14 (the "Management Provisions"), the definition of a "reserve" in section 2(k) (the "Reserve Definition"), the definitions related to a "band" in sections 2(d), (e) and (f) (the "Band Definition"), the portion of the surrender provisions dealing with eligibility to vote found in section 39(a) (the "Voting Provision"), and the provision dealing with the investment of funds found in section 70 (the "Investment Provision").

[559] The Management Provisions read as follows:

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

14. All reserves for Indians, or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held before the passing of this Act, but shall be subject to the provisions of this Act.

[560] The Reserve Definition stated that:

2(*k*) The expression **"reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians**, of which the legal title is in the Crown, and which remains a portion of the said reserve, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

[*My emphasis*]

[561] On the facts of this case, it is my view that the term "reserve" was capable of two meanings. Relying on the singular of "tract", it could have been used to describe any one of the 28 separate reserves allocated by the JIRC. In the alternative, using the plural "tracts", the term "reserve" could have been used to describe all 28 reserves as one. The "particular band" of Indians referred to in the Reserve Definition was the band for which a reserve was set apart. In this case, since all 28 reserves were allocated to the Squamish, the "particular band" mentioned in the Reserve Definition would have been the Squamish "tribe".

[562] The Reserve Definition acknowledged that the process of reserve creation took place outside of the *Indian Act*[82]. In this case, it was the JIRC's Minutes of Decision which created the reserves for the Squamish "tribe".

[563] The Band Definition stated that:

2(*d*) The expression "band" means any tribe, band or body of Indians who own or are **interested in a reserve** or in Indian lands in common, of which the legal title is vested in the

Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible;

(*e*) The expression "the band" means the band to which the context relates;

(*f*) The expression "band," when action is being taken by the band as such, means the band in council;

[*My emphasis*]

[564] In my view, the fact that the JIRC created numerous separate reserves for the Squamish "tribe" meant that two definitions of a band were possible depending on whether the term reserve was defined in the singular or in the plural. All the Indians who spoke the Squamish language could have been defined as one Squamish band interested in one reserve. As well, the term "band" could have been used to refer to smaller groups of Squamish Indians who were interested in one of the individual reserves.

[565] The Voting Provision stated that:

39. No release or surrender of a reserve, or portion of a reserve, **held for the use of the Indians of any band**, or of any individual Indian, shall be valid or binding, except on the following conditions: -

(*a*.) The release or surrender shall be assented to by a majority **of the male members of the band**, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General;**but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question**;

[*My emphasis*]

[566] The Crown submitted that the Voting Provision provided the Department with the authority to take surrenders from individual bands of the Squamish "tribe" of Indians, and to administer the proceeds from the sale or lease of those surrendered lands only for those individual bands. However, the Burrard plaintiffs offered a different interpretation of the Voting Provision. They submitted that the requirement that no Indian could vote on a surrender unless he habitually resided on or near the reserve (defined as all 28 reserves) meant that those Indians who habitually lived "off-reserve" (i.e. not on any of the 28 Squamish reserves) lost their voting privileges.

[567] I have not accepted the Burrard interpretation. In my view, to vote on a surrender, Squamish men had to meet three requirements. Firstly, they had to be members of the band for whom the reserve was set aside. This meant, I think, that they had to be Squamish Indians because, regardless of which definition of reserve was used, all the reserves were set aside by

the JIRC for the Squamish "tribe". Secondly, prospective voters had to be habitual residents on or near the reserve "in question". Finally, to vote, Indian men also had to have an "interest" in that reserve. It is my conclusion that Squamish band or "tribe" membership, habitual residence, and an "interest" in a reserve were three different concepts. To illustrate the differences, I will use the example of Alec Dan. As we have seen, he was a Musqueam man who lived on the False Creek Reserve of the Squamish "tribe". In those circumstances, he was a resident but he would not have been entitled to vote on a surrender at the Reserve because (i) he was not Squamish, and (ii) he was not considered to be a member of the False Creek Band and therefore was not "interested" in the Reserve.

[568] The Investment Provision stated:

70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands, and from the property held or to be held in trust for Indians, or from any timber on Indian lands or reserves, or from any other source, for the benefit of Indians, **(with the exception of any sum not exceeding ten per cent, of the proceeds of any lands, timber or property, which is agreed at the time of the surrender to be paid to the members of the band interested therein)**, shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given, -- and may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart, from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys under the provisions of this Act, and for the construction or repairs of roads passing through such reserves or lands, and by way of contribution to schools attended by such Indians.

[*My emphasis*]

[569] This provision also made a distinction between band members and interested band members, and reinforced the fact that, in addition to being a Squamish Indian, one had to be a member of the band which held the reserve, and therefore interested in the reserve, to receive a distribution. The reference to an interest would have been unnecessary if all Squamish Indians had been entitled to participate in distributions.

[570] I have concluded that the Provisions meant that, for purposes of reserve administration, it was open to the Crown to treat the 28 Squamish reserves as one reserve under the Reserve Definition. The Crown could also have said that all the Squamish People were interested in that one reserve and were therefore a single band under the Band Definition. Following this logic, the Crown could have taken the position that all Squamish adult males who were resident anywhere on the reserve (ie. on any of the 28 reserves taken together) were entitled to vote on all surrenders. Finally, any post-surrender cash distributions could have been made for the equal benefit of all Squamish Band members.

[571] However, I have also concluded that the Crown was not bound to proceed in this manner. There was nothing about the JIRC's allocation of 28 separate reserves for the use and benefit of a language group it called the Squamish "tribe" which required the Crown to treat the 28 reserves as one and all the Squamish People as one band under the *Indian Act*. In my view, although the JIRC set apart the reserves for the use and benefit of the Squamish "tribe", the manner in which Squamish Indians used and benefitted from those reserves was to be determined according to the provisions of the *Indian Act*. As discussed above, the Provisions

gave the Crown the discretion to manage the individual reserves and related bands, or groups thereof, as separate administrative units. Further, since "interest" and "residence" were not defined terms in the *Indian Act*, it was also open to the Department to let the Squamish People decide who was a "resident" of and who had the requisite "interest" in a particular reserve. I have concluded that this method of administration was entirely legal and was the method which was consistently used by the Department, even though Departmental officials sometimes expressed other views about how reserve administration might have been managed.

[572] In this regard, the Burrard and the Squamish referred to statements made by certain officials who expressed the opinion that the Squamish "tribe" was entitled to share in the Squamish reserves in common. The plaintiffs relied on these statements as evidence that the Department intentionally administered the Squamish reserves in an illegal manner.

[573] The first statement was made in 1901, by Indian Agent Devlin, after he received a proposal from a citizens' group to purchase the False Creek Reserve. Devlin wrote his superior, Indian Superintendent Vowell, to ask how he should proceed (CB461) and expressed his opinion that:

...when it [comes] to a question of Surrender the whole Squamish Band should have a voice in the matter and should participate in any benefits accruing.

Superintendent Vowell agreed with Agent Devlin's opinion, noting that "The False Creek Indian Reserve was laid off for the Squamish Band of Indians in common" (CB462).

[574] In another letter to Vowell, Devlin again expressed his view that all the Squamish Indians were interested in the False Creek Reserve, and not just those who were resident thereon. He said (CB479):

I would recommend that the ground be disposed of and the amount derived from the sale thereof [?] for the benefit of the Indians interested. Mr. Hamilton and the City Authorities are labouring under a misapprehension as to the number of Indians interested in the False Creek Reserve, and I think it only right that they should be put right in these facts. The whole of the Squamish Indians numbering about 369 people, which includes those of Capilano Creek, Squamish Mission, False Creek, Seymour Creek, Burrard Inlet No. 3, Howe Sound and Squamish River, are all equally interested and as a majority of the male members of the full age of 21 years would have to consent to the [sale?] of this ground before it could be sold with [?] and they would only consent to surrender it on being satisfied that they were getting what it was worth...

[575] The Squamish and Burrard also said that years later, in 1916, Indian Agent Byrne, expressed a similar view in his testimony before the McKenna-McBride Federal- Provincial Royal Commission on Indian Affairs (the "McKenna-McBride Commission") (CB826, pp. 11-12). There, he dealt with Commissioner McKenna's question and said:

Q. Commissioner: Do any or all of these Indians have interests in other reserves?

A. Byrne: I believe every one of them have interests in other reserves.

Q. Commissioner: On the 25th January, in the course of your examination in regard to certain Squamish Reserves, the following question was asked "Do any or all of these Indian families have interests in other Reserves", and the answer is "I believe all of them have, everyone of them have interests in other Reserves". The question of interest was not further gone into pending reference to the Minutes of Decision. I have now before me copies of the Minutes of Decision and they [show] that all these Reserves were set aside for the Squamish Tribe...and your belief was in accordance with the information disclosed by the Minutes of Decision?

A. Byrne: Yes.

The Burrard and Squamish submitted that Byrne's testimony revealed that he believed that all the Squamish Indians held an interest in common in all of the Squamish reserves, based on the JIRC's allocation of the reserves.

[576] However, elsewhere in his testimony before the McKenna-McBride Commission, Agent Byrne testified about the Department's practice and said that, in his experience, it consistently administered the Squamish reserves in accordance with the wishes of the Squamish People. In answer to the commission's questions he said:

Q. Commissioner: We will take the Squamish Indians as a whole as given in the Schedule - that is having set aside for them 28 Reserves - numbering from 1 to 28?

A. Byrne: Yes.

Q. Commissioner: And I would ask whether in the administration of the affairs of that Tribe, what Tribes are regarded as being interested in those Reserves?

A. Byrne: Well I would say that **as far as the administration goes, I have left it with the Indians themselves to determine in what Reserves they had an interest in**. In my administration there was no question that ever came up.

Q. Commissioner: And your administration did not include alienation of certain Reserves for which large sums of moneys were received?

A. Byrne: No.

Q. Commissioner: But for the purpose of your administration that is looking after their local interests and so forth, **you have treated these Indians as grouped according to the Indians' own views**?

A. Byrne: **Yes**.

Q. Commissioner: Did the Department ever give you any instructions as to the Tribal rights of the Indians of the Squamish Tribe to the Reserves that appear in the Schedule[83] as having been allotted to the Squamish Tribe?

A. Byrne: No. The practice I follow is the practice I found was followed when I took

charge of the Agency.

[CB826, pp. 66-67]

[*My emphasis*]

[577] Agent Byrne also gave evidence to the McKenna-McBride Commission about the Squamish People's varied reserve interests and he spoke about the Department's method of taking surrenders. He said that surrenders were taken from those Squamish Indians who were considered by the Squamish People to be habitually resident on and interested in the reserve in question. In that regard, he responded to the commission's questions as follows:

Q. Commissioner: How many Indians live on this reserve?[84]

A. Byrne: Eighteen

Q. Commissioner: How many houses have they at Seymour Creek?

A. Byrne: Five.

Q. Commissioner: So the population of 18 would form 5 families?

A. Byrne: Yes.

Q. Commissioner: And these five families have individual holdings on the reserve?

A. Byrne: Yes.

Q. Commissioner: And those holdings I suppose take up the whole of the reserve?

A. Byrne: Yes, with the exception of some outsiders that may have allotments there that I am not aware of. **It is very hard to know what Indians have holdings on different parts of the reserves**. A man and his family might have been living at Seymour Creek for ten years and for some reason they remove to Mission, but yet their individual allotment will hold good there. **They are so mixed up that it is practically impossible to identify the Indian owners of allotments on the Seymour Creek reserve**.

[CB826-29]

. . .

Q. Commissioner: But you have never been called upon to consider what the interest of the whole of the Squamish Tribe would be in any revenue derived from the sale of any of their Reserves?

A. Byrne: Well of course I have been a party to the sale of that portion acquired by the P.G.E.[85] through the Capilano Reserve, and in that particular case I just dealt with the Indians

of the Capilano Band **after giving notice to all the Squamish Indians that I was going to hold a meeting to find out who should participate in the proceeds**.

Q. Commissioner: Did the Department ever give you any instructions as to the Tribal rights of the Indians of the Squamish Tribe to the Reserves that appear in the Schedule as having been allotted to the Squamish Tribe?

A. Byrne: No. **The practice I follow is the practice I found was followed when I took charge of the Agency**.

[CB826, pp. 66-67]

[*My emphasis*]

[578] The Department's official reports and correspondence were consistent with its practice of administering the reserves of separate bands of the Squamish "tribe" and did not recognize the existence of a single Squamish "Band" until after the Amalgamation in 1923. The Department's *Annual Report* for 1884 listed the following six bands in the Fraser River Agency: "Burrard Inlet Reserve No. 3", "Capilano Creek", "False Creek", "Mission - Burrard Inlet", "Seymour Creek" and "Squamish - Howe Sound" (CB361). Notably, the Musqueam Band was included on this list, indicating that the Department considered that the Squamish bands were equal in stature to the Musqueam Band. The *Annual Reports* continued to describe separate Squamish bands until after Amalgamation in 1923. The *Annual Report* for 1897 indicated that Chief George Chepxim of the False Creek Reserve, Chief James Sla-hult of Burrard I.R. No. 3, and "Government" Chief Harry of Mission I.R. No. 1 were chiefs whose status was equivalent to that of Chief Johnny of the Musqueam Band.

[579] The Squamish and Burrard argued that the Department had no coherent policy for administering the reserves of the Squamish "tribe". However, the evidence as a whole showed that the Department, confronted with a migrating Squamish population with assorted ties to various communities on different reserves, decided that the sensible procedure was to give notice that a proposed surrender was under consideration, and then let the Squamish People determine who was resident on and interested in the reserve in question for the purposes of a surrender vote. Those groups of people were then treated by the Department as a "band" for the purposes of surrenders and related monetary distributions. In my view, this method of reserve administration was applied in a consistent manner.

[580] References to this procedure were found in three Common Book documents. The first document (CB913-2) was a list of members of the "Uquayakin Sub-Band of the Cheakamus Band of the Squamish Tribe" which was submitted by Chief Charlie of that band to Indian Agent Perry. It showed that, in 1922, according to Chief Charlie, 20 of the Squamish men who were interested in and resident on the Cheakamus reserve in the Squamish River valley actually lived on Mission I.R. No. 1 in Burrard Inlet.

[581] The second document illustrated the principles which guided an Indian agent when he drafted a pay list. It was a letter from Agent Byrne of July 29, 1916, to Squamish Chiefs Tom

and Harry on Mission I.R. No. 1 (CB842). The letter related to the creation of a pay list of those Squamish Indians who were entitled to participate in the distribution of interest money related to an earlier sale of lands on the Capilano reserve to the P.G.E. Railway Company. The letter showed that, although the Indian agent set the rules for the pay list, it was the Squamish Indians who ultimately decided who was resident on and interested in the Capilano reserve for the purpose of receiving distributions. It also showed that, by this time, individual bands held elections to decide whether to accept other Squamish Indians as members of their bands. Once elected to band membership, new members had an "interest" in the band's reserve. The letter stated:

I beg to acknowledge receipt of your communication of the 25th inst. enclosing the names of Indians which you consider entitled to participate in the proceeds of the interest accruing on the monies, the proceeds of the sale of certain lands on the Kapalino Indian Reserve to the P.G.E. Railway Company.

In this connection I have to inform you that all names of Indians appearing on the previous Pay List must be retained except for those who have died, those young women who have married men living on other Reserves and have abandoned their rights, or any person who voluntarily desires not to remain. **Of course the Kapalino Band of Indians in a properly constituted meeting held for that purpose may elect other Indians of the Squamish Tribe to become members** and those people so elected and the wives of members of the Kapalino Band who have been married to bona-fide members of the said Band since the last payment was made, shall be entitled to their proportionate share so long as they remain members of this Band.

[*My emphasis*]

[582] The third document was a pay list drawn up for the sale of reserve lands in the Squamish River valley to the P.G.E. Railway Company in 1913 (CB1424-2). It listed 37 names and then read:

I, Chief Joseph, the Chief of Skwulwilemi, Ahtsann, Skwawmish, Mamaquum and Stawamus hereby certify that the persons whose names appear in the above schedule habitually reside on or near and are interested in the Skwulwilemi, Ahtsann Skwawmish, Mamaquum and Stawamus Reserves and are all the persons who so reside on or near or are interested in the Reserves in question and that no other persons whatever are entitled to any claim or interest in the said Reserve.

Witness Chief Joseph his

T. [Wilson] mark

[583] These documents illustrated the independence and power of the separate Squamish chiefs and bands in the years before the Amalgamation in 1923. Indeed, it is my opinion that, at least until 1913, the majority of chiefs and bands of the Squamish "tribe" would not have accepted an amalgamated administration of the "tribe's" reserves and funds.

[584] The Burrard Band, which was considered by the Department to have the use and benefit of Burrard I.R. No. 3 and Inlailawatash I.R. No. 4, was an example of a band which

conducted its affairs independently. In 1904, the male members of the Burrard Band agreed to the lease of mooring space for log booms on the foreshore of the Inlailawatash reserve. The band council resolution referred to Inlailawatash as "...one of the reserves of our band" (CB547). The proceeds from this lease were deposited into a trust account managed only for the Burrard Band (CB1415-11). In 1908, Chief George and other members of the Burrard Band agreed to lease the foreshore of the Burrard I.R. No. 3 for the storage of log booms (CB600). They negotiated this agreement directly with the lessee and ignored the surrender provisions in the *Indian Act*. For this reason, the lease was not accepted by the Department until it was approved by a resolution of the band (CB602). In 1904, the Burrard received income from a lease at I.R. No. 4 (CB1499) and, in 1912, they were paid for an expropriation of land on I.R. No. 3 (CB1516). These funds were not shared with other bands of the Squamish "tribe".

[585] There was also evidence that Chief George Sla-hult and other members of the Burrard Band resisted the Department's efforts to influence the band's membership. The membership issue arose in 1916, at the time of a distribution to the Burrard Band from the proceeds of a sale of land on Burrard I.R. No. 3. Three Squamish men, who wanted to share in the distribution, petitioned the Department to be added to the Burrard Band pay list (CB834, 833, 1537). One of the men, Tommy Johnny, received the written support of eight Squamish chiefs (EX-B22, B23). In a letter to Chief George, Agent Byrne expressed his opinion that Tommy Johnny's claim to an interest in Burrard I.R. No. 3 had merit (CB1544). However, the Department took the position that the three claims would only be recognized if they were approved by a vote of the Burrard Band (CB834, 1544). When the Band rejected Tommy Johnny's claim, the Indian agent grudgingly accepted its decision and there was no evidence that the matter went further. Byrne's reaction was revealed in his letter to Mr. Johnny on January 22, 1918 (CB853):

In reply to your of the 16th ins., in regard to your claim to an interest in Burrard Inlet No. 3. I have to inform you that Chief George and some other members of this Reserve visited the office a short time ago and vigorously protested against you being classified as a member of that band. I am taking this matter up with the Department again to see what can be done, but it seems strange indeed that the indians cannot agree on matters of this kind.

[586] This evidence showed, firstly, that the Department deferred to the Burrard Band on the question of who was interested in its reserve and, secondly, it showed the determination of the Burrard Band to manage its own affairs even when the Department tried to influence its decision.

Conclusions

[587] I have decided that the Squamish Indians' right to use and benefit from their 28 reserves did not derive entirely from the JIRC's reserve allocation. That allocation was only the first step in the process of defining the rights which members of the Squamish "tribe" had in their reserves. The JIRC identified those Indians who spoke the Squamish language as a "nation" or "tribe" and it identified their reserves. It also gave them the right to live wherever they chose on those reserves. However, the JIRC's allocation did not automatically give all eligible Squamish males the right to vote on a particular surrender, and it did not provide all Squamish Indians with the right to share equally in the monetary wealth generated by all reserves. Those matters were governed by the *Indian Act* and, as discussed above, the Crown was entitled, under the *Indian*

Act, to administer each individual Squamish reserve or groups of reserves for those Squamish Indians whom the Squamish People identified as interested residents. In my view, this method of administration was entirely legal and was also, given the politics and mobility of the Squamish, a reasonable exercise of the discretion given to the Minister and the Department under the *Indian Act*.

[588] This conclusion means that, in the process of Amalgamation, the Burrard Band did not forfeit an interest in the other reserves of the Squamish "tribe" or in the wealth generated by those reserves. The Burrard Band had no such interests prior to 1923 and, in particular, had no interest in the False Creek Reserve.

THE FACTS ABOUT AMALGAMATION

Background

[589] There were three significant factors which pushed the bands of the Squamish "tribe" towards Amalgamation in 1923. They were: (1) the influence of Squamish leader Andrew Paull and an organization called the Allied Indian Tribes of British Columbia (the "Allied Tribes"), (2) expectations of revenue from the sale of reserves in Burrard Inlet, and (3) the growing belief that the proceeds from past sales and leases of reserve lands had been inequitably distributed. I will consider each factor in turn.

(1) The Influence of Andrew Paull and the Allied Tribes

[590] Andrew Paull was the single most prominent Squamish figure in the history of the False Creek Reserve in the period between the 1913 Sale and the surrender of the Reserve in 1946. It was Paull who initiated and led the campaign for Amalgamation.

[591] He was born in 1892 and was raised and schooled on Mission I.R. No. 1. As a teenager, Paull worked as an apprentice in the office of a Vancouver lawyer and there acquired an understanding of the law, particularly as it related to Indian affairs. He often represented Indians in court but he never qualified to practice law in British Columbia because, if he had become a lawyer, he would have lost his Indian status under the *Indian Act* (CB8923, pp. 51-52).

[592] Andrew Paull first appeared in the documentary record in 1913, when he acted as secretary to "Government" Chief Harry on Mission I.R. No. 1 (CB8253). Paull came to prominence during the 1913 Sale. At that time, he served as a spokesman for those Squamish Indians who objected to the sale of the Reserve by the False Creek Band because the proceeds of sale were not being shared with other Squamish Indians (CB1933). However, it was not clear what Paull thought of the transaction at the time because he also acted as an interpreter for the members of the False Creek Band who received money from the Province (CB838-195).

[593] The documentary record suggested that, after 1913, Paull retired for a time from his involvement in Squamish affairs. Then, seven years later, he re-appeared as a signatory to a letter to the Minister dated April 10, 1920, in which he described himself as the "Secretary for the Squamish Nation of Indians" (CB2597). As well, at that time, a petition of Squamish chiefs appointed Andrew Paull, and others, "to represent the Squamish Indians before the Federal

Government in all matters pertaining to the Reserves of the Squamish Indians and in all matters concerning the welfare of the people in general" (CB2643). Andrew Paull was to act as the group's spokesman and interpreter. It was soon after Paull's reappearance in their affairs that the Squamish began to pressure the Department to approve amalgamation.

[594] In January of 1922, the Squamish "tribe" joined the Allied Tribes and Andrew Paull became a leading figure in the organization (CB957). Its objective was to present a united front to the Federal Government and to the Province about various issues relating to the "B.C. Indian Land Question". The Allied Tribes believed that reserve lands should be administered on a "tribal" basis (CB957). It was this philosophy and Andrew Paull's involvement with the Allied Tribes which created some of the impetus for the Squamish petitions for amalgamation in 1923.

(2) Expectations of Revenue from the Sale of Reserve Lands in Burrard Inlet

[595] In the early 1900s, Vancouver's political and business leaders began to advocate the surrender and sale of the False Creek Reserve and the other Indian reserves around Burrard Inlet. One justification for this demand was the view that it was undesirable to maintain Indian reserves in an urban environment. Another justification was the fact that the reserves were in locations which had become desirable for industrial and residential development. The Province agreed with the need to remove urban reserves and played an aggressive role in two of the major reserve acquisitions in British Columbia prior to 1923, namely the purchase of the Songhees reserve (in what is now downtown Victoria) in 1911, and the purchase of the False Creek Reserve in the 1913 Sale.

[596] Officials of the Department appeared to accept that Vancouver's urban reserves would have to be sold. As early as 1912, Inspector Ditchburn wrote Indian Agent Peter Byrne and said that:

It is very probable that this[86] and other Indian reserves in the proximity of Vancouver will in the near future have to be surrendered... (CB682).

[597] In the aftermath of the 1913 Sale of the False Creek Reserve, Ditchburn reported to the Secretary of the Department and predicted that other Burrard Inlet reserves would eventually be surrendered and sold. He said:

Having been informed while in Vancouver that **Chief Mathias of the Kapilano Reserve No. 5, was negotiating with outside parties for the surrender of this reserve**, which consists of 444 acres, I went to him and informed him that he must not deal with outsiders, and advised that as the Reserve Commissioners[87] would be on the Coast very shortly, any matters pertaining to the sale of Indians lands should be made to this commission. **Mathias informed me that he has had several offers made to him of late for the sale [of] his reserve. Chief Harry of the Mission reserve No. 1 at North Vancouver, also told me that outsiders had been endeavouring to negotiate with him for his reserve**, but that he prefers to await the coming of the Commissioners.

These chiefs fully realize that they will eventually have to move off the reserves close to the cities and move up to the Squamish River, where they have plenty of reserves, and I am of the opinion that no difficulty would be met with in the matter of getting them to

surrender their present reserves, providing they get a good value for the land. (CB732)

[*My emphasis*]

[598] The clearest indication of the Federal Crown's willingness to contemplate the removal of Indian reserves from urban areas was its enactment of the *Oliver Act* in 1911. It amended the *Indian Act* to allow the Crown, with judicial oversight and Parliamentary approval, to purchase urban Indian reserves without the Indians' consent.

[599] It is also clear from the record that, by 1923, many of the Squamish Indians were prepared to sell all or part of their urban Vancouver reserves[88]. For example, Squamish Chief Mathias Joe of the Capilano reserve made statements to the McKenna-McBride Commission in 1915 in which he indicated that he would sell his Burrard Inlet reserve and use the proceeds of sale to establish his people on other reserves in Howe Sound and in the Squamish River valley (CB809-43).

[600] In 1922-23, there were three past and proposed transactions which were expected to generate substantial proceeds. They were the sale of timber on Cheakamus I.R. No. 11 in the Squamish River valley (the "Timber Sale"), the proposed sale of Seymour Creek I.R. No. 2 in Burrard Inlet to the Burrard Bridge and Tunnel Company, and the expropriation of the False Creek Reserve by the Vancouver Harbour Commission, which had taken place in 1915. The evidence showed that the Squamish People were becoming concerned about how the proceeds of these transactions would be distributed.

(3) The perception that the proceeds from previous sales or leases of Squamish reserve lands had been inequitably distributed.

[601] Prior to 1913, most transactions involving the purchase or lease of the Squamish "tribe's" reserve lands had been relatively small. However, in 1913, circumstances changed when two transactions occurred which, for the first time, involved comparatively large amounts of money and reserve land. The first was the 1913 Sale of the False Creek Reserve. Despite Squamish submissions to the contrary, I have found that the record showed that, in 1913, the False Creek Band concealed from the Department their negotiations with the Province and sold the False Creek Reserve directly to the Province in order to pocket all the purchase money[89]. The second transaction was the sale of large portions of the reserves in the Squamish River valley to the Pacific Great Eastern Development Company (the "PGE Sale"). Those two transactions created resentment among Squamish Indians who were not paid and, in my opinion, sparked the beginning of a shift in attitude about how the Squamish People's reserve interests should be managed (CB895).

[602] In another transaction on Vancouver Island, large sums of money were paid directly to the Indians interested in the Songhees reserve in Victoria. This also created expectations among bands of the Squamish "tribe" that they too would receive substantial sums of money if their reserves were sold.

[603] Andrew Paull repeatedly asserted that, before the 1913 Sale, the Squamish Indians had believed that all the proceeds from transactions on any of their reserves should have been shared among all the members of the Squamish "tribe" (for example, see CB 1933, 890, 895, 903). However, I do not accept the accuracy of his assertions. It is clear to me that Paull was speaking about what he had come to believe the Squamish Indians' views should have been, rather than what they actually had been. It was in 1913 that the False Creek Band sold its Reserve and kept the proceeds. As well, Andrew Paull, without criticizing the process, shared in the proceeds of the PGE Sale, which were distributed only to interested residents. Further, as will shortly be discussed, Andrew Paull's initial proposal for amalgamation in 1913 did not deal with combining reserves and finances. It dealt only with the creation of an elected council of chiefs. Accordingly, it is my view that it was not until after the events of 1913 that the Squamish People began to consider the possibility of amalgamating their reserves and trust funds.

[604] Some years later, in 1922, in a letter to Inspector Ditchburn, Andrew Paull provided a number of examples of situations in which Squamish Indians with proper claims had been left off pay lists, while other Indians with claims of "questionable authority" had been included on the lists. He expressed his concerns as follows:

The actual facts of affairs among this tribe can be summed up in the following term, that the fittest receives money, or if you can make a big enough noise, you will be put on the list and if not, no one will hear from you. (CB902)

[605] By this time, Paull was not the only person who had become concerned about the accuracy of the pay lists. In a December 1922 letter to Inspector Ditchburn, Indian Agent Charles C. Perry reported that a number of Squamish Indians had complained to him that, in a previous sale of timber on Cheakamus I.R. No. 11, the chiefs of that reserve had drawn up a pay list "in their own personal pleasure", with the result that only a "limited number" of Indians of the Cheakamus Band had received any money. In the same report, Perry said that Andrew Paull had told him that "there would be revolution and hard feeling amongst the Squamish Indians unless this present distribution is made equitable" (CB917). Paull was referring to the pending distribution of the proceeds from the Timber Sale. The Department agreed to withhold that distribution until the Squamish completed their discussions about amalgamation.

[606] In my view, there is no doubt that the movement towards amalgamation, which began in earnest in 1921, was driven primarily by two factors. Firstly, by the fact that the substantial proceeds from the 1913 Sale and the PGE Sale had only been received by those who were considered to be interested in and resident on the surrendered reserves and, secondly, by the fact that, in 1922, a similar method of distribution was about to be used for the significant sums to be distributed from the Timber Sale.

Moving Toward Amalgamation: The Early Squamish Proposals

[607] As mentioned earlier, on January 20, 1913, Andrew Paull wrote the first proposal for amalgamation (CB694). In that document, 35 Squamish chiefs and band members asked for an elected council. Their proposal read:

...the Squamish band of Indians being desirous of advancing along [modern] lines in regard to the administration of our affairs in connection with our different reserves and the people living there on.

.....

We therefore hereby petition the department of Indian Affairs to grant us permission to elect a council to assist our present Government Chief Harry in dealing with the various matters effecting the Welfare of the members of our band. (CB693)

[608] A more formal and comprehensive proposal for amalgamation was drafted in 1915. It was signed by 58 Squamish Indians and included a request for amalgamated reserve interests and distributions (CB808). According to Andrew Paull, "Government" Chief Harry of Mission I.R. No. 1 wanted to establish a consensus among the Squamish People before it was submitted. However, he died before a consensus could be reached (CB902) and the proposal was never sent to the Department. It read:

WHEREAS we the undersigned Chiefs and members of each and every Reserve of the Squamish Tribe of Indians, in assembly at [blank] on the [blank] day of [blank] 1915, and

.....

WHEREAS in the event of any sale of any Squamish Indian Reserve compensation shall be divided equally between each man[,] woman and child, irrespective of age or occupation or position, on condition that the participants in the proceeds of such sale shall have established their qualification to participate in any such sale.

WHEREAS it is hereby further understood and agreed that compensations to individual houses, clearings and other improvements shall be derived and compensation be given to the owner of house and other improvements.

.....

WHEREAS we the undersigned do hereby humbly petition and pray the Department of Indian Affairs to take such steps, or enact such laws, as will cause to bring into lawful effect, the above pledge agreement and resolution of we the undersigned, as we are hereby resolved to withdraw and annul all previous census to each and every Reserve and that hereafter as a result of this resolution the members of the various reserves will be the legitimate members of each of every Squamish Indian as contained in the above resolution.

[609] As described above, nothing further happened until Andrew Paull wrote to Deputy Superintendent General Duncan Scott in November of 1921 (CB890) and raised the possibility of amalgamation. Paull said:

Prior to the Kitsilano Reserve transaction it was the understanding among the Squamish Indians that each reserve was the property of the Tribe but now, in protest to the Kitsilano reserve and following the [custom] of that deal each reserve have their separate bands.

It is now the prayers of the Squamish Tribe that the old [custom] of every Squamish Reserve to be the joint and common property of the Tribe, as was Prior to Kitsilano deal, and any further monies coming from Kitsilano reserve to be put to the credit of those Squamish Indians who have not received money from Kitsilano or the Stawawus[90] deals...

Under the present system in the event of any sale would lead to a lot of discontent among the Indians and it is questionable what the results would be, because if each Indian looks back far enough, each Indian by [heritage] has an interest in each Squamish Reserve. That discontent is evidently shown by the members of the tribe in the Kitsilano and Stawamus transactions.

[610] Andrew Paull sent a series of letters to the Department in support of amalgamation (CB895, 898, 902, 903, 904, 907). Then, in a letter of November 17, 1992, to Inspector Ditchburn, Paull stated that:

It is the unanimouse desire of the Skwawmish Tribe to have tribal ownership of all reserves to the credit of the Squamish Indians, and I am instructed by the Squamish tribe to represent them in establishing for the tribe, tribal ownership of the reserves, and the consolidation of all funds to the credit of the different bands and it is the further wish of the tribe that you advise the Department of the decision of the Skwawmish Tribe and to take such action as is necessary, in order that their wishes be granted and an established and legal fact. (CB902)

[611] Paull also urged the Department to consider amalgamation before any further surrenders were taken or distributions were made (CB898, 903). Paull emphasized that, under amalgamation, any Squamish Indians who had "received large sums of money" (i.e. from the 1913 Sale and the PGE Sale) would not receive further distributions until all the other Squamish Indians had received distributions of equivalent amounts (CB898).

Moving Toward Amalgamation: Initial Squamish Meetings

[612] A number of the chiefs and principal men of the Squamish "tribe" met in Howe Sound in April of 1922 (the "First Meeting"). Their purpose was to appoint Andrew Paull as the "tribe's" spokesman in upcoming meetings with the Department in Ottawa. However, the minutes revealed that amalgamation was also extensively discussed and endorsed by a number of chiefs. Chief Andrew, who was still considered to be chief of the False Creek Reserve (even though it had been vacant since the 1913 Sale) was among those who spoke in support. He indicated that there had been earlier discussions when he said:

I have spoken at a meeting at North Vancouver and at a meeting at Brackendale[91] and each and every time I always said that I never did like to be a blockade towards amalgamation. So I said I was willing to relinquish all right and claim on Kitsilano reserve providing that by doing so we would become amalgamated. And again on this day still stand by my word. (CB892-11)

[613] On December 24 and 31, 1922, the Squamish Indians held meetings (the "Second and Third Meetings" respectively) which were both attended by Indian Agent Perry. They were called specifically to discuss amalgamation and the Timber Sale. The Second Meeting was held at the Cheakamus reserve and was attended by 41 Squamish men over the age of 21. Four of the men, Chief George, Denny Jim, Joseph Thomas, and Aleck Guss, were members of the Burrard Band (CB914). Agent Perry reported that no resolution was brought to a vote, although the issue was discussed for over two hours. Five days later, the Third Meeting took place at the Mission I.R. No. 1 in Burrard Inlet. It was attended by 27 Squamish men, including 4 "chiefs" from the Cheakamus reserve (CB916). Denny Jim, Joseph Thomas, and Felix Thomas of the

Burrard Band were among those present. The minutes of the Third Meeting showed that, although no resolution was passed, amalgamation was again discussed.

[614] The Common Book contained a record of another meeting which took place on January 10, 1923 (CB922). The minutes showed that the meeting was attended by 48 Squamish men, including four men from Burrard I.R. No. 3. A handwritten note on the minutes indicated that a vote was taken, with 29 in favour and 18 against the resolution. The Burrard submitted that this document was a minute of a meeting about amalgamation which was held on the Mission reserve on January 26, 1923, and that the vote recorded was the most representative of all the votes on the subject of amalgamation.

[615] However, CB922 was indisputably dated January 10th, not January 26th, and the names of the attendees recorded on CB922 were similar to, but did not exactly match, other records of the January 26th meeting. I have decided that it is possible, as the Burrard suggested, that the meeting of January 10th was held to discuss amalgamation, because the Squamish petition for amalgamation, dated January 26, 1923, mentioned a total of six prior meetings on the subject (CB932). However, because there was no evidence about the reason for the January 10th meeting and no evidence about the subject matter of the resolution which was put to a vote, I have disregarded the January 10th meeting for the purpose of this discussion.

[616] The next meeting to consider amalgamation was held at the Cheakamus reserve on January 24, 1923 (the "Fourth Meeting"). Its minutes indicated that all 23 Squamish men who were present voted in favour of amalgamation and for a distribution of the proceeds from the Timber Sale to all Squamish People who were interested in any of the reserves of the Squamish "tribe" (CB926). Also present were Agent Perry and Andrew Paull, who acted as interpreter. No Burrard men attended this meeting which, according to Paull's diary, took up most of the day (CB1006-15). After the meeting, Andrew Paull and Agent Perry collected four additional votes in favour of amalgamation from Squamish Indians who had not been present (CB927).

[617] On January 26, 1923, a meeting was held at Mission I.R. No. 1 (the "Fifth Meeting"). Before the Fifth Meeting, Agent Perry wrote to both Chief George of Burrard I.R. No. 3 and to Chief Jimmy Harry of Seymour Creek I.R. No. 2 (CB929). He stressed the importance of their involvement in the discussions about amalgamation and offered to arrange transportation so that they could attend the meeting. The letter is reproduced in full below:

There is to be a very important meeting of all the Squamish Chiefs at the Mission Reserve No. 1, this evening. These chiefs have come down from Squamish Reserves on purpose to take up some very important questions and it is highly desirable that you be present at this meeting for we need your council and assistance.

Please do not fail to come. Mr. Bartlett is coming with a car and will take you back with him if you wish. If you do not come to the meeting to take part in this discussion, you cannot be considered in connection with transactions of the future where the interests of the majority of the Squamish Indians may be affected. So I will repeat this urgent message do not fail to come.

[*Emphasis in original*]

[618] The minutes of the Fifth Meeting indicated that Agent Perry made an opening statement and that nine chiefs and five head men made speeches about amalgamation. Andrew Paull acted as the interpreter. Chief George of the Burrard Band opposed amalgamation when he said:

... that he had been advised by Chief Jimmy Harry not to amalgamize. He asked Mr. Ditchburn who advised him to keep away from amalgamation. Said he was totally ignorant of the purposes of amalgamation. (CB928)

[619] Denny Jim, another Burrard Indian, also spoke against amalgamation at the Fifth Meeting. He said:

Denny Jim (brother of Chief George) said "We will get in a hole over this business". Told Chief Matthias to mind his own business. (CB928)

[620] The minutes of the Fifth Meeting showed that 34 Squamish men voted in favour of amalgamation and that 13 were opposed. In addition, the minutes recorded 24 votes in favour of amalgamation from the Fourth Meeting, making a combined total from the two meetings of 58 votes for amalgamation and 13 against. The minutes did not provide a list of those present and an indication of how each man voted. However, separate voting lists which were prepared at the meeting did include that information (CB930). The tally in the voting lists differed from the one in the minutes in that the lists showed 39 votes in favour of amalgamation and 11 in opposition. In any event, either 13 or 11 men voted against the amalgamation proposal. According to the voting lists, of the 11 who opposed amalgamation, nine were members of the Burrard Band from Burrard I.R. No. 3[92] and two -- Chief Jimmy Harry and his nephew -- were from Seymour Creek I.R. No. 2 (CB930)[93].

[621] After January 26th, 12 Squamish men who had not attended the Fifth Meeting wrote to Agent Perry and recorded their votes in favour of amalgamation (CB935, 937). As well, four men of the Burrard Band who had not attended the meeting, wrote a letter to the Superintendent General in which they expressed opposition to amalgamation (CB934).

[622] The votes recorded in the minutes of the Fifth Meeting (CB928), plus the subsequent "write-in" votes, showed that 73 Squamish men voted in favour and 17 (including at least 13 members of the Burrard Band) voted against amalgamation. Using the more detailed voting lists from the two meetings (CB926, 1439), the Crown submitted a voting tally of 78 in favour and 15 opposed. I have estimated that, at the time of the Fifth Meeting, there were 119 Squamish men (including 14 men of the Burrard Band) who were eligible to vote (CB986, 1439)[94]. It is therefore clear that, in January of 1923, amalgamation had the support of a majority of the Squamish People[95].

The Formal Petition

[623] Immediately after the Fifth Meeting, the Squamish People presented a petition to the Department asking it to implement amalgamation (CB932). It was signed by 60 Squamish Indians, including Andrew Paull and 13 chiefs. It sought the consolidation of all the Squamish "tribe's" reserves, trust funds and distributions for the benefit of the "whole tribe". However, the petition did not mention the formation of a council of chiefs. The petition said:

PETITION OF THE SQUAMISH TRIBE OF INDIANS

VANCOUVER AGENCY, BRITISH COLUMBIA

WHEREAS six meetings have recently been held by Indian Agent C.C. Perry, with the members of the Squamish Nation of Indians in the Vancouver Agency, the said meetings having been held in connection with the pending distribution of money obtained from the sale of timber taken from the Cheakamus Indian Reserve No. 11 of the Squamish Indians, to determine once and for all the status of the Indians in relation to their Reserves, and to the said distribution in particular;

AND WHEREAS upon the most searching and careful examination it has been found that, in consequence of the interrelationships existing between the several families composing the Squamish Indian Tribe, in which the inequalities and conflicting claims have been manifold detrimental to the best interests and just claims of the Indians, individually and collectively;

AND WHEREAS in the past money distributions have been made, in which Indians entitled to share have been eliminated from pay lists whey they should have been included;

AND WHEREAS the Squamish Indians as a whole realize that the system in vogue in the past must be changed, since the whole of the Squamish Reserves were originally set aside for the Squamish Nation, as shown in the Dominion Schedule of Indian Reserves;

AND WHEREAS the Chiefs representing almost the entire Squamish Tribe have agreed with their people to amalgamate all the Squamish Reserves and interests, including the funds in trust in the names of the Squamish Bands at Ottawa, subject to the approval of the Department of Indian Affairs;

AND WHEREAS the money received from the sale of timber of the Cheakamus Reserve is rightly and properly distributable to the whole Squamish people and any other form of distribution would not be acceptable to them:

IT IS THEREFORE RESOLVED AND AGREED at a final meeting held at Squamish Mission Reserve No. 1, North Vancouver, on January 26, 1923 in the presence of the Indian Agent and of fifteen chiefs of the Squamish Tribe to present a petition to the Department of Indian Affairs, **praying that the said Department approve of amalgamation of the Squamish Nation into one body and that the Trust Funds be now consolidated for the benefit of the whole Tribe.**

It is also desired that the Department shall take note of the fact that it is possible to assemble the whole Squamish Tribe at any meeting which may in future be called to deal with any matter which may affect the interests of the said Squamish people.

We commend this proposal to the Department as the best and most feasible and just means of administering the affairs of the Squamish Tribe and earnestly pray that the Department will not refuse this amalgamation so sincerely desired by the people.

To the foregoing we attach our respective signatures which represent the voting strength of the Squamish Nation, in the presence of Mr. Andrew Paull, Secretary of the Squamish Indians, the Dominion Constable T.W.H. Bartlett and Indian Agent Charles C. Perry.

[*My emphasis*]

The Department's Response to the Petition for Amalgamation

[624] The Department's response to the Squamish petition was, at least initially, inconsistent and less than enthusiastic. The first Departmental view was expressed in a letter written by Deputy Superintendent General Duncan Scott on July 4, 1922. It was sent in response to one of Andrew Paull's letters in favour of amalgamation (CB897). Scott said:

I have read your letter of the 30th ultimo[96], in which you state that it is the desire of the Squamish Indians to be amalgamated, and to have an equal interest in all lands set aside for the tribe. The matter requires serious consideration. **The reserves set apart in British Columbia were intended for the Indians who were settled thereupon, and I am therefore not convinced that it would be in the interests of the Indians, or a profitable administration, to adopt your suggestion.**

[*My emphasis*]

[625] The Department was concerned that it would be difficult to assemble a quorum of the members of an amalgamated Squamish band for band meetings. Inspector Ditchburn described this concern in his letter to Agent Perry of December 18, 1922 (CB912). Ditchburn wrote:

... Andrew Paull has written to me on this same question and I have been giving it a great deal of consideration and the conclusion I have arrived at is that while the proposition may sound feasible in theory it would be impractical to carry it out in view of the fact that the members of the Squamish tribe are so scattered having reserves both on Burrard Inlet and at the head of Howe Sound...It has been the practise in the past when it has been necessary to transact business in connection with any particular reserve to deal with only those Indians who have had interest in the same. **To depart from this practise at the present time no doubt would be disastrous to the public interest**. As you may know there has been considerable agitation to remove some of the present Indian villages from along the shores of Burrard Inlet and negotiations have taken place at various times with these Bands. **In the event of them being consolidated as suggested by Andrew Paull you will quite appreciate the fact that there would be considerable difficulty in the way of getting surrenders**....

Andrew Paull himself was a prime mover in disposing of several of the reserves at the head of Howe Sound to the Pacific Great Eastern Development Company and received besides his share, I understand, a considerable amount on the side. **At that time, however, Andrew Paull and his friends did not consider that any other Indians than those immediately interested**

in the reserves, which were sold, should participate in the funds.

[*My emphasis*]

[626] Ditchburn clearly anticipated that further offers would be made which would involve the surrender and sale of reserves in Burrard Inlet, and he viewed amalgamation as a barrier to obtaining surrenders (see also CB944). He also doubted Andrew Paull's motives because, when Paull profited from the PGE Sale in 1913, he did not advocate a general distribution of the proceeds from that transaction. Ditchburn characterized amalgamation as a "scheme" concocted by Andrew Paull and his supporters to (i) block the anticipated surrender and sale of the Burrard Inlet reserves, and (ii) to obtain interests in reserves in which they previously had no interests (CB944, 952). Ditchburn was not, however, opposed in principle to the consolidation of Squamish trust funds for the benefit of the entire Squamish "tribe". He considered that to be a different issue (CB899, 912).

[627] Unlike Inspector Ditchburn, Indian Agent Perry supported amalgamation and recommended that the distribution of proceeds from the Timber Sale be delayed until the proposal was "carefully and fully investigated and settled" (CB909). Unlike Ditchburn, Perry believed that many Squamish leaders who favoured amalgamation had unselfish motives (CB915). In a letter to his superiors in the Department, Perry commended the proposal for the "earnest and favourable consideration of the Department" (CB946). He wrote:

In conclusion I would recommend that, as this resolution of the Squamish people to amalgamate is the fruit of a very strenuous and sincere effort to bring order out of the chaotic conditions, which appear to have marked the history of the Squamish people, I trust that the same will receive at the hands of the Department its very fullest and determined consideration.

[628] Despite Agent Perry's support for the proposal, the Department's initial response was negative. Assistant Deputy Superintendent General McLean, in a letter to Andrew Paull dated February 27, 1923, rejected the aspect of amalgamation which called for the consolidation of the bands' trust accounts. McLean was concerned because distributions had already been made to some bands, and he feared that "it would be a difficult matter to adjust this should the present arrangement be altered" (CB958).

[629] However, on February 28, 1923, the day after McLean's letter, Deputy Superintendent General Scott wrote Agent Perry and stated that amalgamation was "a matter that will require very careful consideration". He asked Perry to discuss it with Inspector Ditchburn (CB961).

The Burrard Opposition to Amalgamation

[630] As described above, although members of the Burrard Band attended the Second and Third Meetings, it was not until the Fifth Meeting that Chief George's opposition to amalgamation was clearly noted (CB928). Then, on January 29, 1923, three days after the Fifth Meeting, Chief George and other members of the Burrard Band sent their own petition to the Superintendent General. It was signed by 14 Burrard men who were eligible to vote and expressed their unanimous opposition to amalgamation. It read:

We Indians of the **No. 3 Reserve Band on the Burrard Inlet, east of the Second Narrows, have always been in harmony with one another and have been progressing as a band, and therefore, desire to remain so.**

We Indians of the said No. 3 Reserve are against amalgamation because it will not further our interests.

....

Our understanding is that if amalgamation should pass our Chief, as a leader, would be void of power. The majority would always rule. We always had faith in our Chief, who has always been honest and just in any dealings at said No. 3 Reserve.

....

We Indians know that in the near future we will have to make way for the further development of industry on Burrard Inlet, and we were hoping to see the day when we would receive compensation for our rights from the said No. 3 Reserve which would give us a fairer start to keep up with our good white brethren. We all know that more than half of our native brethren have received monies from the sale of their reserves which should have given them the start we, the Indians of No. 3 Reserve, are still waiting for, which money they did not share with us, but have spent foolishly. Hence, our objection to amalgamation. We therefore hope the Department of Indian Affairs will acknowledge our claims and reasons for protesting against being drawn into the question of amalgamation. (CB934)

[*My emphasis*]

[631] This petition showed, in my opinion, that the Burrard considered themselves to be a distinct "band" and wished to retain that status. Secondly, it showed that the Burrard understood that amalgamation would place them in a minority position in the amalgamated Squamish Band and that Chief George would lose his power to decide matters relating to the Burrard reserves. Thirdly, the petition demonstrated that the Burrard believed that they had exclusive rights to I.R. No. 3 and, fourthly, it indicated that the Burrard were well aware that other bands had received proceeds from the sale of "their reserves" and that those proceeds had not been shared with the Burrard. Finally, it is my view that, despite submissions to the contrary, this petition showed that the Burrard Band was looking forward to the sale or lease of some or all of its land to generate funds to be used for the band's welfare.

[632] After the Fifth Meeting on January 26, 1923, Chief George and Chief Jimmy Harry of the Seymour Creek reserve sought legal advice about their rights in connection with amalgamation. In a letter dated February 2, 1923, the law firm of Abbott, MacRae and Co. wrote to Agent Perry on the two chiefs' behalf. The themes expressed in the Burrard's petition of January 29, 1923, were repeated in their lawyer's letter. It illustrated that Chief George was aware of the value of Burrard I.R. No. 3 and that he opposed amalgamation partly because of the possibility of having to share any financial gain from the sale or lease of I.R. No. 3 with all the Squamish People.

The letter read in part:

We have also been consulted by Chief George of No. 3 Reserve, who also objects to the amalgamation of all the Squamish Indian Reserves for the purpose of distributing any moneys which are on hand now or which may hereafter be realized...Both of these Chiefs further desire to point out that as conditions at present exist the only Reserves that are likely to be saleable in the future and perhaps for some considerable time, are No. 2 and No. 3 Reserves, and that as a result the anxiety of the Chiefs of the other Reserves to share in any realization from the two saleable ones is based on selfish motives entirely. (CB945)

[633] Six months later, the Burrard prepared a second petition to the Department, dated July 16, 1923. It was signed by the same 14 members of the Burrard Band who had signed the petition of January 29, 1923 (CB970). The Crown said, and I agree, that there was no evidence to show that this petition was ever received by the Department[97]. Nevertheless, I accept that it represented the views of the Burrard Band at the time it was written. It emphasized the Burrard People's distinct ancestral identity as non-Squamish Indians and highlighted their capacity and determination to continue as a separate band. The petition said:

We, the original members of No. 3 Reserve at Burrard Inlet, wish to make known what is our only misunderstanding between the bands of Squamish Indians, a fact which we would like to impress on the minds of all concerned.

Years and years ago our forefathers settled and from generation to generation have lived on Burrard Inlet. It was not until lately that other bands, including people from Squamish River, made their homes on what is known now as No. 1 Reserve - a permanent home for some, and a Mission Reserve for a few others - whereas we, the members of No. 3 Reserve, always have had our permanent home on Burrard Inlet.

We hereby wish the Department of Indian Affairs to fully understand our position in refusing to discuss amalgamation, for, as far as the other bands of Squamish Indians are concerned, it would be more of a hindrance than a help to both parties.

We wish to forge ahead and we believe we are capable of holding our own in competition with our white brethren with a little interest from the Department of Indian Affairs at Ottawa.

We [ask?] only one thing of the Department, namely, the [continuation of?] the same agreeable co-operation in handling our [affairs?] as in the past - more so for the future now that we realize the urgent need of more substantial ways of earning a livelihood, in poultry, agriculture or cattle.

We would thank the Officials for the interest they [...] far taken in our affairs and hope to agree in every way in the future, knowing full well the need of combining our efforts to become what we wish to be, worthy of any trust the Department of Indian Affairs may see fit to [...] and respected members of No. 3 Indian Reserve [...]

The Approval of Amalgamation

[634] After the meetings in January of 1923 which led to the Squamish petition for amalgamation, Andrew Paull lobbied the Department to approve the proposal in letters dated

February 1, 1923 (CB950) and February 22, 1923 (CB957)). Then, several months later, on July 17, 1923, a final meeting about amalgamation was held on the Mission reserve (the "Sixth Meeting"). It was attended by 45 Squamish Indians, including all the Squamish chiefs except Chief Jimmy Harry of Seymour Creek I.R. No. 2 (CB973-5). Chief George of the Burrard was present. Indian Agent Perry presided and Andrew Paull acted as the interpreter. The minutes of the meeting showed that a resolution was passed "by a large majority of the Squamish Tribe" (CB973, pp. 7-8). The resolution dealt with the creation of a council of chiefs - a matter which had not been included in the Squamish petition of January 26, 1923. The resolution said:

That the Deputy Superintendent General be requested to give full recognition to a council composed of all the Squamish Chiefs who shall under [the supervision &] presidency of the Indian Agent and the supervision of the Indian Dept to represent the whole of the Squamish Indians [for] all their affairs;

That all the Indians of the Squamish tribe be consolidated under one Band, the reserves retaining their present identity as to name, location and number;

That all the funds of the several Bands now posted in the Trust Accounts of the Department be consolidated under one accountto be known as the Squamish Indian Trust Account.

That the Indian Agent endeavour to arrange with Mr. Scott, if possible, to hold a meeting for interview with the Squamish Chiefs to present this resolution and other matters, during his visit to Vancouver in July 1923.

[*My emphasis*]

[635] A marginal note on the minutes of the Sixth Meeting was apparently written by Agent Perry. It read, "These resolutions were approved by Dr. Duncan C. Scott at Vancouver Board of Trade Rooms, July 23, 1923 at meeting of Squamish Indians, Chiefs & officials" (CB973-8). This marginal note referred to Duncan Scott's approval of a further petition for amalgamation which was dated July 23, 1923, and signed by 16 Squamish chiefs and 72 other Squamish Indians. It began with a preamble which said:

...the Squamish Nation of Indians have had under consideration for the past eight years the question of the amalgamation of the several bands of the tribe and after a series of meetings recently during which we considered and digested the

question of amalgamation and with a view of [eliminating] for all time to come inequality or disagreement among the Squamish Tribes. It was unanimously agreed by the members and Chiefs of the under mentioned reserves, that the amalgamation of the several is the only solution for the good government of the tribe, which would have as an ultimate result the abolishment of all feeling that has arisen in past transactions, and which we know will henceforth bring about a brotherly feeling among each and every member of the Squamish people. (CB975)

This petition also called for the establishment of a unified Squamish Band council and for the consolidation of all the bands' trust accounts. No Burrard men signed the petition. The Crown noted that 22 Squamish Indians, who had not voted at the Fourth or Fifth Meetings, signed this petition.

[636] On July 31, 1923, Agent Perry wrote to Andrew Paull to confirm the Department's acceptance and implementation of Amalgamation. He said:

I have most hearty pleasure in officially informing you, for the purposes of your records, that on July 23rd, instant, in the Board of Trade Rooms, Vancouver, B.C., Dr. Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, formally, and in the presence of the Squamish Chiefs and People and officials of the Department, **approved the petition of the Squamish Indians praying for the amalgamation of the several bands into one Band to be known as the Squamish Band and the Consolidation of the funds of the several bands into one fund. The formation of a Council of Chiefs was also approved**, the standing chiefs to be constituted as a Squamish Council until further arrangements are agreed upon. (CB984)

[*My emphasis*]

The Burrard Rejection of Amalgamation

[637] On or about September 5, 1923[98], Chief George wrote to Inspector Ditchburn (CB990). In that letter, he indicated that he had held a meeting of the Burrard Band (presumably at Inspector Ditchburn's request), and he explained his band's reaction to Amalgamation in these words:

In accordance with my promise I called a meeting as soon as I was able to get my band together. The unanimous conclusion of this meeting was that we remain a band as before. **The financial aspect of the situation was discussed, and it was also agreed that we could not submit to the leadership of Andrew Paull and his followers**.

[*My emphasis*]

[638] The letter of September 5th enclosed a petition which was again signed by all 14 Burrard men of voting age (CB988) (the "Final Petition"). It was clearly based, in part, on the earlier Burrard petition of July 16, 1923, which had been prepared but not sent to the Department. With respect to the Departmental approval of Amalgamation, the Final Petition said:

It has now come to our knowledge that we, the members of No. 3 Reserve, not being amalgamated with the Squamish band, are to forfeit our homes and all rights and claims on No. 1 Reserve, and we feel compelled to protest that this is not justice, in view of the fact that Burrard Inlet has always been our permanent home. We lay no claims to Squamish River reserves, but we do claim all rights on Burrard Inlet, as descendants of the original inhabitants-- as can be proved, if necessary, by chiefs from various reserves surrounding Burrard Inlet.

We therefore beg to inform the Department of Indian Affairs that at a meeting of all the

members of No. 3 Reserve **we have reached the unanimous decision that we, the members, wish to be exempted from any amalgamation with the Squamish tribes**.

[*My emphasis*]

[639] The Burrard Plaintiffs suggested that the Final Petition represented a claim by the Burrard Band to an interest in all the Squamish reserves in Burrard Inlet. They also said that it demonstrated that the Burrard People were confused and believed that they would have an interest in those reserves even if they did not participate in Amalgamation.

[640] In my opinion, this was not a reasonable interpretation of the Final Petition. I do agree that the Burrard People understood that they would forfeit their homes on and "rights and claims" in Mission I.R. No. 1, and that they felt this was unjust. However, in my view, the injustice described in the Final Petition did not arise because the Burrard Band claimed an interest in I.R. No. 1 and the other Burrard Inlet reserves. Rather, the injustice arose because the land which was occupied by those reserves was part of the territory around Burrard Inlet which the Burrard Band viewed as its ancestral territory. The Burrard People also said that they did not consider themselves entitled to "claim" the Squamish River reserves. In my view, this statement confirmed that, when speaking of "claims", they were actually making what we would now describe as aboriginal title claims to the land around Burrard Inlet and were not claiming reserve interests.

[641] It is clear to me that the Burrard Band understood that the only reserves in which it had an interest were I.R. No. 3 and I.R. No. 4, and it was correct in this understanding. In my view, the Burrard People also understood that they were losing their rights to reside on other Squamish reserves and they felt that this was unjust, but, in spite of that, they all wanted "to be exempted" from Amalgamation.

[642] Chief George, in his September 5th letter to Inspector Ditchburn, noted that Andrew Paull had told him that the Burrard would be excluded from "the million dollars" that was about to be distributed to the members of the recently amalgamated Squamish Band (CB990). Chief George asked if Paull's statement was true. Inspector Ditchburn replied that Paull's statement was incorrect, but said that, even if a distribution had been pending, a non-amalgamated Burrard Band would not be entitled to participate in the distribution because it would be a separate band (CB994). He said:

...I beg to say that it would naturally follow if the Indians from this reserve are to become a separate band they could hardly expect to take part in the funds of another Band or Tribe.

[643] Inspector Ditchburn also indicated that members of the Burrard Band would be entitled to compensation for any improvements they had made on Mission I.R. No. 1[99]. However, he added that the land on the Mission reserve would not be held by the Burrard Band. He said that it:

... would form part of the holdings of the amalgamated bands, unless some provision is inserted in the amalgamation papers which would protect the Indians of No. 3 Reserve in their land holdings on No. 1 Reserve, when the latter is disposed of.

[644] Inspector Ditchburn, in his reference to "the amalgamation papers", suggested that an agreement would be drafted which might protect the interests held by members of the Burrard Band in Mission I.R. No. 1 so that they could share in the proceeds of any future sale of that reserve. However, it appears that no such "amalgamation papers" were ever prepared and, in any event, Mission I.R. No. 1 was never sold.

[645] Inspector Ditchburn subsequently wrote to Duncan Scott on September 12, 1923, and sent him the Final Petition (CB992). Ditchburn also advised Scott that he had "informed Chief George that, should his Band remain out of the amalgamation scheme, they could not expect to participate in the funds of the joint bands" (CB990).

[646] On September 26, 1923, Scott issued instructions to consolidate the Squamish trust accounts and to exempt the account for Burrard I.R. No. 3 from the consolidation (CB996). Thereafter, the balance in the consolidated Squamish Band account was approximately $161,000 (CB999) and the Burrard Band account balance was approximately $6,740. At that time, there were 412 members of the Squamish Band and 43 members of the Burrard Band (CB1438, 1439). According to the Burrard calculations, after Amalgamation, the Burrard People, who had represented 9-10 percent of the population of the Squamish "tribe", held approximately 4 percent of the "tribe's" funds.

[647] The Burrard also noted that, before Amalgamation, the Squamish "tribe" had been allocated reserves with a total acreage of 5,594 acres (according to Agent Perry, CB980) or 5,472.5 acres (Order in Council 911, CB981). After Amalgamation, the Burrard said that the combined acreage of Burrard I.R. No. 3 and Inlailawatash I.R. No. 4 amounted to 5.5 percent of the total reserve acreage which had been held by the Squamish "tribe" before Amalgamation.

The Aftermath of Amalgamation

[648] The Burrard characterized the Amalgamation as a "severance" of the Burrard People's interests in the reserves of the Squamish "tribe" other than I.R. No. 3 and I.R. No. 4. On this isue, Chief Leonard George and Lillian George testified for the Burrard that, after Amalgamation, several Burrard Band members lost their homes on Mission I.R. No. 1.

[649] Lillian George said that Chief George lost two homes on the Mission reserve. She testified that one house was taken by his daughter and that Squamish Indians took over the other. Mrs. George also said that Denny Jim had to leave his home on the Mission reserve and that, eventually, it was torn down[100]. However, there was other evidence which showed that the house was not destroyed. In that regard, a Squamish band council resolution in 1925 asked Indian Agent F.C.J. Ball to prevent Denny Jim from continuing work on "his [alleged] house on [this reserve]" (CB1019). Another document indicated that, on Denny Jim's death, the house was willed to his son, Gus Denny. However, since Gus Denny was a member of the Burrard Band, he could no longer live on Mission I.R. No. 1. To resolve the situation, the house was given to Denny Jim's grandson Edmond Guss, who was a member of the Squamish Band (CB1172).

[650] However, Lillian George's testimony demonstrated that not all of the Burrard People

were excluded from their homes on the Mission reserve. She testified that two Burrard Band members were permitted to remain after Amalgamation. One was her father, Felix Thomas. She said that, after Amalgamation, he was allowed to remain on the Mission reserve "for a while". This proved to be an understatement in view of Mrs. George's later evidence to the effect that her family lived on Mission I.R. No. 1 for fourteen years after Amalgamation until her father died in 1937. As well, Mrs. George said that Denny Jim's wife Sarah remained in the Denny house on the Mission reserve until her death.

[651] The evidence, taken as a whole on this issue, showed that, in the pre-Amalgamation era, five men who were members of the Burrard Band had houses on the Mission reserve[101]. In my view, they were entitled to live on I.R. No. 1 because of the JIRC's allocation which gave the Burrard, as Indians of the Squamish "tribe", the right to reside on any of its reserves. As mentioned earlier, Inspector Ditchburn indicated that those who lost their homes would be compensated but, according to Chief Leonard George, no compensation was paid.

[652] The evidence also included two pay lists which related to transactions at Mission I.R. No. 1 in 1910 and 1919 (CB652 and 860). The first showed that Chief George of the Burrard had received a payment, in 1910, and this indicated that he had been accepted as a member of the Mission Band. The second list showed that four Burrard men were paid in 1919. They were Chief George, Dan George, Joseph Thomas, and Aleck Guss. This evidence meant that, in 1919, these four men of the Burrard Band were also members of the Mission Band and, therefore, had interests in Mission I.R. No. 1. I have assumed that these four men were still members of the Mission Band at the date of the Amalgamation in 1923.

[653] It is clear to me that the four Burrard men knew of their interests in Mission I.R. No. 1 (because they had received distributions) and also knew that they would lose those interests if they remained members of the Burrard Band and if the Burrard Band stayed out of Amalgamation. In spite of this, they voted unanimously against the Burrard Band's participation in Amalgamation.

[654] However, Dan George and Aleck Guss did try to retain their interests in Mission I.R. No. by joining the new amalgamated Squamish Band. Together with another Burrard Band member, Felix Thomas, they asked the Burrard People to allow them to leave the Burrard Band and join the Squamish Band. This request was denied at a meeting of the Burrard Band and all three men remained members of the Burrard Band (CB1003). Based on this evidence, I am further satisfied that the four Burrard Band members who had also been members of the Mission Band with interests in I.R. No. 1 knew, when they rejected Amalgamation, that they had given up their memberships in the Mission Band and their related interests in I.R. No. 1.

[655] Finally, on this subject, I should note that the Burrard also identified Joseph Harry as a Burrard Band member who, according to the pay lists, had interests in the Mission and Waiwakum reserves. However, the Crown said that Joseph Harry was not a Burrard Indian, and noted that he did sign any of the Burrard petitions rejecting Amalgamation (CB934, 988). The Crown also noted that a "Joe Harry" remained on the amalgamated Squamish Band list after 1923 (CB986-3). In these circumstances, I have concluded that Joseph Harry was probably not a Burrard Indian.

Burrard Submissions and Discussion

[656] The Burrard said that, in approving Amalgamation, the Crown breached its fiduciary duty to the Burrard Band in the following ways:

1. The Crown failed to take a surrender under the *Indian Act*.

2. The Crown failed to obtain the informed consent of the Burrard People.

3. The Crown failed to ensure that the Burrard People understood Amalgamation.

4. The Crown failed to implement Amalgamation in a manner which protected the interests of the Burrard People.

I will discuss each submission in turn.

1. The Requirement for a Surrender under the Indian Act

[657] The Burrard said that Amalgamation was void *ab initio* because the Crown did not take a surrender from the Squamish "tribe", as required by the *1906 Indian Act*. The Burrard characterized Amalgamation as a legal "severance" of both the Squamish and the Burrard People's interests in all 28 reserves which had been allocated to the Squamish "tribe" by the JIRC. The Burrard argued that, when a band or group of Indians gave up its legal interest in a reserve or reserves, the Crown was required to obtain a formal surrender under the *Indian Act*.

[658] The Burrard relied on the surrender provisions in the *1906 Indian Act*. They read:

s. 48 Except in this Part otherwise provided, no reserve or portion of a reserve shall be sold, **alienated** or leased until it has been released or surrendered to the Crown for the purposes of this Part: Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

s. 49(4) ...such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

s. 50 Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.

[*My emphasis*]

[659] The Burrard argued that the surrender provisions were intended to interpose the Crown between the Indians whose reserves were at issue and the party acquiring those reserves regardless of whether the acquiror was Indian or non-Indian. The Burrard noted that the surrender provisions included a requirement that a surrender be approved by the Governor in Council. The Burrard said that the underlying rationale for the surrender provisions was the

prevention of exploitative transactions. Although the Burrard acknowledged that the surrender provisions were typically used when a non-Indian purchased or leased Indian lands, they argued that the rationale for the surrender provisions applied equally to a transaction in which Indian lands were being "alienated" to another Indian band. In both situations, the Burrard submitted, the critical fact was that an Indian band was losing all or part of its reserve interest.

[660] The Burrard also noted that any alienation of reserve lands without a surrender, in a situation in which a surrender was required, would be null and void, *R. v. Easterbrook*, [1931] 1 D.L.R. 628 (S.C.C.); *R. v. St. Ann's Shooting & Fishing Club Ltd.*, [1950] 2 D.L.R. 225 (S.C.C.); *R. v. Cowichan Agricultural Society*, [1950] Ex.C.R. 448; *Lower Kootenay Indian Band* v. *Canada* (1991), 42 F.T.R. 241 (T.D.).

[661] The Burrard argument about the requirement for a surrender depended on their earlier submission to the effect that an entity called the Squamish "Band" existed under the *Indian Act* prior to 1923 and that it had an interest in common in all the reserves allocated by the JIRC. In the Burrard's view, Amalgamation was an event in which that Squamish "Band" lost its reserve interests in Burrard I.R. No. 3 and No. 4 without a surrender vote. However, I already concluded that there was no Squamish "Band" under the *Indian Act* prior to 1923, that the Burrard Band had no interest in any of the reserves held by other bands of the Squamish "tribe", and that the other bands of the Squamish "tribe" had no interests in the Burrard Band's reserves. Accordingly, it is my view that the issue of surrender does not arise on the facts of this case. For this reason, I have dealt with the Burrard submissions on this topic in the alternative.

[662] The starting point for a consideration of this issue is *Wewayakum*, in which the trial judge concluded that the surrender provisions of the *Indian Act* applied only when non-Indians were acquiring reserves. In that case, the Cape Mudge Band argued that the band resolution in which it relinquished its interest in the Campbell River reserve was void because there had been a failure to observe the surrender provisions of the *1906 Indian Act*. However, Teitelbaum J. ruled that the surrender provision did not apply when Indian people transferred reserve land between themselves.

[663] Teitelbaum J. rejected the plaintiff's submission that the surrender provisions applied because, in his view, the band resolution did not effect the "sale", "alienation" or "lease" of the reserve (para. 443). In particular, after a review of the relevant cases, His Lordship ruled that the term "alienated" in section 48 of the *1906 Indian Act* had to be interpreted with reference to the more specific words "sold" and "leased" in the section and concluded that the surrender process was only intended for situations in which the Indian interest was being granted to a non-Indian third party. He said (at para. 444):

The surrender process was therefore necessary to merge the Crown's underlying or ultimate title and the native interest into one title which could then in turn be granted to a non-native third party. It would seem to follow that these considerations would not apply to the 1907 Resolution, the objective of which was to maintain the reserve status in the land at Campbell River. In other words, these considerations would not apply to situations where the intention was to confirm a reserve interest in other Indians, particularly where all such Indians were members of the same band or tribe. It would also seem to me that to surrender and disencumber the land of its native interest would be counter productive to the objective of retaining the status of such land as a reserve.

[664] The conclusions of the trial judge were discussed and confirmed by the Court of Appeal at paragraphs 51 to 56 of its decision. The Court of Appeal said (at para. 56):

As noted, the 1907 Resolution simply sought to resolve a dispute between the Wewaikai and the Wewaikum, two Indian Bands belonging to the same Indian nation, i.e. the Laich-kwil-tach, as to the ownership of the Campbell River

reserve. The Crown simply acted as a facilitator in this process. To the effect that the resolution effected the transfer of any interests held by the Wewaikai in the Campbell River reserve, which would only arise by virtue of their membership in the Laich-kwil-tach Indian tribe, the surrender provisions had no application.

[665] In my view, *Wewayakum* is directly applicable to the Burrard's view of Amalgamation. Even if, as the Burrard say, Amalgamation involved a transfer of the Squamish "Band's" interests in I.R. No. 3 and I.R. No. 4 to the Burrard Band, no surrender was required to effect that change.

2. Failure to Obtain the Informed Consent of the Burrard People

[666] The Burrard said that the Crown had a fiduciary obligation to obtain the Burrard People's informed consent to Amalgamation. They argued that this fiduciary obligation included the fiduciary duties described below:

(1) A duty to investigate. The Burrard said that the Department had a duty to investigate two central issues. The first was the question of the whether the Squamish and Burrard people had an entitlement in common to all the Squamish reserves. The second issue concerned the nature and extent of the claims of the Burrard People to the Burrard Inlet reserves in particular. The Burrard submitted that this information was necessary to enable the Crown to make a fair division of the reserve interests of the Squamish "tribe" in Burrard Inlet.

(2) A duty to inform and advise. The Burrard argued that the Department had, at a minimum, a duty to provide full disclosure to the Burrard of all pertinent information about their reserve interests. They also had a duty to advise both the Squamish and the Burrard about their respective reserve rights and about the consequences of the proposed Amalgamation.

(3) A duty to consult. The Burrard submitted that the Department had a duty to consult with the Burrard to ascertain their views about Amalgamation. The Burrard said that the Crown only consulted with the Burrard People about whether or not they intended to accept or reject the Amalgamation proposal as it was presented to them. They said that the Department failed to ascertain the reasons for the Burrard's opposition to Amalgamation.

(4) A duty to secure an agreement. The Burrard submitted that, in the case of Amalgamation, the Department failed to obtain the agreement of the Squamish and Burrard on the terms of the division of the reserves and funds of the Squamish "tribe".

(5) A duty to obtain a formal relinquishment of reserve interests. The Burrard argued

that, even if a formal surrender was not required, the Crown nevertheless had a fiduciary duty to the Burrard Band to obtain a formal relinquishment from the amalgamated Squamish Band of its interests in the Burrard Band's reserves and to follow procedures which were analogous to the procedures for a formal surrender under the *Indian Act*.

(6) A duty to obtain the approval of the Governor in Council. In the absence of express statutory provisions authorizing the amalgamation of Indian bands, the Burrard submitted that the Crown nevertheless had a fiduciary duty to have the Amalgamation approved by the Governor in Council.

[667] The Burrard submitted that, even if a formal surrender under the *Indian Act* was not required, the Crown nevertheless had a fiduciary duty to follow procedures which were analogous to the surrender provisions. The Burrard also said that the only way the Crown could fulfill its fiduciary duties was to proceed in this manner. The Burrard illustrated its submission by noting that, in three other situations, the Crown had adopted surrender-like procedures which allowed it to fulfill its fiduciary duties.

[668] In this regard, the Burrard relied on the procedures used by the Crown in taking a surrender from the Yellow Quill Band in the Northwest Territories. That band, according to Treaty No. 4, held three separate reserves, including the Fishing Lake Reserve. In 1905, the Canadian National Railway offered to purchase a portion of that reserve but, when the Department attempted to negotiate the necessary surrender, it was thwarted by the fact that the Indians who lived on the three reserves considered themselves to be three distinct bands. To resolve the situation, the Department arranged meetings of each of the three "bands" and obtained their agreement to relinquish any interest each held in the other bands' reserves. Once this had been accomplished, the Department took a surrender from the band on the Fishing Lake Reserve.

[669] The Burrard also suggested that the procedure followed in *Wewayakum*, which involved band meetings and a vote to cede a reserve interest, should have been used in Amalgamation. In *Wewayakum*, one part of the dispute between the Cape Mudge ("Wewayakai") Band and the Campbell River ("Wewayakum") Band concerned which band was entitled to Campbell River I.R. No. 11. The site of the Campbell River reserve had been used by the Cape Mudge Band since before its allocation as a reserve. However, in 1896, the Campbell River Band occupied the Campbell River reserve with the agreement of the Department, and later a dispute arose between the two bands regarding their respective interests in the reserve. In 1907, the local Indian agent held meetings with both bands to obtain their views. A further meeting was held with the Cape Mudge Band, at which a majority of the band voted to cede the band's interest in the Campbell River reserve to the Campbell River Band.

[670] Finally, the Burrard pointed to the procedures used by the Crown with respect to Inlailawatash I.R. No. 4. In 1877, the JIRC had allocated that reserve jointly to the Squamish and Musqueam "tribes". However, the reserve was actually administered by the Department for the exclusive use and benefit of the Burrard Band, and this continued to be the case after Amalgamation. In 1926, after a logging company offered to purchase the reserve, Inspector Ditchburn wrote a letter to Deputy Superintendent General Duncan Scott in which he recognized that, unless the Musqueam band relinquished its reserve interest in writing, it would have to participate in the surrender (CB1036).

[671] The matter was partially resolved when Chief Jack Stogan of the Musqueam Band signed a statement in which he said that the Musqueam Band had no claim to the Inlailawatash reserve (CB1038). However, Assistant Deputy Superintendent General McLean wrote Agent Perry to say that a resolution was preferable (CB1044). Accordingly, a meeting was held and a majority of the voting members of the Musqueam Band passed a resolution relinquishing its interest in the reserve (CB1045).

[672] The Burrard submitted that the Department took important steps in these three situations, which were not taken in Amalgamation. They were:

- The Department investigated the claims at issue.

- The Department consulted with the Indians and bands involved and ascertained their views and wishes.

- The Department drafted a form of agreement or resolution incorporating the Indians' views and wishes.

- The Department convened a meeting of the band that was to cede its rights and obtained the majority or unanimous consent of the voting members to the agreement or resolution.

[673] However, I have been unable to agree that the Crown breached a fiduciary duty to the Burrard by failing to review and implement Amalgamation using procedures which were analogous to the surrender provision of the *Indian Act*. In my view, the Crown had a statutory duty to ensure that the Burrard Band, when presented with the opportunity to join the other bands of the Squamish "tribe" in an amalgamated Squamish Band, understood the extent of its reserve interests and understood the proposal and the consequences of a decision to accept or reject it. I have also concluded there existed a statutory duty to balance the interests of those in favour of and those opposed to Amalgamation in an effort to achieve, to the extent possible, a fair result. However, there were no procedural steps, statutory or otherwise, which the Crown was bound to follow.

[674] In my view, the Department took the steps which were necessary in the circumstances to ensure that all the Squamish People (including the Burrard) reached an informed decision about Amalgamation. The merits of the proposal were discussed in correspondence and in a series of meetings which took place over many months. Members of the Burrard Band (and, in particular those who were also members of the Mission Band) attended four of the six meetings. As well, the Department was directly involved. Indian Agent Perry appears to have attended all but the First Meeting and, before the important Fifth Meeting on January 26th, 1923, he took the unusual step of writing to Chief George to encourage him to attend (CB929). Later, in the summer of 1923, when Amalgamation was about to be approved, Inspector Ditchburn encouraged the Burrard Band to hold a meeting to discuss the proposal, and Chief Leonard George testified that, according to his oral history, Amalgamation was "actively debated" by the Burrard People.

[675] In each of the three situations relied on by the Burrard as models for the "correct" procedure, the Crown had written confirmation from the bands which showed that they agreed

to the arrangement that was ultimately implemented. This was also true in the case at bar. The Crown received the Squamish petitions in favour of Amalgamation and also received the Burrard's Final Petition, which informed the Department in unambiguous terms that "we...wish to be exempted from any amalgamation with the Squamish tribes" (CB988).

[676] In light of my conclusion that the Burrard Band only had reserve interests in I.R. No. 3 and I.R. No. 4 and did not forfeit any reserve interests in Amalgamation, I do not propose to discuss the balance of the specific fiduciary duties listed above because they all related in some way to the Burrard's view that, in Amalgamation, the Burrard Band lost its reserve interests in other reserves of the Squamish "tribe".

3. The Burrard Band's Understanding of Amalgamation

[677] The Burrard said that they did not understand that they had interests in common in the other reserves of the Squamish "tribe", including the False Creek Reserve, which they would lose on Amalgamation. The Burrard argued that the Crown's "misadministration" of the Squamish reserves in favour of individual bands rather than for the entire Squamish "tribe" resulted in the Burrard being misinformed about the extent of their interests in the Squamish reserves (other than Burrard I.R. No. 4 and Inlailawatash I.R. No. 3). The Burrard said that the Department misled the Burrard into believing that they had interests only in the latter two reserves. Because of their misunderstanding of the extent of their reserve interests, the Burrard submitted that their decision to reject Amalgamation was meaningless.

[678] These submissions were again predicated on the Burrard's position that the Burrard Band had an interest in the reserves of the Squamish "tribe" other than Burrard I.R. No. 3 and Inlailawatash I.R. No. 4. However, as I concluded earlier, the evidence demonstrated that the Burrard Band was interested only in the Burrard and Inlailawatash reserves. I have therefore concluded that the Burrard Band was not misinformed about the extent of its interests in other reserves of the Squamish "tribe", and I have also concluded, for the reasons given below, that the Burrard were not confused about Amalgamation.

[679] The Burrard noted that Chief George expressed ignorance of the "purposes" of Amalgamation at the Fifth Meeting (CB928). However, he did not say that he was confused about the meaning or effect of the proposal. The evidence showed that Chief George did not trust Andrew Paull's motives and feared that, after amalgamation, the Squamish People would sell the Burrard Band's reserves against the wishes of the Burrard People. Given that context, I have concluded that Chief George's statement about his ignorance of the purposes of amalgamation was an expression of his lack of trust in Andrew Paull. It did not mean that he was unaware of what amalgamation meant to the Burrard Band.

[680] As well, even if Chief George had been confused about the meaning of amalgamation at the outset of the Fifth Meeting, he could not have been confused by the time the meeting ended. The evidence disclosed that there was a full discussion and that Andrew Paull gave an outline of the proposal for amalgamation. I think it reasonable to assume that Paull would have spoken about all the matters which he included in the petition he sent to Inspector Ditchburn the following day (CB932).

[681] The Burrard plaintiffs also said that the Burrard People continued to be confused about Amalgamation after 1923. They pointed to a letter written by Andrew Paull to the Department on April 7, 1925, in which Paull complained that he had heard "indirectly" that the Burrard were saying "that by an arrangement entered into with the Indian Department, their claims in the Reserves of the amalgamated Bands is admitted by the Departments" (CB1025). However, Andrew Paull did not describe the arrangement, and there was no evidence from the Burrard or anywhere in the record about the existence of or terms of an "arrangement" between the Department and the Burrard respecting the reserves of the amalgamated Squamish Band. I have therefore concluded that no such arrangement existed. The only arrangements which were mentioned in evidence were the undertaking to compensate members of the Burrard Band who lost their homes on Mission I.R. No. 1. and the possibility of protecting the interests of the four Burrard men who were members of the Mission Band.

[682] Paull's letter (CB1025) was the only evidence on which the Burrard relied in support of their submission that the Burrard People were confused about Amalgamation in the years after its implementation. However, given that Inspector Ditchburn's letter to Chief George in 1923 (CB994) had made it clear that the Burrard would have no post-Amalgamation interest in the amalgamated Squamish funds or reserves, I am not prepared to conclude, on the basis of the vague statement in Paull's letter, that the Burrard Band was confused about Amalgamation.

[683] In my view, the correspondence and petitions signed by Chief George and other Burrard Band members represented the best evidence about their understanding of Amalgamation. The Burrard indicated that they feared a loss of control over the management and disposition of their reserves and the loss of their exclusive entitlement to any related proceeds. As well, they realized that Chief George would have only one vote in the amalgamated Squamish Band Council, and that he would be powerless to prevent the surrender and sale of the Burrard reserves if that was the wish of the majority of Squamish chiefs.

[684] Also of significance was the evidence that Chief George and the Burrard People understood that, in rejecting Amalgamation, they were choosing to continue as a separate band under the *Indian Act*. The Burrard, in their correspondence with the Department, characterized themselves as a "band" distinct from the Squamish. For example, Chief George wrote to the Department in September of 1923 and informed Inspector Ditchburn that, at a meeting to discuss Amalgamation, the Burrard unanimously agreed that they desired to "remain a band as before" (CB990).

4. Failure to Implement Amalgamation in a Manner Which Protected the Interests of the Burrard People.

[685] The Burrard submitted that the Crown had a fiduciary duty to balance the interests of the Squamish and Burrard People. The Burrard said that the Department breached its fiduciary duty to the Burrard People when it left them in a position in which they had to choose between becoming a vulnerable minority within an amalgamated Squamish Band (vulnerable in the sense of not being numerous enough to prevent their reserves from being sold by the Squamish majority) and becoming a separate but relatively impoverished band. The Burrard said that, when they rejected Amalgamation, the Burrard received an unfair *per capita* share of the reserves and funds formerly held by the bands of the Squamish "tribe". The Burrard therefore argued that the Crown, in its implementation of Amalgamation, favoured the interests of the Squamish People over those of the Burrard People.

[686] In this regard, the Burrard relied on the reasons of Teitelbaum J. in *Wewayakum*, where he said (at paras. 493 and 494):

The dispute in the case before me is in essence between two Indian Bands, each claiming possession of each other's reserve. It would seem to me that the Crown has a duty to balance and reconcile the interests of both the Cape Mudge Indians and the Campbell River Indians and to resolve their conflict regarding the use and occupation of the Laichkwiltach reserves. **In resolving this conflict, the Crown's duty would be not to favour the interests of one band over the interests of the other. In my view, the Crown owes a duty to both bands.**

The Crown's duty in the case before me was to balance the interests of the two bands and avoid taking sides in their dispute. **While the Crown was required to put the interests of the Indians ahead of its own interests, it could not put the interest on [sic] one band ahead of the other.**

[*My emphasis*]

[687] The Burrard said there were only two courses of action available to the Crown which would have achieved a balanced and fair result, and that the Crown breached its fiduciary duty by not exploring these options and by not selecting the second for implementation if the first could not be achieved.

[688] In the Burrard's submission, the Crown's options were:

1. to "re-allocate" the Burrard Inlet reserves of the bands of the Squamish "tribe" so that, after Amalgamation, they were jointly owned by the Squamish and Burrard Bands; or

2. to require the Burrard to join the Amalgamation and become part of the Squamish Band.

[689] It is my view that the Burrard's first option was completely unrealistic, because the other bands of the Squamish "tribe" on the reserves around Burrard Inlet would not have agreed to grant a joint interest to the Burrard Band in the Mission, Capilano, Seymour Creek and False Creek reserves. I say this because (1) the Burrard Band was not considered by the other Squamish Indians to have reserve interests in the other Burrard Inlet reserves, and (2) granting such an interest would have meant a windfall to the Burrard People. They would have received an interest in reserve land in Burrard Inlet which was disproportionate to their relatively small numbers when compared to the population of the rest of the Squamish "tribe"[102].

[690] Based on the acreages shown in a schedule of the Squamish and Burrard reserves prepared by Agent Perry in July 1923 (CB980), the total acreage of all the Burrard Inlet reserves was approximately 987 acres. The Burrard proposal would have given the Burrard Band a 50 percent interest in 987 acres. This would have been the equivalent to giving it a 100 percent interest in approximately 494 acres. Since the two Burrard Band reserves contained only 288 acres, it seems obvious that, even though the Squamish Band would have retained sole control over the (less valuable) Squamish River and Howe Sound reserves, it would not have agreed that the first option was fair.

[691] Further, I am not at all sure that the Burrard Band would have agreed to the joint Squamish ownership of its Burrard Inlet reserves. At trial, the Burrard witnesses emphasized that the Burrard People had a strong ancestral attachment to their reserves and considered themselves to be culturally distinct from the Squamish People and the sole "owners" of their reserves. In light of this evidence and the importance the Burrard placed, in 1923, on retaining control of their reserves, I am not persuaded that the Burrard Band would have accepted the joint ownership option, because it required the Burrard Band to relinquish a 50 percent interest in its reserves to the Squamish.

[692] It is also my view that the second option was wholly unrealistic given the Burrard Band's vehement and unanimous repudiation of Amalgamation, and given my conclusion that the Burrard Band's opposition to Amalgamation was primarily political and not financial. The Burrard wanted to control their own destiny. They respected the leadership of Chief George and conducted their affairs by consensus wherever possible. In my view, the Burrard People were adverse to Amalgamation primarily because it would eliminate their established system of independent governance. They did not want to find themselves in a minority position in an amalgamated Squamish Band controlled by a council of chiefs led by Andrew Paull. In these circumstances, I cannot agree that the Crown was obliged to force the Burrard into Amalgamation.

[693] With regard to the Burrard's submission that Amalgamation was financially improvident, or at least unfair, because the Burrard Band did not receive a *per capita* share of the reserves of the Squamish "tribe", it is my opinion that this conclusion was based largely on hindsight.

[694] In 1923, the Burrard Inlet reserves were seen as particularly valuable and the Squamish River and Howe Sound reserves were relatively remote, largely uninhabited, and of less value. The Burrard Band had 43 members and accounted for less than 10 percent of what would have been the total post-Amalgamation population. Yet, pre-Amalgamation, the Burrard held more than 25 percent of the reserve land in Burrard Inlet. Accordingly, if the Burrard Band had joined Amalgamation, its members' interests in the Burrard Inlet reserves would have been substantially reduced, because, on a *per capita* basis, the Burrard would have been entitled to less than a 10 percent interest in the Burrard Inlet reserves. It could not have been evident in 1923 that the Burrard People's acquisition of a *per capita* interest in the other Squamish reserves in Amalgamation would eventually compensate them for the loss of their interests in their reserves.

[695] As well, if the Burrard Band had joined the Amalgamation, each former Burrard Band member would notionally have had a *per capita* interest in the funds of the amalgamated Squamish Band. Those funds totalled $167,740 and the total population of the amalgamated band would have been 455. Accordingly, each Burrard Band member would notionally have been entitled to $167,740 ¸455, or $369. The total for the Burrard Band would have been $369 x 43, or $15,867.

[696] Because the Burrard Band's funds were not touched in the Amalgamation, it had the sum of $6,740 in its account. This sum, divided by 43, represented $156 *per capita*. Accordingly, in rejecting Amalgamation, each Burrard Band member notionally did not receive $213 and the Band notionally did not receive $213 x 43, or $9,159.

[697] I have described these sums as notional because they were used for capital projects and the full amount was not available for distribution on request. I have no doubt that the Burrard Band appreciated that, if it joined Amalgamation, the capital of the amalgamated Squamish Band would be spent by the Department in a manner which took the wishes of the Squamish Band Council into account. As the Burrard clearly understood, they would have been in a minority position and there was no guarantee that the amalgamated band's funds would have been used for projects which benefitted the Burrard.

[698] When the financial aspects of Amalgamation are looked at on a *per capita* basis, it is my conclusion that, although the Burrard Band failed to improve its capital position by approximately $9,000 when it rejected Amalgamation, its decision met its primary objectives and allowed it to remain independent and in control of its Burrard Inlet reserves. In these circumstances, I cannot conclude that the Burrard's decision was improvident. In any event, I am not persuaded that the Burrard used the proper approach when they considered the consequences of Amalgamation on a *per capita* basis. In my view, the Crown's decision to separate the Burrard Band's reserves and funds on a band basis rather than on a *per capita* basis was fair, given the Burrard's own view of its reserve interests and the fact that reserve administration had been conducted on a band basis for many years.

5. The Crown's Duty in Amalgamation

[699] For the reasons discussed in Part IV, it is my conclusion that the Crown did not owe either the Squamish or the Burrard Indians a Private Law Fiduciary Duty or a *sui generis* fiduciary duty in Amalgamation. However, in the context of Amalgamation, I should also refer to a statement made by the Federal Court of Appeal in *Tsartlip* (para.35) in which it said:

The concept of fiduciary duty is remarkably unsuited, in my view, for the purpose of defining what is the role of the Minister when, in the exercise of his statutory duties with respect to the management of land in a reserve, he assesses the competing interests of a member of a band on the one hand, and of the band as a whole. The Minister has no interest in the outcome of his decision.

[700] The Federal Court of Appeal also dealt with an internal band dispute in *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689 (C.A.). In that case, the Court considered section 77(1) of the *1970 Indian Act* which said that only band members who were ordinarily resident on a reserve could vote in band elections. The Court reached its decision about the validity of Section 77(1) based on section 15 of the Charter but had this to say about an argument which had been made in favour of a fiduciary duty (at para. 60):

In support of the respondents' position, it was argued by CAP that the residency requirement in subsection 77(1) constitutes a breach of the fiduciary duty owed by the Crown to Aboriginal peoples. Specifically, it was argued that excluding members of the band from participation in the band on the basis of residency is inconsistent with the Crown's fiduciary obligation to act in the best interests of Aboriginal peoples. In light of our findings under section 15 and section 77, it is not necessary for us to decide this issue. **We remark in passing, however, that to apply the fiduciary duty in this context, where the dispute over competing visions of band democracy is internal to the band itself, would be an extremely novel exercise and one which has yet to find expression in the jurisprudence on the fiduciary duty.**

[*My emphasis*]

On appeal, the Supreme Court of Canada upheld the Charter decision and made no reference to the Court of Appeal's comment about the fiduciary duty[103].

[701] In my opinion, in responding to both a request from the Squamish People for amalgamation and to a request from the Burrard People for autonomy, the Crown had a statutory duty not only to balance and protect the interests of both Bands, but also a duty to promote and respect their informed choices and their autonomy. I agree with Rothstein J. in *Fairford* when he reviewed the law on this issue and said at paras. 183-184:

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,*[104] 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....

[702] Finally, I should observe that I have found no special circumstances in the events leading up to Amalgamation which would justify the imposition of a *sui generis* fiduciary duty.

Conclusions

[703] Amalgamation was a proposal which was advanced by a majority of the Squamish People. It was the subject of many meetings and much discussion among the Squamish and Burrard. The Burrard considered the political, cultural, and financial implications of Amalgamation. It is clear that, by the time the Burrard Band asked to be "exempted" from Amalgamation, its members knew that some of them would eventually lose their houses on Mission I.R. No. 1 and that others would lose their interests in that reserve as members of the Mission Band. Yet, they unanimously petitioned the Department to remain independent and in

control of their reserves under the leadership of Chief George. I am satisfied that the Burrard knew everything of relevance about the meaning and consequences of Amalgamation and that the Band's decision was fully informed and not improvident. In these circumstances, no fault can be found with the Crown's decision to exclude the Burrard from Amalgamation.

[704] For all these reasons, an order will be made dismissing the Burrard Action and the Burrard counterclaim in the Squamish Action.

PART VIII - LIMITATIONS

[705] At the request of all parties, limitation defences have been considered in the alternative as they relate to the Musqueam and Burrard Actions and to the Musqueam and Burrard counterclaims in the Squamish Action (together the "Counterclaims").

BACKGROUND

[706] After the Settlement, no limitation issues remained outstanding in connection with the Squamish Action. However, since the Squamish were the first to commence an action in connection with the Reserve, and since the Counterclaims were made in the Squamish Action, it is important to understand how that action developed.

[707] The Squamish issued a statement of claim on June 30, 1977, in Federal Court file T-2618-77, and thereby commenced what became known as the "Omnibus Action". In that action, they made a number of claims (including a claim to the Reserve) to preserve them under the grace period in British Columbia's new limitation legislation of 1975. Four years later, on March 20, 1981, the Squamish filed their statement of claim in the Squamish Action, and the Crown agreed to treat that statement of claim as if it had been filed on June 30, 1977. That agreement eliminated most of the limitation defences which would otherwise have been available to the Crown against the Squamish under the new limitation legislation, and meant that, before the Settlement, laches and acquiescence were the only limitation issues between the Crown and the Squamish in the Squamish Action.

[708] The Musqueam filed their statement of claim in the Musqueam Action on December 30, 1992, and the Burrard commenced the Burrard Action four months later on April 30, 1993.

[709] Shortly thereafter, on July 16, 1993, Justice Rouleau of this Court ordered that the Squamish, Musqueam and Burrard Actions be tried together. It is this trio of actions that was earlier defined as the "Mathias Litigation". His Lordship also ordered that the Musqueam and Burrard Bands be made defendants in the Squamish Action and that they file the Counterclaims in that action.

THE CAUSES OF ACTION

[710] In the Musqueam and Burrard Actions, the plaintiffs sought two types of remedies. Firstly, they asked for declarations that those parcels of the former Reserve which were still the property of the Crown be held in trust in their favour. This declaratory relief was directed at

restoring their Indian interest in the land and was based on breaches of fiduciary duty alleged to have been committed by the Crown and the Squamish. Secondly, the Musqueam and Burrard asked for accountings and damages under a variety of headings related to the loss of their reserve interests due to breaches of fiduciary duty by the Crown and the Squamish.

[711] In addition, the Burrard, but not the Musqueam, sought a declaration that the 1946 Surrender and the Crown's acceptance of that surrender were void and of no legal effect. They also asked that all the post-Amalgamation transactions relating to parcels of the former Reserve which remained the property of the Crown be declared void and of no legal effect, or in the alternative, voidable at the instance of the Burrard.

[712] The Crown submitted that the events which gave rise to the Musqueam cause of action occurred on June 15, 1877, when the JIRC issued its Second Minute of Decision and allocated the Reserve to the "Skwawmish Tribe". With respect to the Burrard cause of action, the Crown said that the relevant event occurred on July 23, 1923, when the Department approved Amalgamation. The Musqueam and Burrard did not dispute that these were the dates on which the events occurred which gave rise to their causes of action.

[713] However, contrary to the parties' submissions, I have concluded that the Burrard cause of action arose on October 5, 1923. This was the date of a letter from Deputy Superintendent General Duncan Scott to Indian Agent Perry, in which the Department finally approved Amalgamation (CB999; 1153). With respect to the Musqueam, their cause of action arose on February 7, 1889, when the *1888 Land Act* came into force in British Columbia. At that time, the JIRC's decision to allocate the Reserve to the Squamish "tribe" was implemented.

THE LIMITATION LEGISLATION

[714] The Crown took the position that, even if the Musqueam and Burrard had an interest in the False Creek Reserve, their causes of action were barred by British Columbia's limitation legislation which applies to the Mathias Litigation by reason of section 39(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7. It says that, in actions brought in the Federal Court, causes of action which arise in a province are to be governed by the limitation law of that province.

[715] Before 1975, British Columbia's limitation legislation (the "Pre-1975 Legislation") established limitation periods of various lengths for named causes of action. However, if a cause of action was not mentioned, no limitation period applied. Before 1975, no limitation period was prescribed for actions for breach of fiduciary duty.

[716] In 1975, this approach changed with the passage of the *Limitation Act, 1975*, S.B.C. 1975, c. 37 (the "*Limitation Act*"). It contained a "catch-all" provision which imposed a six-year limitation period for all actions not mentioned elsewhere in the act. This had the effect of introducing a six-year limitation period for actions for breaches of fiduciary duty. However, the act contained a provision for the postponement of the running of that limitation period in certain circumstances.

THE CROWN'S LIMITATION ARGUMENTS

[717] In its defences to the Musqueam and Burrard Actions, the Crown made the limitation

arguments described below. The Squamish, in their defences to the Musqueam and Burrard Actions and Counterclaims, made only the arguments described in paragraphs (b) and (c).

(a) The Crown said that the transitional provisions in section 14 of the *Limitation Act* are a complete bar to the Musqueam and Burrard causes of action. This will be described as the "Transitional Argument".

(b) The Crown also argued, with support from the Squamish, that the *Limitation Act* imposed a six-year limitation for claims for breach of fiduciary duty and that the period has expired without being postponed. This submission will be referred to as the "Fiduciary Duty Argument".

(c) Again with Squamish support, the Crown argued that section 8(1) of the *Limitation Act*, which provided an ultimate 30-year limitation period with no possibility of postponement, applies to bar the Musqueam and Burrard causes of action. This submission will be referred to as the "Ultimate Limitation Argument".

(d) Finally, the Crown argued that the equitable defences of laches and acquiescence, preserved in section 2 of the *Limitation Act*, apply to defeat the Musqueam and Burrard causes of action. The Squamish did not support this submission.

[718] In final argument, the Burrard replied to each of the Crown's limitation arguments and adopted the Musqueam constitutional argument described herein at paragraph 783. The Burrard also raised section 15(1) of the *Charter*, but only with respect to the Crown's Fiduciary Duty and Ultimate Limitation Arguments. The Burrard did not argue the *Charter* in reply to the Transitional Argument.

[719] Although they made submissions which related to one or two of the Burrard arguments, the Musqueam did not expressly adopt the Burrard's oral submissions, except as they related to section 15(1) of the *Charter*. Nor did they make full argument in reply to the Crown, except on the subject of laches and acquiescence. The Musqueam limitations submissions dealt primarily with their constitutional argument in which they challenged the validity of the incorporation of the *Limitation Act* by section 39(1) of the *Federal Court Act*. This constitutional argument was intended to defeat the Crown's Transitional, Fiduciary Duty, and Ultimate Limitation Arguments.

THE TRANSITIONAL ARGUMENT

RE: ACTIONS FOR BREACH OF FIDUCIARY DUTY

Introduction

[720] The Crown said that the transitional provisions in s. 14 of the *Limitation Act* barred the Burrard and Musqueam causes of action for breach of fiduciary duty. Sections 14(1), (2) and (3) are relevant to this discussion. They provide that:

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

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

(3) If, with respect to a cause of action that arose before this Act comes into force[106], the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before July 1, 1977, the limitation period governing the cause of action shall be the shorter of

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

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

.....

[721] In reply to the Transitional Argument, the Burrard argued that neither section 14(1) nor section 14(3) applied to causes of action for breach of fiduciary duty which arose prior to July 1, 1975. They said that section 14(2) therefore applied to impose the six-year limitation period in section 3(4) of the *Limitation Act*. However, they added that the postponement provisions in section 6(3) of the act meant that, instead of running from 1923, the six-year limitation period did not start to run until after April 30, 1987. This meant that the Burrard Action, which was commenced on April 30, 1993, was in time.

[722] The Musqueam pleaded that they only discovered the existence of their cause of action shortly before they began the Musqueam Action on December 30, 1992. However, they called no evidence to support this position.

Section 14(1) of the *Limitation Act*

[723] The Crown did not take issue with the Burrard's position on section 14(1) as it related to their actions for breach of fiduciary duty. Since such actions had no limitation periods, neither the Musqueam or the Burrard Actions nor their Counterclaims for breach of fiduciary duty were statute-barred under the Pre-1975 Legislation. Accordingly, section 14(1) of the *Limitation Act* did not apply to either plaintiff.

Section 14(3) of the *Limitation Act*

[724] However, the Crown argued that section 14(3) provided a transitional regime for all causes of action which arose prior to July 1, 1975, whether or not they were subject to a specified limitation period under the Pre-1975 Legislation. The Crown said that the limitation period of six years for actions for breach of fiduciary duty under the *Limitation Act* was shorter than the unlimited period under the Pre-1975 Legislation and that section 14(3) of the *Limitation Act* therefore applied. In consequence, the Crown argued that the Burrard and Musqueam causes of action for breach of fiduciary duty, all of which arose prior to July 1, 1975, were statute-barred on July 1, 1977.

[725] In response, the Burrard said that section 14(3) of the *Limitation Act* applied only if the cause of action in question was "formerly governed" by a limitation period under the Pre-1975

Legislation. The Burrard argued that the words "formerly governed" in s. 14(3) were intended to limit the application of that subsection to causes of action which had prescribed limitation periods under the Pre-1975 Legislation which were longer than those imposed by the new *Limitation Act*.

[726] The Burrard provided the following definitions for the word "govern" to support their interpretation of s. 14(3). *Black's Law Dictionary* (6th ed.) defined "govern" as follows: "to direct and control the actions or conduct of, either by established laws or by arbitrary will; to direct and control, rule, or regulate, by authority; to be a rule, precedent, law or deciding principle for". In addition, the *New Shorter Oxford English Dictionary* gave "govern" the following meanings: "rule with authority, conduct the policy, actions and affairs; control, influence, regulate or determine; and constitute a law, rule, standard or principle for; serve to decide (a legal case)".

[727] Section 14(3) refers to "limitation periods" which "formerly governed" a cause of action. In my view, contrary to the Burrard submission, this terminology includes situations in which no limitation period was prescribed. To say that a cause of action has no limitation period is a submission of substance in that it "constitutes a law, standard or principle for" a cause of action, or "serves to decide" when an action can be brought. In other words, the unlimited limitation period "governed" in the sense that it "applied" to resolve the question of when a plaintiff could bring an action.

[728] It is noteworthy that section 14(3) did not say that both periods it described were provided by legislation. The earlier period was described only as the "governing" limitation period whereas the second period was to be "...provided by this Act...". It is therefore my conclusion that "govern" was used as a synonym for "applied to" or "related to". Since the limitation period which formerly governed or "applied to" the cause of action for breach of fiduciary duty was an unlimited period, and since the six-year limitation period provided by the *Limitation Act* was a shorter period, section 14(3) applied to bar actions for breach of fiduciary duty at the expiry of the grace period on July 1, 1977.

[729] I am also persuaded that the Crown's interpretation of section 14(3) is correct because it takes a more generous approach to causes of action which were caught in the transition between the Pre-1975 Legislation and the *Limitation Act*. Because the *Limitation Act* introduced a new six-year limitation for causes of action, such as breach of fiduciary duty, which are not otherwise described in the act, causes of actions which formerly had no limitation period became subject to limitation legislation for the first time. In such situations, it was reasonable for section 14(3)(a) of the *Limitation Act* to provide a two-year grace period for the commencement of actions before they became statute-barred[107]. The Burrard interpretation of section 14(3) is more onerous because it means that all actions for breach of fiduciary duty which arose prior to July 1, 1975, would immediately become subject to a six-year limitation period that ran from the date on which the relevant events occurred. Therefore, any cause of action which was more than six years old when the *Limitation Act* became law would have been statute-barred on July 1, 1975, without the benefit of the grace period.

[730] I have considered the Burrard's further submission that limitation legislation must be strictly construed and that any ambiguities in the legislation are to be resolved in favour of a

plaintiff. This proposition was stated in *Ordon Estate v. Grail,* [1998] 3 S.C.R. 427 at para. 136, citing *Berardinelli v. Ontario Housing Corp.,* [1979] 1 S.C.R. 275 at 280. However, the Burrard's interpretation of section 14(3) is only favourable to them in this case because they allege that the limitation period was postponed. For plaintiffs who cannot argue postponement, the Burrard interpretation would be the more onerous, because those plaintiffs would be denied the benefit of the grace period. In my view, the principle in *Ordon Estate* should not be applied to exceptional plaintiffs such as the Burrard in this case. Rather, it should work in favour of the majority of plaintiffs who cannot postpone their claims. Accordingly, I have concluded that the principle of statutory interpretation set out in the *Ordon Estate* does not apply on the facts of this case. This means that, under section 14(3) of the *Limitation Act*, both the Burrard and Musqueam causes of action for breach of fiduciary duty expired and were statute barred on July 1, 1977.

RE: ACTIONS FOR POSSESSION OF LAND

Introduction

[731] To this point, the Transitional Argument has been considered as it relates to actions for breach of fiduciary duty. However, the Burrard also characterized their action as one for possession of land with respect to those parcels of the former Reserve still owned by the Crown. If they are correct, then section 16 of the Pre-1975 Legislation applied to impose a 20-year limitation period. The Burrard also said that the running time for that limitation period was postponed, pursuant to the common law doctrine of equitable fraud, until at least July 1, 1975, when the *Limitation Act* came into force. At that point, they said that, because of s. 14(2) of the *Limitation Act*, the limitation periods and exceptions provided by the act apply to their cause of action for possession of land. In particular, they said that their action has no limitation period because it is an action for the possession of land in which the person entitled to possession had been dispossessed in circumstances amounting to trespass under s. 3(3)(a) of the *Limitation Act*.

[732] Against this background, the following matters will be addressed in turn:

A. Can the claims in the Burrard and Musqueam Actions and in their Counterclaims be characterized in part as actions for the possession of land which had a 20-year limitation period under the Pre-1975 Legislation?

B. If so, was that limitation period postponed at least until the *Limitation Act* came into force on July 1, 1975?

C. If the 20-year limitation period was postponed until July 1, 1975, does either section 3 (3)(a) or section 14(3) of the *Limitation Act* apply to the Burrard and Musqueam Actions and Counterclaims?

A. Possession of Land under the Pre-1975 Legislation

[733] Although the Burrard and Musqueam did not expressly plead that they had a right to

possess the Reserve, they did seek declarations of trust over those parcels of the Reserve which are still held by the Crown and argued that they had Indian interests which included the rights to use, possess and benefit from the Reserve. The Burrard noted that, in *Wewayakum* (at paras. 157 and 204), Justice Teitelbaum treated the plaintiffs' actions for declarations of Indian interest as actions for possession of land and applied the 20-year limitation period under the Pre-1975 Legislation.

[734] The Crown took the position that the Burrard and Musqueam Actions should not be considered to be actions for possession of land. The Crown noted that the two bands were seeking declarations of constructive trust and said that their actions were for equitable title rather than for possession. However, because the Indian interest in a reserve includes a possessory right[108], I am persuaded that the Musqueam and Burrard actions for a declaration confirming their interests in the Reserve were, in part, actions for possession of land.

[735] As mentioned above, it was section 16 of the Pre-1975 Legislation which provided a 20-year limitation period for actions for possession of land. It read:

16. No person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

Under this section, unless postponement occurred pursuant to the common law doctrine of equitable fraud, both the Musqueam and Burrard causes of action, which arose in 1889 and 1923 respectively, expired in 1909 and 1943. Those causes of action are therefore barred by s. 14(1) of the *Limitation Act*, which says that causes of action with limitation periods that expired before July 1, 1975, remain barred.

B. Postponement due to Equitable Fraud

[736] The common law doctrine of equitable fraud was pleaded only to extend the 20-year limitation period for actions for possession of land under the Pre-1975 Legislation until July 1, 1975, when the new *Limitation Act* took effect. The Burrard submitted that the Crown committed equitable fraud against the Burrard when it mislead them about the nature and extent of their rights in the Reserve.

Guerin*and *Semiahmoo

[737] The Burrard relied on the decision of the Supreme Court of Canada in *Guerin*, in which the Court concluded that the Department's failure to provide the Musqueam Band with a copy of a lease amounted to equitable fraud. Dickson J., for the majority, described the doctrine of equitable fraud and its application. At page 390, he wrote:

It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Ass'n et al*., [1958]

1 W.L.R. 563 at p. 573, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the band amounted to equitable fraud. Although the branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the branch and the band.

The Supreme Court held that, although the cause of action arose when the impugned lease was signed in 1958, the limitation period did not start to run until 1970, when the Musqueam Band obtained a copy of the lease.

[738] Isaac C.J. also discussed the principles of equitable fraud in the Federal Court of Appeal's decision in *Semiahmoo*. In considering whether the Crown's conduct had been "unconscionable", the Chief Justice emphasized that it "must be assessed *having regard to the special relationship between the Crown and the Semiahmoo Indian Band*" [emphasis in original]. He rejected the traditional definition of "unconscionable", which emphasizes moral turpitude and dishonest behaviour, and said (at page 42):

However, equitable fraud does not require dishonesty or an improper motive; it requires only that the respondent acted unconscionably having regard to its relationship with the Band.

[739] In *Semiahmoo*, the Department did not mislead the band about the terms of the original surrender. However, in the post-surrender period, although there was no "overriding intention" to mislead the band, the Court found that the band was not told that the Crown's plans for the development of the surrendered lands had changed, even though the band asked about the status of the lands and their possible return. In these circumstances, the Court applied the doctrine of equitable fraud in its consideration of the postponement provisions in section 6(3) of the *Limitation Act* and delayed the running of the limitation period until 1989. In that year, the band had obtained a consultant's report which revealed that the Crown had abandoned its original plan to build a customs facility on the surrendered lands.

The Burrard Submissions

[740] The Burrard alleged that the Crown committed equitable fraud in three ways. Firstly, they said that the Department retained in its exclusive possession documents which revealed the Burrard's "in common" entitlement to an interest in the Squamish reserves, including the False Creek Reserve. Secondly, according to the Burrard, the Crown retained in its exclusive possession documents which concerned Amalgamation and, when the Crown realized that it had approved Amalgamation in a manner which deprived the Burrard of its interest in all the Squamish reserves, it failed to disclose the documents which revealed the error. Thirdly, the Burrard said that the Department committed equitable fraud either when it recognized, or failed to recognize, that it had "misadministered" the reserves of the Squamish "tribe" by managing them for the benefit of separate bands. They said that this misadministration concealed from them the true extent of their "in common" interest in all the Squamish reserves.

[741] Regarding their first submission, the Burrard said that documents existed which showed that it had an "in common" entitlement to the Squamish reserves. Those documents were: (i) the JIRC's decisions and reports; (ii) the Department's schedules of reserves, which were appended to its annual reports to Parliament; and (iii) Indian agent Byrne's testimony before the McKenna-McBride Royal Commission. The Burrard said that all this material was in the exclusive possession of the Department. However, no evidence was adduced to support this allegation, and it was clear that some of the material would have been on the public record. As well, the Burrard did not allege that they asked for and were refused any documents. Further, there were no documents in the trial record which indicated that the Department[1099] ever considered that the Burrard had an "in common" interest in all the Squamish reserves. In sum, there was no evidence to indicate that information about the Burrard's interest was ever suppressed or withheld.

[742] Secondly, the Burrard said that the Department retained exclusive possession of all the documents relating to Amalgamation. Presumably, such documents included the correspondence, petitions and minutes of meetings which were discussed in detail in Part V(A). It seems fair to assume that the Burrard were aware of the contents of both the letter written by Chief George to Inspector Ditchburn (CB990) and the three petitions signed by Burrard men in opposition to Amalgamation. As well, they must have received oral reports about the discussions at the public meetings attended by members of the Burrard Band. Further, the status of the various Squamish and Burrard band bank accounts, both before and after Amalgamation, were matters of public record (see, for example, CB1440). Finally, there was no evidence that, prior to the Burrard Action, any Burrard People ever asked for information concerning Amalgamation, or that any information or documents were concealed.

[743] The Burrard also argued that, in the years 1940, 1947, 1960 and 1967, events occurred which illustrated that the Department realized, or ought to have realized, that it had misadministered the Squamish reserves when it approved Amalgamation without taking a surrender and without recognizing the Burrard's "in common" interest in the Squamish reserves. In considering this topic, I will state and then discuss each of the Burrard's submissions.

[744] Regarding the events of 1940, the Burrard said in final argument:

The amalgamation issue resurfaced at least four times from 1923 to 1967. It is submitted that on each occasion, officials and agents of the Crown ought to "have realized their original breach and exercised their power to correct it."

On May 3, 1940, Indian Agent Ball reported to the DIA that Chief Matthias Joe and Louie-Lewis, a Councillor of the Squamish Band, were "holding clandestine meetings to try and break away from the amalgamation of the Squamish tribes." He reported that Louie Lewis had even approached the Indian Commissioner to dissolve the amalgamation (CB1149). In April of 1940, Chief Mathias Joe of the Capilano Reserve No. 5 and the "Chief of the Kitsilano" Reserve sought legal advice from Hamilton, Read and Paterson regarding the amalgamation. The firm wrote to Major McKay, Commissioner of Indian Affairs, requesting copies of the "Amalgamation Agreement" (CB1145). Major McKay wrote to the Secretary of the DIA on May 13, 1940 seeking a copy of the Order-in-Council confirming the amalgamation. He commented that "**as**

considerable Band Funds were involved, it is presumed that such Order was necessary" (CB1151). [Emphasis added]. Secretary T.R.L. MacInnes responded on May 25, 1940 stating that an Order in Council was not required to **confirm** an amalgamation: "This is done by departmental letter approving of the **agreement** or **resolution** passed by the Bands concerned. The letter previously mentioned by you of October 5, 1923, would appear to cover the case." (CB1153) [Emphases added.]

It is submitted that at this time, the DIA should have realized that the Burrard's claims were outstanding.

[745] This submission concerned an exchange of correspondence which occurred in April and May of 1940. It came about when two Squamish chiefs (who were not Burrard People) approached a law firm in Vancouver and expressed dissatisfaction with Amalgamation. The firm asked the Department for information about Amalgamation and this prompted a review of the Department's files.

[746] It is apparent from the relevant correspondence that, by this time, neither the Commissioner of Indian Affairs for British Columbia nor the Secretary of the Department had personal knowledge about the procedures which had been used to implement Amalgamation. Commissioner McKay clearly assumed that an order in council had been passed, but it is evident that the Department concluded that an order in council had not been required to implement Amalgamation. The Secretary therefore wrote to Commissioner McKay and told him that the Department's formal approval of the Squamish petition for Amalgamation had been expressed in Deputy Superintendent General Duncan Scott's letter to Indian agent Perry dated October 5, 1923 (CB999), and that that communication had been sufficient (CB1153).

[747] Although the Department's review of Amalgamation was undertaken at the request of the Squamish, not the Burrard, Commissioner McKay did note that Chief George of the Burrard had "strongly opposed amalgamation on behalf of his people and succeeded in preventing their inclusion in the proposed union" (CB1147). The Burrard submitted that, in the course of its review of Amalgamation, the Department should have realized that it had deprived the Burrard of its interest in all the Squamish reserves. However, the Department clearly concluded that it had acted properly when it approved Amalgamation in 1923 and that the approval had been correctly documented. In my view, there was no evidence in this exchange of correspondence which indicated that the Department recognized in 1940 that it had erred in 1923.

[748] The Burrard also addressed events which occurred in 1947 and said:

In 1947, the DIA's solicitor, W.M. Cory was of the opinion that while an Order in Council was not necessary to **confirm** an amalgamation, it was necessary to reallot reserves between or among newly constituted Indian bands (CB1187).

It is submitted that Cory's opinion created an obligation on the part of the DIA to review all amalgamations conducted in the past to ensure that they had been done in accordance with Cory's recommendation; namely surrender and reallocation of the amalgamated reserves by the Governor in Council.

[749] This submission referred to an opinion letter dated May 9, 1947, and written by Mr.

W.M. Cory, who was a solicitor for the Department (CB1187). The Department was apparently considering a proposal to amalgamate two Indian bands, and it asked Mr. Cory to consider whether an order in council would be required. The Burrard submitted that Mr. Cory concluded that an order in council was needed to reallot reserves between or among newly constituted Indian bands. However, I do not agree with this characterization of his opinion. He only referred to one earlier amalgamation which had occurred in 1941 and expressed the view that section 17 of the *Indian Act* provided sufficient authority for amalgamation by Ministerial approval. As I interpret his opinion, his references to a surrender and order in council were presented only as suggestions and not as legal requirements. Further, he nowhere suggested that the procedures adopted for previous amalgamations should be corrected. In addition, whatever Mr. Cory may have believed, there is no evidence that the Department ever concluded that a surrender and order in council were required in amalgamation situations, or that the Department believed that it should have revisited and corrected the procedures used the Amalgamation.

[750] With respect to 1960, the Burrard submitted the following:

On January 14, 1960, Thomas A. Rhodes, Barrister and Solicitor, wrote a letter to Member of Parliament W. Payne, on behalf of Chief Lewis, regarding the "so-called amalgamation" which the Chief maintained was "rigged" and "obtained by fraud" (CB1229-1 and 2). Payne evidently forwarded this letter to the DIA. Private Secretary W.B.M. Best of the DIA responded to the allegations as follows:

The first point dealt with is the allegation that the amalgamation of the Squamish and Mission bands of Indians was "rigged". On July 25 [sic], 1923, the Squamish Indians submitted a petition requesting amalgamation of the various Squamish bands or groups. The petition was signed by the majority of the Squamish Indians, **only one group being opposed to amalgamation, these Indians being occupants of Burrard No. 3 and Inlailawatech [sic] No. 4 Reserves. They were excluded from the amalgamation.** Louie Lewis signed the petition as a member of the Kitsilano group, as did Chief Andrew, then Chief of the same group. Following amalgamation, a fully representative council was elected by the Indians. **There is no record here of any complaint or protest against amalgamation**, although Louie Lewis in [1940] unsuccessfully endeavoured to bring about a splitting up of the Squamish band. Apparently he was not supported by the older Kitsilano Indians. (CB1230 - 1 and 4). [Emphases added.]

It is evident that Best researched the documents on file and read the Burrard's petition setting out, not only their desire to be "exempt" from amalgamation, but also their claim of interest to "all rights on Burrard Inlet". It is submitted that Best ought to have realized the DIA's original breach in failing to address this "complaint or protest against amalgamation" and corrected same.

[751] In this submission, the Burrard dealt with a letter dated January 14, 1960, from Mr. Thomas Rhodes, barrister and solicitor, to Member of Parliament W. Payne. The letter was written on behalf of Squamish Chief Lewis Lewis (CB1229) who purported to represent "the original members of the Kitsilano band". He complained that the Squamish Band members who lived on Mission No. 1 reserve "were dominating and exploiting the Kitsilanos". Chief Lewis further alleged that "the amalgamation by the Mission band with the Kitsilanos was only

obtained by fraud". Private Secretary W.B.M. Best of the Department replied to Mr. Payne's query on this issue and rejected Chief Lewis' claims (CB1230). As the Burrard noted in their submissions, Mr. Best also referred to the Burrard People's opposition to Amalgamation and their exclusion from the process in spite of their assertion of "all rights on Burrard Inlet". However, Mr. Best's letter did not indicate that the Department considered that it had made an error when it approved Amalgamation and excluded the Burrard.

[752] The Burrard submissions regarding events in 1967 stated that:

In 1967, Chiefs Philip Joe and Joe Mathias Joe went to Ottawa to "investigate the terms of amalgamation" (Ex-B50). On cross-examination at trial on February 24, 1998, at page 2 of the transcript, Chief Joe testified as follows:

Q. ... And you were going to make inquiries of the Department of Indian Affairs as to what had happened in amalgamation; is that correct?

A. Yes, and the thing called cut-off lands.

Q. Yes. And you made those inquiries; isn't that correct?

A. Yeah, we thought with some people in the Department of Indian Affairs in relation to what they had in terms of documents regarding amalgamation, in terms of documentation regarding cut-off lands.

Q. And the Department of Indian Affairs was going to look into the matter of amalgamation; is that right?

A. I believe they were. I believe they answered some questions, but I don't believe that they had all the answers. We dealt with it over a number of years.

It is submitted that on each occasion, in 1940, 1950, 1960 and 1967, and throughout the "number of years" thereafter the Crown knew or ought to have known that the Burrard's outstanding claims had never been addressed and that they had been severed from their reserve interests without their informed consent. The Crown had a duty to rectify these breaches of its fiduciary obligations to the Burrard.

[753] As this submission indicated, the Burrard placed some importance on a 1967 trip to Ottawa made by Squamish Chiefs Philip Joe and Joe Mathias. At that time, they had authority from the Squamish Band Council to "investigate on the terms of the amalgamation" (EX B50). Neither the minutes of the band meetings which were in evidence nor Chief Philip Joe's testimony at trial indicated why the Squamish Band wanted information about Amalgamation. Chief Joe did testify that the Department "answered some questions" but that they did not have "all the answers" (transcript, February 24, 1998, p. 3). However, the Court heard no evidence about what questions were asked and answered. In my view, since the Burrard Band was not involved in this investigation, this testimony provided no evidence of conduct by the Department which could constitute equitable fraud against the Burrard.

[754] The Burrard submitted that its situation was analogous to those described in *Guerin* and

Semiahmoo, in that the Department held back material documents and facts which would have disclosed to the Burrard that they had a cause of action against the Crown. However, in my view, *Guerin* and *Semiahmoo* are clearly distinguishable on the basis that (i) the Burrard did not ask for documents; (ii) the Department had no documents in its exclusive possession which would have given the Burrard more information than they already possessed or than was on the public record; and (iii) no documents were ever withheld from the Burrard.

[755] In the above submissions, the Burrard also suggested that, because the Crown ought to have realized that it had misadministered the reserves and deprived the Burrard of their reserve interests in Amalgamation, it committed equitable fraud when it failed to realize its errors and failed to inform the Burrard of the facts giving rise to a cause of action. However, in my view, this submission involves an unwarranted extension of the doctrine of equitable fraud. A defendant who failed in a duty but was unaware of the failure, and did not attempt to conceal the facts which would have alerted the plaintiff to the failure, cannot be guilty of equitable fraud.

Conclusions

[756] Presumably because the Crown's administration of the Reserve for the Squamish was a matter of public record, the Musqueam did not adopt the Burrard submissions as they related to equitable fraud. Accordingly, the Musqueam action for possession of land expired under the Pre-1975 Legislation in 1909, 20 years after their cause of action arose in 1889.

[757] In the case of the Burrard, I have concluded that there was no postponement by reason of equitable fraud and that the Burrard cause of action for possession of land therefore expired on October 5, 1943, 20 years after the Department formally approved Amalgamation.

[758] The limitation periods for both the Musqueam and Burrard actions for possession of land therefore expired before July 1, 1975 and, under section 14(1) of the *Limitation Act*, they remain barred under that act.

C. Action for Possession of Land under the *Limitation Act*

[759] In the further alternative, if the 20-year limitation period which applied to the Burrard Action for possession of land was postponed by the doctrine of equitable fraud until July 1, 1975, the *Limitation Act* would have applied. However, the *Limitation Act* did not contain a provision which was directly analogous to section 16 of the Pre-1975 Legislation. Certain actions for possession of land which were described in section 3(3) of the *Limitation Act* had no limitation period. All other actions for possession of land became subject to the six-year limitation period in section 3(4) of the *Limitation Act*. Consequently, if the *Limitation Act* applied, the Burrard had to show that their action for possession of land fell within one of the exemptions in section 3(3). Otherwise, their action for possession of land fell under section 3(4), and section 14(3) of the *Limitation Act* barred it as of July 1, 1977. Therefore, the next question is whether one of the exceptions in section 3(3) of the *Limitation Act* applied. In this regard, the Burrard made two submissions.

[760] Firstly, they said that their claims fell under s. 3(3)(a) of the *Limitation Act*. It reads:

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

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

.....

It is clear that s. 3(3)(a) applies only if (a) the plaintiff was entitled to possession of the land in question; (b) the plaintiff was dispossessed of the land; and (c) the dispossession occurred in circumstances amounting to trespass. In this regard, the Burrard submitted that their situation was analogous to that in *Leonard v. Gottfriedson* (1980), 21 B.C.L.R. 326 (B.C.S.C.). There, the three conditions in section 3(3)(a) were met because a band member occupied a parcel of reserve land in the band's possession and built a house on the land without authorization. Rae J. ruled that the plaintiff band's action for a declaration that the band member was unlawfully in possession of the land fell under section 3(3)(a).

[761] Secondly, the Burrard said that, by denying the Burrard the use and benefit of the Reserve by not recognizing its reserve interest after 1923, the Crown and/or the Squamish engaged in conduct "amounting to trespass", as described in section 3(3)(a) of the *Limitation Act*. They relied on a number of definitions of trespass. However, in my view, the one taken from Salmond and Heuston, *The Law of Torts*, is the most relevant. It reads (at p. 46):

The trespass to land is committed by entering upon, remaining upon or placing or projecting any object upon land in the possession of another without lawful justification.

[762] This definition suggests that trespass is a physical act. However, in 1923, when the Burrard were allegedly "dispossessed" of their interest in the Reserve, neither the Squamish nor the Crown were in physical possession of any portion of the Reserve. Accordingly, I have concluded that neither of them could have been trespassers at that time.

[763] The Crown said that, because neither the Musqueam nor the Burrard had ever been in possession of the Reserve, neither plaintiff could have been "dispossessed" in the circumstances described in section 3(3)(a). Instead, the Crown characterized both the Burrard and Musqueam claims as claims for the wrongful disposition of lands by a fiduciary, and said that they involved the reallocation of equitable rights rather than the disturbance of a party in possession.

[764] In my view, because the definition of trespass imports the notion of physical trespass, "possession" in this context must mean physical possession. Even if the Burrard, as members of the Squamish "tribe", had the right to use and benefit from the Reserve in 1923, there is no evidence that any Burrard People exercised that right and "possessed" the Reserve in 1923. Indeed, the evidence is clear that no Squamish People (which at that time included the Burrard) lived on or used the Reserve after the 1913 Sale. Since the Burrard have not shown that they were in possession of the Reserve, they could not have been "dispossessed in circumstances amounting to trespass" as required by s. 3(3)(a).

[765] The Musqueam adopted the Burrard submissions[110] and, in addition, relied on the British Columbia Court of Appeal's decision in *McRae v. McRae Estate* (1994), 90 B.C.L.R. (2d) 132. In *McRae*, the court applied s. 3(3)(b) of the *Limitation Act*, which dealt with actions "for possession of land by a life tenant or remainderman". However, the Musqueam did not argue

that the Musqueam Band should be considered a "life tenant or remainderman". They simply stated their view that the facts in the *McRae* case were analogous to their claim for a reserve interest but, on reflection, I have concluded that the *McRae* decision is not based on an analogous situation.

[766] For the reasons given above, I have concluded that the Burrard and Musqueam actions for possession of land are not actions of the kind described in s. 3(3)(a) of the *Limitation Act* and are therefore subject to the six-year limitation period prescribed by s. 3(4) of the act. Because this six-year limitation period is shorter than the 20-year limitation period that applied under the Pre-1975 Legislation, the Burrard and Musqueam causes of action for possession of land became subject to the transitional rules in s. 14(3) of the act and were statute-barred on July 1, 1977.

ARGUMENTS TO CIRCUMVENT SECTION 14(3)

Introduction

[767] Thus far, I have concluded that section 14(3) of the *Limitation Act* barred the Musqueam and Burrard actions for breach of fiduciary duty on July 1, 1977. Further, under the Pre-1975 Legislation, the Musqueam cause of action for possession of land became statute-barred in 1909 and the parallel Burrard cause of action expired in 1943. Those causes of action remained statute-barred pursuant to section 14(1) of the *Limitation Act*. However, these conclusions may not be dispositive of the limitations issue because three submissions were made to demonstrate that section 14 of the *Limitation Act* does not apply in this case. These submissions will be described as the "Counterclaim Argument", the "Guerin Argument" and the "Constitutional Argument". Each will be considered in turn.

The Counterclaim Argument

[768] As mentioned earlier, on June 30, 1977, the Squamish filed their Omnibus Action, which included a claim to the False Creek Reserve. Thereafter, in 1981, the present Squamish Action was filed and the Crown and Squamish agreed that, for limitation purposes, it would be treated as if it had been filed when the Omnibus Action was commenced. This meant that the Crown would not argue that the limitation periods in s. 3(4), s. 8(1) and s. 14(3) of the *Limitation Act* applied to the Squamish in the Squamish Action.

[769] On July 16, 1993, by order of Justice Rouleau (the "Order"), the Burrard and Musqueam were made defendants in the Squamish Action and, pursuant to the Order, the two bands each filed Counterclaims in the Squamish Action (the "Burrard Counterclaim" and the "Musqueam Counterclaim"). The Order also provided that the Squamish, Musqueam and Burrard Actions were to be tried together.

[770] The Burrard submitted that the Order provided the foundation for their submission that both the Burrard Action and the Burrard Counterclaim survived the operation of section 14 of the *Limitation Act*. In this regard, the Burrard relied on s. 4(1)(a) of the *Limitation Act*. Section 4, in its entirety, reads as follows:

4. (1) Where an action to which this or any other Act applies has been commenced, the

lapse of time limited for bringing an action is no bar to

(a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim;

(b) third party proceedings;

(c) claims by way of set off; or

(d) adding or substituting of a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

(2) Subsection (1) does not operate so as to enable one person to make a claim against another person where a claim by that other person

(a) against the first mentioned person; and

(b) relating to or connected with the subject matter of the action,

is or will be defeated by pleading a provision of this Act as a defence by the first mentioned person.

(3) Subsection (1) does not operate so as to interfere with any judicial discretion to refuse relief on grounds unrelated to the lapse of time limited for bringing an action.

(4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, notwithstanding that between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

[771] The Counterclaim Argument was presented in an unusual manner in that only the Burrard addressed it in oral submissions even though both the Musqueam and Burrard pleaded section 4 of the *Limitation Act* against the Squamish, but not against the Crown, in their replies in their respective actions. However, neither band pleaded the Counterclaim Argument in reply to the Squamish statements of defence to their Counterclaims in the Squamish Action. Indeed, no such replies were filed.

[772] The Musqueam and Burrard may have proceeded in this manner because they believed that the Squamish, Musqueam, and Burrard Actions had been joined under Federal Court Rule 1716(2)(b). However, the Order made no reference to that rule and did not say that the actions were joined. Rather, Justice Rouleau described them as separate actions and ordered them tried together. In a later decision on a pre-trial motion, Rouleau J. confirmed that he had not merged the Plaintiffs' actions.[111]

[773] In my view, section 4(1)(a) of the *Limitation Act* applies only to the Counterclaims and yet it was not pleaded in the Squamish Action in which the Counterclaims were made. However, in the circumstances of this case in which the three actions in the Mathias Litigation were tried together, I have concluded that it would be unjust to disregard the Counterclaim Argument since it was pleaded in the Musqueam and Burrard Actions. As well, for this reason, I have not accepted the Squamish submission that the Counterclaim Argument took them by surprise.

[774] In approaching the issue of whether section 4(1) of the *Limitation Act* applies to the Musqueam and Burrard Counterclaims, it was useful to consider the legislative purpose behind section 4. Lambert J.A. addressed the matter in *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273 (C.A.). There he wrote, at pages 298 and 300:

I think that the wording of s. 4(1) and (3) can best be understood in relation to the mischief that was sought to be remedied and the legislative purpose that was to be carried into effect. The mischief was that claims could be brought at the last moment before the limitation period expired and the writ could be served after the limitation period expired, so that legitimate counterclaims and third party proceedings would be prevented, giving the plaintiff a simple, one-sided battle where his claim would be considered, but all claims against him and all claims for contribution would be barred by a limitation period. The legislative purpose in the enactment of s. 4 of the Limitation act was the [sic] prevent that injustice and similar injustices.

...

The legislative purpose must surely have been to permit those proceedings which are brought within the applicable limitations period to go ahead, and to permit all subordinate proceedings which are dependent on the main proceedings to go ahead with them, but to prevent any proceedings which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable.

[775] I have concluded that the Counterclaims were, in reality, independent claims. Even though their status as counterclaims gave them an appearance of dependence on the Squamish Action, they were "bogus" counterclaims in the sense that the Squamish never made claims against the Musqueam and Burrard in the Squamish Action or elsewhere in the Mathias Litigation. Further, in view of the earlier Musqueam and Burrard Actions, which were identical to the Counterclaims, the Counterclaims were not required to avoid "one-sided" litigation.

[776] In my view, the language of section 4(1) has no application to the Burrard and Musqueam Actions. They therefore remained barred under section 14 of the *Limitation Act*. Further, given the unusual circumstances described in the previous paragraph, I have decided to exercise the discretion available to me under section 4(3) of the *Limitation Act* to refuse the Musqueam and Burrard relief from limitation periods for their Counterclaims. Accordingly, they also remain barred under section 14 of the *Limitation Act*.

The *Guerin* Argument

[777] Based on the wording of section 3(4) of the *Limitation Act*, the Burrard said their cause of action in Phase I did not arise until 1984, after the Supreme Court of Canada issued the *Guerin* decision. If this submission were accepted, the transitional provisions in s. 14 of the

Limitation Act would not apply, notwithstanding the fact that the events which gave rise to the cause of action all took place prior to July 1, 1975.

[778] Section 3(4) of the *Limitation Act* provides that:

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

[*My emphasis*]

[779] The Burrard submitted that the words "the date on which the right to do so arose" meant that the limitation period runs from the date on which a new cause of action is recognized by the courts, rather than from the date of the relevant events. They said that, in the context of this case, the six-year limitation period did not begin to run until the Burrard had the right to start an action against the Crown for breach of fiduciary duty in relation to the management, control, and administration of Indian reserves. They said that this right did not come into existence until 1984 when, in *Guerin*, the Supreme Court of Canada first recognized and affirmed the Crown's unique fiduciary obligation. The Burrard argued that, prior to *Guerin*, the courts and legal community considered the Crown's obligations to Indians and Indian lands to have been in the nature of a "political trust".

[780] The Guerin Argument was considered by the Federal Court of Appeal in *Wewayakum*. There, Chief Justice Isaac, in a separate but concurring judgment[112], rejected it in the context of similar wording in section 8(1) of the *Limitation Act* (the 30-year "ultimate" limitation period). His Lordship referred to the case of *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.) and concluded that the words "the right to do so arose" in s. 8(1) meant the date of accrual of the cause of action without reference to the plaintiffs' knowledge of the material facts (para. 43). I agree with this conclusion and have determined that is also applies to section 3(4) of the *Limitation Act*.

[781] The use of the words "the date on which the right to do so arose" in s. 3(4) are clearly intended to deal with causes of action which have arisen in circumstances in which a plaintiff lacked the legal right to sue on the cause of action. For example, in *Bank of Montreal v. Kim* (1990), 68 D.L.R. (4th) 738 (B.C.C.A.), the plaintiff had obtained a judgment against the defendant in Ontario, but could not recover on the judgment in British Columbia until the defendant became a resident of the province and subject to the jurisdiction of its courts. In those circumstances, the wording of section 3(4) meant that the six-year limitation period ran from the date on which the courts of British Columbia acquired jurisdiction.

[782] In my view, the Burrard's right to bring an action against the Crown "arose" in 1923, at the time of Amalgamation. At that time, they had the ability to retain counsel and sue the Crown. Although the Burrard could not have believed that they had a recognized action for breach of fiduciary duty against the Crown until 1984, they could have commenced an action of another kind. For example, in *Guerin* the Musqueam Band sued the Department for breach of trust, not for breach of fiduciary duty. Further, as this case illustrates, plaintiffs are not bound to advance only pre-existing causes of action. Here the plaintiffs took an innovative approach and attempted to extend the law when they alleged breach of fiduciary duty with respect to the

Crown's management of pre-surrender lands, even though that cause of action was not recognized in *Guerin*.

The Constitutional Argument

The Issues

[783] The Musqueam said:

i) That section 39(1) of the *Federal Court Act* ("Section 39(1)") cannot incorporate the *Limitation Act* because it is provincial legislation which is constitutionally inapplicable to Indians and lands reserved for Indians under section 91(24) of the *Constitution Act*.

ii) That Section 39(1) does not evince the clear and plain intention required to extinguish Indian reserve interests.

iii) That, for policy reasons, Section 39(1) should not be read to apply the *Limitation Act* in actions involving Indian lands in the Federal Court when, for constitutional reasons, the *Limitation Act* does not apply in identical actions in the courts in a province.

[784] The Musqueam took the position that the provisions of the *Limitation Act* which bar them from claiming an interest in the Reserve have the practical effect of extinguishing not only their cause of action, but also their interest in the Reserve. The Crown did not take issue with this conclusion and I accept that, if the Musqueam cannot ask a court to rule on their claim to an interest in the Reserve, that interest is effectively lost.

[785] The Burrard adopted the Musqueam submissions. The Squamish indicated that they took no position on the Constitutional Argument.

i) Constitutional Inapplicability of the Limitation Act

The Musqueam Submissions

[786] The Musqueam said that the *Limitation Act* cannot be used to extinguish their interest in the Reserve even though the *Limitation Act* is incorporated by reference by Section 39(1). This was so, they argued, because Section 39(1) was never intended to incorporate provincial limitation legislation, which could not ordinarily apply to Indian lands, in order to extinguish a reserve interest.

[787] Section 39(1) provides that:

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

[788] The Musqueam relied on the decision of Justice Lysyk in *Stoney Creek Indian Band v. British Columbia* (1988), 61 B.C.L.R. (3d) 131 ("*Stoney Creek*")[113], for the proposition that a federal statute cannot incorporate by reference a provincial statute that would otherwise be

constitutionally inapplicable to the subject matter at issue. In *Stoney Creek*, the plaintiff brought an action against Alcan Aluminum Limited and the Province with respect to a road across the band's reserve. In response to the action, the defendant Alcan commenced a summary proceeding for the determination of a question of law and asked the court to decide whether the plaintiff's claim was barred by the *Limitation Act*.

[789] Alcan said that the *Limitation Act* applied to the plaintiff's claim by operation of section 88 of the *Indian Act* ("Section 88"). It reads as follows:

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

[790] Justice Lysyk reviewed the case law and observed that Section 88 made provincial laws of general application applicable to Indians when, for constitutional reasons, they would not apply to Indians of their own force ("*ex proprio vigore*"). However, he noted (at para. 29) that, on its face, Section 88 was limited in that it applied to "Indians" but did not apply to "lands reserved for Indians". He therefore concluded (at para. 36) that Section 88 did not make the *Limitation Act* applicable to cases concerning Indian lands when they were brought in the courts of British Columbia.

The Crown Submissions

[791] The Crown relied on *Wewayakum* and noted that, in that case, the plaintiffs also argued that Section 39(1) can incorporate by reference only "constitutionally applicable provincial law". They said that a provincial limitation period cannot apply to Indian lands because the federal crown has exclusive jurisdiction over such lands. However, Teitelbaum J. concluded that, when Section 39(1) incorporated the *Limitation Act*, it ceased to be constitutionally inapplicable provincial law and became valid federal law. Once that occurred, there was no unconstitutional application of provincial law. Rather, the *Limitation Act* applied as valid federal law to bar and extinguish the plaintiffs' claim. He said (at para. 164):

In my opinion, the specific purpose of s. 39 of the *Federal Court Act* is to expand the application of provincial limitation laws by incorporating such laws by reference and directing this court to apply such limitation not as provincial law, but as valid federal law. In that way, the applicability of provincial limitation laws to matters, which for constitutional purposes fall within the exclusive legislative jurisdiction of Parliament, is resolved by reverential incorporation of such laws as federal law by virtue of s. 39.

In reaching this conclusion, Teitelbaum J. relied, *inter alia*, on the Federal Court of Appeal's decision in *Apsassin* (*Wewayakum*, paras. 165-166).

Discussion

[792] It is my view that Lysyk J.'s conclusions about Section 88 in *Stoney Creek* related only to the scope of the wording of that provision. He did not say, as the Musqueam suggested, that a federal statute could not incorporate by reference a provincial statute that would otherwise be constitutionally inapplicable to the subject matter at issue. Indeed, although Section 39(1) did not apply in *Stoney Creek*, Justice Lysyk appeared to distinguish it from Section 88 when he noted that Section 39(1) specifically adopts provincial limitations laws by reference. His Lordship acknowledged that such legislation is a valid exercise of federal authority (para. 50).

[793] After final argument in this case, Isaac C.J. for the Court of Appeal in *Wewayakum* upheld Justice Teitelbaum's conclusions about the application of Section 39(1) and the *Limitation Act*. In the *Wewayakum* appeal, which took place after Lysyk J.'s decision in *Stoney Creek*, the plaintiff bands argued that Section 39(1), like Section 88, could not incorporate the *Limitation Act* to apply to Indian land. However, the Chief Justice adopted the Crown's factum on limitations at paragraph 24 of his reasons. In that factum, at paragraph 219, the Crown distinguished Section 88 from Section 39(1) in the following manner:

219. It is submitted that s. 39 of the *Federal Court Act*, is clearly distinguishable from s. 88 of the *Indian Act* for the following reasons:

(a) The purpose of s. 88 is to direct, and clarify that otherwise valid Provincial laws of *general application* are also applicable to Indians. There is nothing in s. 88 which *incorporates* such Provincial laws *by reference as valid Federal law*, nor does s. 88 in any way direct that such Provincial laws of general application are to be applied in any way to extinguish or diminish aboriginal rights or claims.

(b) The purpose of s. 39 is entirely different. Section 39 *incorporates by reference as valid Federal law* the Provincial limitation legislation in force in the Province in which a Federal Court action is brought. The very specific purpose of s. 39 is therefore to *avoid any difficulty which might otherwise arise by virtue of the application of provincial laws to a matter within the exclusive legislative jurisdiction of the Federal Parliament*.

(c) Moreover, the only purpose of enacting and incorporating limitation laws is to place finite time limits on a parties right to pursue a legal claim against another party. Section 39 therefore manifests a *clear and plain intention* to apply limitation periods to all actions brought before the Federal Court. In fact s. 39 has *no other* purpose.

(d) The Supreme Court of Canada in *Apsassin (supra)* clearly held that s. 39 of the *Federal Court Act* adopts the limitation legislation in place in the province where the cause of action arose.

[*Emphasis in original*]

Conclusion

[794] In my view, for the reasons given by Justice Teitelbaum and Chief Justice Isaac in *Wewayakum*, the Musqueam submission about the constitutional inapplicability of the *Limitation Act* cannot succeed[114]. Indeed, it is clear that Section 39(1) was enacted in part to cure the constitutional inapplicability of the *Limitation Act* which, but for Section 39(1), would not apply to

claims dealing with lands reserved for Indians.

ii) Clear and Plain Intention

The Musqueam Submissions

[795] The Musqueam said that Section 39(1) does not evince the "clear and plain intention" required to extinguish an Indian band's reserve interest. They argued that the standard for extinguishing a reserve interest, which is the same as the interest conferred by aboriginal title (*Guerin,* p. 379) and which is protected by the surrender provisions in the *Indian Act*, should be at least as high as the standard for extinguishing an aboriginal right that is protected by Section 35. They therefore said that limitation legislation must expressly address the extinguishment of a reserve interest and, in that regard, relied on *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In *Sparrow*, the impugned provision of the *Fisheries Act* and its regulations prohibited everyone from fishing with a net of a certain size. However, the Supreme Court of Canada concluded that the legislation did not evince a clear and plain intention to extinguish the accused's aboriginal right to fish.

[796] This issue was also addressed in *Delgamuukw* when Lamer C.J. concluded that Section 88 of the *Indian Act* did not operate to apply provincial laws of general application to extinguish aboriginal rights, because it did not "evince the requisite clear and plain intention to extinguish aboriginal rights" (para. 183). The Musqueam applied this reasoning to the case at bar and said that, similarly, Section 39(1) does not evince a clear and plain intention to extinguish a reserve interest.

[797] The Musqueam also relied on *Chippewas of Sarnia Band v. Canada (Attorney-General)*, [1999] O.J. No. 1406 (S.C.) (QL) ("*Chippewas*")[115], in which Campbell J. applied the "clear and plain intention" test when deciding whether limitation statutes applied to treaty-protected Indian land. The decision followed a motion for summary judgment brought by the plaintiff band in respect of former Chippewa treaty land in what is now Sarnia, Ontario. The plaintiff alleged that the surrender of the land had been taken without lawful authority, and it sought a declaration that, *inter alia*, the Letters Patent approving the post-surrender sale of the reserve were void *ab initio*. Campbell J. granted the plaintiff's motion and, in so doing, rejected a variety of limitation defences.

[798] In particular, he rejected the argument that Section 88 operated to apply the province of Ontario's limitation legislation. His Lordship cited *Stoney Creek* with approval, and noted that Section 88 applied only to "Indians" and not to "lands reserved for Indians". He also observed that the Chippewa lands in Sarnia were treaty lands, and that Section 88 stated that it was subject to the terms of any treaty (paras 484-488). Finally, Campbell J. concluded that "clear and plain Parliamentary intent" was necessary to extinguish aboriginal rights, and that Section 88 did not evince an such intention (para 489).

[799] Some of the defendants in *Chippewas* (but not the Crown) argued that section 32 of the *Crown Liability and Proceedings Act*, S.C. 1990, c. 8 ("Section 32") incorporated Ontario's limitation legislation by reference. This is of importance because Section 32 is similar to Section

39(1). Section 32 says:

Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

Although His Lordship did not apply Section 32, because only the Crown is entitled to rely on the provision, he did say that it lacked the "clear and plain Parliamentary intention" to extinguish aboriginal title and, presumably he would have reached the same conclusion about Section 39 (1).[116]

[800] The defendants in *Chippewas* also raised limitation defences contained in two pre-Confederation Ontario limitation statutes[117], and Campbell J. applied the "clear and plain intention" test to them as well. I will summarize His Lordship's reasons on this point, because again it is clear that they could also apply to Section 39(1).

[801] Justice Campbell concluded that the clear and plain intention test must be strictly applied to statutes which purport to extinguish Indian title to land, and he characterized that title as a "special subset of aboriginal rights". He said (at para. 545):

To extinguish aboriginal land title, the clearest intention is required. Parliament cannot extinguish aboriginal title by accident or by incidental effect. **Parliament can only extinguish aboriginal title if it clearly wants to do so and clearly evidences that intention in plain language in the legislation itself**.

[*My emphasis*]

[802] He also said that when aboriginal title is protected by treaty it enjoys an even greater protection from extinguishment by federal statute, because the existence of a treaty engages the honour of the Crown (paras. 547, 558), and he concluded that neither pre-Confederation limitation statute expressed the clear and plain intention required to extinguish treaty-protected aboriginal title[118]. He said (at para. 594):

As noted above, to apply the preconfederation 1834 and 1859 limitations statutes to bar this claim would be to extinguish the unceded unsurrendered treaty-protected aboriginal title of the Chippewas of Sarnia band in the disputed land. Such statutes may extinguish aboriginal rights if a clear and plain intent to do so is demonstrated, and for the purposes of argument it will be assumed, contrary to the conclusion reached above, that the same is true of treaty rights. **As noted above, such intent cannot be lightly implied. Although it may arguably be proven by necessary implication, it must be proven strictly. The clearest intent must be demonstrated. Although the words "extinguish aboriginal and treaty rights" need not be used, there must be some plain words in the statute that demonstrate that Parliament (in this case its 1834 and 1859 equivalents) specifically intended to address aboriginal and treaty rights.**

[*My emphasis*]

[803] Justice Campbell added that, because Indian title is *sui generis* and not subject to general property legislation, statutes which purport to extinguish aboriginal title must address this issue expressly. Campbell J. wrote (at para. 595):

Do the 1834 and 1859 preconfederation limitations statutes evidence the specific intent necessary to extinguish Indian title in the disputed land and to violate Treaty 29? The question can be answered very briefly. No such intention is expressed in either statute...**The words "Indian" and "reserve" and "treaty" appear nowhere in the statute. In the absence of any statutory reference to Indians, or lands reserved for the Indians, or treaties, one cannot find in the statute any clear intention to abrogate, abridge or infringe any Indian land right or treaty right.**

[*My emphasis*]

The Crown Submissions

[804] The Crown argued that, because Section 39(1) expressly applies to all causes of action before the Federal Court, and because questions relating to reserve interests are within the jurisdiction of the Federal Court, Section 39(1) must have been intended to apply to claims involving Indian reserve land. The Crown said that, in these circumstances, Section 39(1) does evince a clear and plain intention to extinguish Indian reserve claims on the expiry of the applicable limitation periods.

[805] The Crown also submitted that, in *Apsassin* in the Supreme Court of Canada, McLachlin J. rejected constitutional arguments which are identical to those advanced by the Musqueam. Her Ladyship said (at para. 122):

Other arguments, neither presented nor considered below, were presented by the Bands and interveners in support of relaxing or not applying the limitation periods prescribed by the *Limitation Act* of British Columbia. I find them unpersuasive in the context of this case and consider them no further.[119]

The Crown said that the fact that McLachlin J. described the other limitation arguments as "unpersuasive" indicated that she both considered and rejected them. Further, even though she did not give reasons for her conclusions, she must have rejected them because she could not have applied the 30-year limitation period (in paras. 119 and 122) without doing so.

[806] Because Her Ladyship's reasons did not describe the other limitation arguments made by the appellants and the intervenors, counsel for the Crown furnished the Court with excerpts from the facta filed in the Supreme Court. They reveal that those parties made the following arguments:

- s. 38(1) [now Section 39(1)] of the *Federal Court Act* lacked the clear and plain intention to extinguish the right and title of a potential claimant (argued by the intervenors The Musqueam Nation and Erminiskin Tribal Council; the intervenor Assembly of First Nations; the intervenors Chief Bosum et al.; and the intervenors Chief Terry Buffalo and Samson Indian Band and

Nation).

- the case law surrounding the interpretation and applicability of Section 88 should be used to determine whether the *Limitation Act* should apply by operation of [Section 39(1)] (argued by the intervenors The Musqueam Nation and Erminiskin Tribal Council).

- provincial laws, even as referentially incorporated federal law, cannot infringe upon matters which are in pith and substance within federal jurisdiction (argued by the intervenors Chief Bosum et al.).

Discussion

[807] The case law does not universally support the principle that a federal limitation statute must express a clear and plain intention to extinguish Indian title in non-treaty reserve land in the circumstances in this case, in which the extinguishment occurred on the expiry of all limitation periods long before Section 35 came into force.

[808] As noted earlier, the Court of Appeal's decision in *Wewayakum* was released after final argument in the Mathias Litigation. In his decision, Chief Justice Isaac rejected the plaintiffs' contention that Section 39(1) lacked the clear and plain intention to "extinguish, erode, eliminate or limit" their right to a reserve interest (para 29)[120]. His Lordship concluded that the "clear and plain intention" test has no application in cases in which the Indians' claims are not rooted in any aboriginal or treaty right and therefore not subject to s. 35 of the *Charter*.

[809] The Chief Justice adopted the Crown's factum, which provided three reasons for the inapplicability of the "clear and plain intention" test in *Wewayakum*. It read as follows:

220. Moreover the *"clear and plain"* test applied in *Delgamuukw* with respect to the extinguishment of aboriginal rights arises only in connection with the extinguishment of *constitutionally protected aboriginal rights*. For the following three reasons the issues on this Appeal clearly do not fall within that test:

(a) The Bands on this Appeal have not proved (or even claimed) any aboriginal right or title to the reserves in issue. The Trial Judge found as a fact that neither Band had any claims of an *"aboriginal entitlement"* to the reserves in question. [Reasons; A.B. 31, p. 5426-7 & 5536] There has been no ground of appeal raised by the Appellant Bands with respect to this finding. Therefore there is no question as to the extinguishment of an *"aboriginal right or title"*.

(b) The constitutional protection of aboriginal rights arises only from the enactment of s. 35 of the *Constitution Act, 1982*. The reserves at issue in this Appeal and the claims of the Bands to these reserves all date back to times long before the enactment of s. 35 of the *Constitution Act* in 1982.

(c) In the alternative, even if the Bands had asserted an aboriginal right, the mere assertion of such a right does not attract the protection of s. 35. Section 35 only operates to protect a *proven and existing aboriginal right*. The application of a limitation period, barring the prosecution of an

action due to excessive delay does not *"extinguish"* any proven or existing aboriginal right. The limitation period, simply creates a procedural bar to the prosecution of a legal action. A limitation period prohibits the prosecution of certain stale (and unproven) claims; it does not *"extinguish"* any established and proven aboriginal rights.

[*Emphasis in original*]

[810] However, in *Chippewas*, Campbell J. concluded that none of the limitation statutes before him evinced the clear and plain intention required to extinguish Indian title to land, and he appears to have concluded that reserve interests had to be expressly mentioned. However, *Chippewas* may be distinguishable from the case at bar because Campbell J. placed significant emphasis on the fact that the disputed land in *Stoney Creek* was protected by a treaty with the Crown.

[811] In dealing with this issue, I have also considered statements of McLachlin J. in *Van der Peet*, at para. 286. There, she said:

For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow, supra*, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion,* 476 U.S. 734 (1986), at pp. 379-80: "what is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

[812] Section 39(1) first appeared as section 18 of the *Supreme and Exchequer Courts Act* of 1877.[121] No evidence was led at trial to indicate whether, at that time, the Crown "actually considered" that Section 39(1) would (for practical purposes) extinguish Indians' claims to interests in non-treaty reserves. Accordingly, if a clear and plain intention is required in this case, and if it also requires the kind of "clear evidence" described by McLachlin J., that standard has not been met.

[813] On the other hand, based on the facta in *Apsassin* described above, it also appears that the Musqueam argument concerning the lack of the requisite clear and plain intention in Section 39(1) was made in the Supreme Court and rejected in a unanimous judgment, albeit without reasons.

[814] Finally, in *Delgamuukw*, at para. 180, the Supreme Court of Canada said, "While the requirement of clear and plain intent does not, perhaps, require that the Crown 'use language which refers expressly to its extinguishment of aboriginal rights' (*Gladstone*, [[1996] 2 S.C.R. 723] at para. 34), the standard is still quite high".

Conclusions

[815] Limitation legislation is enacted in part to recognize that, eventually, the evidence needed to advance or resist a claim becomes distorted, or no longer exists. In these circumstances, courts cannot be confident that they are dealing with matters in a responsible and just way, and limitation legislation removes such cases from their jurisdiction. Given this

important objective, I am of the view that it would be wrong to apply rules which have been developed to deal with the extinguishment of constitutional and treaty rights to defeat limitation legislation in a case in which no such rights were asserted. I am also of the view that the nature and purpose of Section 39(1) creates the inescapable and necessary inference that Parliament intended that, on the expiry of limitation periods, all causes of action in Federal Court, including those involving Indian land, would be extinguished.

[816] Against this background, I have reached the following conclusions:

- The law is not settled on the question of whether, in situations such as the present case that do not involve Section 35 or a treaty, a federal limitation law must express a clear and plain intention to extinguish an Indian reserve interest.

- If an expression of clear and plain intention is a requirement, the law is also unsettled about how it is to be expressed and demonstrated. However, it is my view that, in cases of this kind, that expression can be by necessary implication from the context and does not require language which actually mentions "reserve interests" and "extinguishment", or actual proof that those matters were considered by the Crown in 1877 when Section 39(1) was first enacted.

- Finally, Section 39(1) does express a clear and plain intention to extinguish reserve interests, even though the words "reserve interest" and "extinguishment" are not used, because it is valid limitation legislation which applies to causes of action dealing with Indian lands.

iii) The Legislative Anomaly

[817] The Musqueam said that the purpose of Section 39(1) is to ensure that identical limitation periods apply in comparable proceedings in the Federal Court and the courts of the provinces. In this regard, they relied on the decision of Marceau J.A. in *Apsassin*, in which he observed that a uniform application of limitations legislation is essential in areas where the Federal Court and the courts in the provinces have concurrent jurisdiction (pp. 84-85).

[818] Prior to *Stoney Creek*, it was assumed that Section 88 extended provincial laws of general application (including limitation legislation) to both "Indians" and "lands reserved for Indians". On this basis, the *Limitation Act*, in conjunction with Section 88, was applied to Indian reserve claims brought in the British Columbia courts. However, Justice Lysyk's conclusion in *Stoney Creek* created a situation in which plaintiffs with claims to Indian lands may face limitation defences in the Federal Court (because of Section 39(1)) which are no longer available to defendants in the courts of British Columbia. This situation will be described as the "Legislative Anomaly".

[819] In *Stoney Creek*, Justice Lysyk recognized that his decision had created the Legislative Anomaly, but said (at para. 50):

While counsel for the defendants may have identified an apparent anomaly, what inference is to be drawn as to Parliament's intentions? It does not follow that it is for the courts, rather than Parliament, to close the legislative gap. Indeed, having regard to the principles of statutory and constitutional interpretation pertinent in this area of the law, and to which I shall turn shortly, it can be persuasively argued that apparent anomalies or discrepancies in the law ought to be

resolved in a manner that is not hostile to, but which maintains Indian rights.

[820] The Musqueam argued that, based on Justice Lysyk's observation, I should resolve the Legislative Anomaly by interpreting Section 39(1) so that it does not incorporate any provisions in the *Limitation Act* which would have the effect of extinguishing Indian title in reserve land. This remedy, the Musqueam said, would be consistent with the policy or legislative purpose behind Section 39(1), which is to ensure the uniform application of limitations legislation in the Federal Court and the courts of British Columbia and the other provinces.

[821] However, I am not persuaded that the Legislative Anomaly should be solved by reading Section 39(1) as it if applied to Indians but not to Indian lands. In my view, this would amount to a misreading of the section because it clearly applies the *Limitation Act* to all proceedings in the Federal Court, and those proceedings include actions which involve Indian lands. In my view, a legislative amendment, rather than a misreading of Section 39(1), is the proper solution.

The Fiduciary Duty and Ultimate Limitation Arguments and Laches and Acquiescence

[822] I have decided not to address the remaining limitation issues. To this point, based on the Transitional Argument, I have concluded, in the alternative to my decision on the merits, that the Musqueam and Burrard Actions and Counterclaims have been statute-barred for many years. It now seems that to write in the further alternative would be contrary to principles of judicial economy. As well, it is my view that a consideration of *Charter* issues in what would be the "double alternative" is not appropriate. I have reached this conclusion based on a statement made by Estey J. on behalf of the Supreme Court of Canada in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at p. 383. There, he said:

The development of the *Charter*, as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new *Charter* provisions, none should be undertaken.

PART IX - COSTS

INTRODUCTION

[823] On March 15 and 16, 2001, the Crown and the Squamish argued their motions for awards of costs and for directions to the assessment officer (the "Assessor"). The motions were based primarily on their success in Phase I, as described in the Reasons for Judgment for the First Phase of the Trial, which were dated October 5, 2000. Those reasons have been re-issued and now appear as Parts I to V(A) in these Final Reasons for Judgment.

[824] As described in detail in Part I of these Reasons, Phase I of the trial dealt with the Musqueam and Burrard claims to entitlement to an interest in the Reserve. In contrast, two subjects were considered in Phase II. The first was the Squamish claim against the Crown for its alleged mismanagement of the Reserve and the second was limitations. After the Settlement, limitations remained the only outstanding issue in Phase II.

[825] The Squamish and the Crown both sought awards of costs against the Musqueam and Burrard. However, since their requests were different, they will be described and discussed separately. As conclusions are reached, directions will be given to the Assessor. These will appear in bold type.

SQUAMISH LEGAL COSTS

[826] The Squamish asked for an order awarding them increased legal costs for all of Phase I and for five days of trial during Phase II. To that end, they suggested the following as alternative approaches:

a) An award of legal costs as a percentage of actual costs that the Assessor concludes are reasonable. The percentage claimed was 50%; or

b) An award of legal costs based on the range of units in Tariff B of the *Federal Court Rules, 1998*, SOR/98-106, under Column V, with certain further increases, and an award of legal costs for written examinations for discovery and meetings of counsel, which are items not mentioned in Tariff B.

The Squamish also asked for a direction that the Musqueam and Burrard be made jointly and severally liable for all costs payable to the Squamish.

PERCENTAGE OF ACTUAL COSTS

[827] Under this approach, the Squamish asked for an award of 50% of reasonable actual costs. Those actual legal costs for Phase I totalled $2,278,199, according to paragraph 149 of the affidavit of Harry A. Slade, Q.C., which was sworn on March 7, 2001 and filed for this motion (the "Slade Affidavit"). The Squamish acknowledged that, despite the references to the *Federal Court Rules* in their Notice of Motion, their request for a percentage of actual costs was not based on Tariff B or on a specific costs rule, but was a matter for the Court's discretion under Rule 400(1).

[828] The Squamish conceded that actual costs have the same monetary value as solicitor-client costs in the sense that an award of actual costs would fully indemnify the Squamish for the fees it has paid to its counsel. However, an actual award of costs, as the Squamish use the term, is not founded on and does not in any way suggest "scandalous" or other "improper" behaviour by the Musqueam or Burrard either before or during the trial. No such conduct is alleged.

[829] The Squamish took the position that an award of 50% of reasonable actual costs would be in keeping with the philosophy behind the 1995 revisions to Tariff B. In that regard, they pointed to the Explanatory Note (the "1995 Explanatory Note") which accompanied, but did not form part of, the revised Rules in 1995[122] . It read:

Tariff B has been revised to reflect a general philosophy that party and party costs should bear a reasonable relationship to the actual costs of litigation,and at the same time to preserve the discretion of the Court and that of the taxing officer as such discretions are provided in Rules 344 and 346.

Tariff B is designed to provide a vehicle for the exercise of both levels of discretion. The Court, in exercising its power to make an order as to costs, may direct that taxation occur under a particular column or combination of columns of that Tariff. Thereafter, the taxing officer allocates a number of units from the range set out in the applicable column of a particular item. The units so allocated are then to be totalled and multiplied by the current unit value to provide an overall quantification of fees.

The numbers of units associated with a particular Tariff item have been assigned on one of two bases. Most Tariff items contemplate a "block fee" as the basis for a taxable service, regardless of the actual time involved in rendering the service. Where, however, actual time can be measured objectively (for example, appearance on a motion or attendance at trial), the Tariff provides that the unit value allocated by the taxing officer be based on such measurable time. It is recognized that the allocation of a certain number of units for the actual time spent in court does not represent an "hourly rate" in a solicitor/client context, as for any Court appearance there will be a considerable amount of time involved in briefing, preparation and waiting, which is not otherwise compensated for in the Tariff. This cost is subsumed in the "taxable time" based Tariff item.

[*My emphasis*]

[830] The Squamish said that, since the Federal Court of Canada's general philosophy is that party and party costs should bear a reasonable relationship to the actual costs of litigation, an assessment of party and party costs under Tariff B should produce this result. However, they noted that (on the assumption that their legal costs are reasonable) an Assessor who uses the maximum number of units allowed under Column III in Tariff B (using a unit value of $100[123]) would award the Squamish only 6% of their actual costs. Similarly, an award based on the maximum number of units allowed under Column V would result in an award of only 13% of actual costs.

[831] Accordingly, since Tariff B does not produce a costs award which is in line with the Court's philosophy that party and party costs should bear a reasonable relationship to actual costs, the Squamish said that they should be entitled to an award which is entirely outside Tariff B.

[832] The Squamish relied on two cases in this court to support their request for 50% of reasonable actual costs. One was *Sanmammas Compania Maritima S.A. et al. v. Ship Netuno et al.* (1995), 102 F.T.R. 172 (F.C.T.D.), in which Madam Justice Tremblay-Lamer stated:

The more current rule brings a new approach to taxing costs. Under the old regime, the jurisprudence was clear; the parties could not expect to recover all their costs under the tariff relating to party and party costs. However, under the new rule **the general philosophy is that party and party costs should bear a reasonable relationship to the actual costs of the litigation.**

This new tendency is to ensure that parties will be able to recover close to actual costs related to the litigation, always under the scrutiny of the court's discretion.

[*Emphasis in original*]

[833] The other case was *Apotex Inc. v. Syntex Pharmaceuticals International* (1999), 2 C.P.R. (4th) 368 (F.C.T.D.), in which Reed J. awarded costs, at the conclusion of a trial, to the successful plaintiff. Her Ladyship acknowledged that the motion for costs should be decided in accordance with the spirit of the 1995 amendments to the cost provisions of the *Federal Court Rules*, C.R.C. 1978, c. 663 (SOR/95-282) [now *Federal Court Rules, 1998*, SOR/98-106]. She relied on the passage from *Sanmammas*, quoted above, and also said that:

The purpose of awarding costs to a successful party has two aspects: to discourage unmeritorious litigation and to partially indemnify the successful party for the costs incurred defending or prosecuting an action as the case may be.

While full compensation may never have been the objective of costs awards, in recent years, the Tariff in the *Federal Court Rules*, as well as those of other jurisdictions, led to awards that were ridiculously low.

The 1995 amendments to the *Federal Court Rules* introduced a new flexible scale of costs and conferred on the Court a broad discretion to direct additional costs beyond the amounts described in the Tariff in appropriate cases.**The *Federal Court Rules* have been described as now reflecting the philosophy that an award of costs *should reasonably reflect the actual costs incurred in the conduct of the litigation*.**

[*My emphasis*]

[834] Apotex sought an increase above Column III in Tariff B, which is the scale used for the assessment of costs unless the Court orders otherwise. Justice Reed noted that Column III is to be used for cases of average complexity and was intended to cover approximately 50% of a modest bill. Against this background, Apotex sought one of the following orders for increased costs above Column III:

- solicitor-client costs
- 75% of solicitor-client costs
- the maximum rates in Column V in Tariff B plus 20%
- the maximum rate in Column V

Apotex also sought a direction that allowable costs were to include fees for two senior and one junior counsel. However, in spite of these broad claims, Reed J. stayed within the Tariff and ordered costs increased to the maximum allowable under Column V. She only moved outside Tariff B when she awarded costs for a second senior counsel.

CONCLUSION RE: PERCENTAGE OF ACTUAL COSTS

[835] I am not prepared to award the Squamish 50% of their reasonable actual costs. In my view, the costs rules, which include Tariff B, are intended to provide parties with a fairly reliable

indication of the costs which may be awarded against them if they are unsuccessful at trial. Granting the order sought by the Squamish would involve a wholesale abandonment of Tariff B and would defeat this objective. As well, it is my view that the Squamish have not justified their request based on the 1995 Explanatory Note. I have concluded that they have missed its true meaning. It says that the philosophy that party and party costs should bear a reasonable relationship to the actual costs of litigation is already reflected in the revisions to Tariff B. Accordingly, it is my opinion that the 1995 Explanatory Note means that a successful party's recovery of party and party costs under Column III of Tariff B remains the normal rule.

[836] In reaching the conclusion that, even if costs are increased, they are still intended to provide recovery on a party and party basis unless misconduct is alleged, I have relied on a decision of MacKay J. in *The Wellcome Foundation Limited et al. v. Apotex Inc.* , 001 FCT 174. In that case, His Lordship rejected the proposition that full or actual costs could be awarded, even for particular items, without a finding of "scandalous" conduct. In that regard, he said (at para. 5):

The defendant urges that since the Court had declined to award costs on a solicitor-client basis, it could not consider in special directions the award of costs on a level comparable to that basis, beyond the levels set out in Tariff B. Here the plaintiffs request special directions which would provide for costs to be paid in full in respect of certain of the activities of plaintiff' counsel. I do not agree that there is any general principle as the defendant suggests. If the Court were persuaded that costs on the level of solicitor-client costs were warranted in relation to any aspect of or service rendered at the hearing, in my opinion, the discretion under Rule 400 would permit such an award, but the exercise of that discretion would require explanation of the same sort as that ordinarily required for solicitor-client costs to be awarded for the trial or reference as a whole.

INCREASES WITHIN AND BEYOND TARIFF B

[837] In the alternative to an award of 50% of reasonable actual legal costs, the Squamish have claimed awards of legal costs within and beyond the range of units set out in Tariff B under Column V (the "Squamish Proposal"). The Squamish Proposal is found as Appendix "C" to the "Submissions of the Squamish Nation Application for Costs", dated March 15, 2001, and filed for the costs motion.

THE JUSTIFICATION FOR INCREASED COSTS

[838] Before turning to the details of the Squamish Proposal, I will examine the features of Phase I of the Mathias Litigation, which the Squamish said justify an award of increased costs. The Squamish were wholly successful in Phase I but, had they not succeeded, they faced the prospect of significant adverse damage awards and the loss of all or part of the interest they claimed in the Reserve. Counsel expected that the Reserve would be valued at between $150 and $250 million.

[839] The original Squamish Action concerned only the Crown's administration of the Reserve. The Musqueam and Burrard Actions greatly expanded the litigation because they

raised new and fundamental questions concerning which band was entitled to an interest in the Reserve. Both the Musqueam and Burrard initially pleaded entitlement based on aboriginal title and on an error made by the JIRC in its reserve creation and allocation process. Both bands also said that Musqueam and Burrard People had resided on the Reserve. In addition, the Burrard asserted entitlement based on their failure to consent to the loss of their alleged "in common" interest in the Reserve at the time of the Amalgamation in 1923. By the time final argument was made in Phase I, it had become apparent that Amalgamation was the sole basis for the Burrard case. However, that fact would not have been apparent to the Squamish at an earlier time.

[840] The Musqueam and Burrard claims to entitlement to an interest in the Reserve gave rise, *inter alia*, to the legal issues and related questions of fact described below. Some of the issues were entirely new and, to the extent that other issues had been raised in earlier cases, new arguments were made about how they should be treated in this case.

i) Aboriginal Title and Actual Occupation of the Reserve

- Who were the historical residents or users of Burrard Inlet and the False Creek Site?
- What were the "tribal" affiliations of those people?
- Was the Reserve in Musqueam or Burrard traditional territory?
- Was the use exclusive or shared? Did Coast Salish culture and traditional practices shed light on this issue?
- How did the test for proving aboriginal title in *Baker Lake v. Canada,* [1980] 1 F.C. 518 (T.D.), apply to the False Creek Site?

ii) Errors in Reserve Allocation

- How did the JIRC operate?
- Did the JIRC make an error when it allocated the Reserve to the Squamish?
- What law applied to the reserve creation process both before and after Confederation (ie. *Terms of Union, Indian Act* and *Land Act*)?
- Did a fiduciary duty apply to the administration of pre-surrender land?

iii) Misadministration and Amalgamation

- What was the legal effect of the JIRC's allocation of reserves to the Squamish? Did it grant an interest in common?
- Were the Squamish reserves properly administered?
- Was Amalgamation properly handled?

iv) Remedies

- What would be the liability of the Squamish and Crown if the Musqueam and Burrard were wrongfully deprived of an interest in the Reserve?

v) Limitations

- Were the Burrard and Musqueam claims statute-barred?

[841] Against this background, the Slade Affidavit showed that the preparation for Phase I by all parties involved:

- 24 days of oral examination for discovery
- extensive written examination for discovery
- the search for and production of 20,000 documents
- the reduction of those productions by agreement into the Common Book of approximately 1,603 Phase I documents taking up 41 binders in hard copy and having a total of more than 20,000 pages
- numerous pre-trial conferences
- 11 meetings of counsel to discuss procedures and agreements
- 7 pre-trial motions
- 3 occasions when evidence was taken on commission

[842] As well, Phase I involved:

- 65 days of trial
- 19 witnesses (7 experts)
- 1,687 pages of written argument (the Squamish filed 363 pages)
- 165 exhibits in addition to the Common Book
- Reasons for Judgment for the First Phase of the Trial, totalling 334 pages

[843] In Phase I, the Musqueam called three expert and three lay witnesses, and the Burrard called no experts and two lay witnesses. The Crown led no evidence but cross-examined all the witnesses. Four experts and one lay witness testified for the Squamish, and they also relied on the three witnesses whose evidence had been taken on commission before trial.

[844] To summarize, many of the issues were new and important, the stakes were high and,

for some items, the volume of work was enormous. I have therefore concluded that, for some items, increased costs are justified. Increased costs will be awarded by (i) awarding costs under Column V of Tariff B instead of Column III; (ii) awarding costs for items in Tariff B at levels outside Tariff B; and (iii) awarding costs for items which are not included in Tariff B, such as written examinations for discovery and meetings of counsel.

THE SQUAMISH PROPOSAL - PHASE I LEGAL COSTS

A. *Originating Documents and Other Pleadings*

[845] Item 1. Preparation and filing of originating documents, other than a notice of appeal to the Court of Appeal, and application records.

The Squamish Proposal asked for a direction that costs for this item be assessed in the range of units under Column V, multiplied by four to reflect the number of counsel. However, because the original Squamish Action was only against the Crown, and because the Squamish made no claims against the Musqueam and Burrard, **I direct that there will be no costs for this item.**

[846] Item 2. Preparation and filing of all defences, replies, counter-claims or respondents' records and materials.

The Squamish Proposal asked for a direction that costs for this item be assessed in the range of units under Column V, multiplied by four for four counsel. **However, I direct that costs may be assessed for this item for one counsel in the range of units under Column III.**

[847] Item 3. Amendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party.

9 eligible amendments

The Squamish Proposal asked for a direction that costs for this item be assessed in the range of units under Column V, multiplied by four for four counsel. **However, I direct that costs may be assessed for this item for one counsel in the range of units under Column III for each eligible amendment.**

B. *Motions*

[848] Item 4. Preparation and filing of an uncontested motion, including all materials.

2 Motions

Item 5. Preparation and filing of a contested motion, including materials and responses thereto.

5 Motions

The Motions in this matter were not unduly complex. However, the Squamish Proposal again asked for costs in the range of units under Column V, multiplied by four for four counsel. **I hereby direct that these items are to be assessed for one counsel in the range of units under Column III.**

[849] Item 6. Appearance on a motion, per hour

7 Motions @ 2 hours = 14 hours

I hereby direct that the Squamish may recover costs for one counsel for each motion on an hourly basis. Recovery shall be in the range of units under Column III.

C. *Discovery and Examinations*

[850] Item 7. Discovery of documents, including listing, affidavit and inspection.

The Squamish Proposal asked for 2000 to 6000 units for this item. In my view, this was an extraordinary item for which an increase far beyond the 5 to 11 units under Column V in Tariff B is justified. **Accordingly, I direct that a range of 1000 to 3000 units be used for the assessment of this item in the special circumstances of this case.**

[851] Item 8. Preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution.

2 Examinations

The Squamish Proposal asked for costs for four counsel in the range of units under Column V. However, I have determined that, while an increase within Tariff B is justified, this request is reasonable for only one counsel. **Accordingly, I direct that this item be assessed for one counsel in the range of units under Column V.**

[852] Item 9. Attending on examinations, per hour.

12 days @ 4 hours = 48 hours

The Squamish Proposal asked for costs for two counsel on examinations in the range of units under Column V. **However, I direct that costs may be recovered on an hourly basis for only one counsel in the range of units under Column III.**

D. *Pre-Trial and Pre-Hearing Procedures*

[853] Item 10. Preparation for conference, including memorandum.

18 conferences

The Squamish Proposal asked that costs be assessed for four counsel in the range of units under Column V. **However, I direct that the assessment is to be based on one counsel in the range of units under Column III.**

[854] Item 11. Attendance at conference, per hour.

18 conferences @ 2 hours = 36 hours

Again, the Squamish Proposal sought costs for two counsel in the range of units available under Column V. **However, I direct that the award should be for only one counsel on an hourly basis in the range of units under Column III.**

[855] Item 13. Counsel fee:

(a) preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff; and

(b) preparation for trial or hearing, per day in Court after the first day.

Phase I: 64 days

Commission: 2 days

Total: 66 days

Under this heading, the Squamish Proposal asked for an award in the range of units under Column V for four counsel. I have concluded that an assessment under Column V is appropriate due to the scope and complexity of new issues raised by the Musqueam and Burrard. However, it should be restricted to one first and one second counsel. **I therefore direct that the costs of preparation be assessed in the range of units under Column V for one first and one second counsel.**

E. *Trial or Hearing*

[856] Item 14. Counsel fee:

(a) to first counsel, per hour in Court; and

66 days x 4 hours = 264 hours

2 first counsel

(b) to second counsel, where Court directs,

50% of the amount calculated under paragraph (a).

2 second counsel at 50% of calculation for first counsel

Under this heading, the Squamish Proposal asked for costs in the range of units under Column V for two first and two second counsel. However, in my view, this request was excessive. I do not think that the Musqueam and Burrard should be responsible for the costs of the entire

Squamish counsel team. **Accordingly, I direct the Assessor to award costs on an hourly basis for one full first counsel and 50% of a first counsel (for a total of 1½ first counsel) together with one second counsel in the range of units under Column V.**

[857] Item 15. Preparation and filing of written argument, where requested or permitted by the Court.

The Squamish Proposal sought an increase off Tariff B for this item and asked for an award of costs based on 300 to 800 units. In my view, this is also an item for which an increase beyond Tariff B is justified. The written argument was extensive and dealt with all the Phase I issues. **Accordingly, I direct the Assessor to award these costs in the range of 300 to 500 units.**

[858] Item 28. Services in a province by students-at-law, law clerks or paralegals that are of a nature that the law society of that province authorizes them to render, 50% of the amount that would be calculated for a solicitor.

I direct that costs may be awarded under this item for the reasonable services of students.

F. *Written Examinations for Discovery and Meetings of Counsel*

[859] The Squamish Proposal also sought costs for these two items which are not in Tariff B. The Squamish asked for 500 units for written discoveries. They were extensive and the provision of answers required complex work in new areas. **Accordingly, I direct that a total of 400 units be awarded for written examinations for discovery.**

[860] The meetings of counsel were important because they produced a number of agreements which moved the pre-trial and trial proceedings forward in an efficient manner. These included agreements on the scope of written discovery and on the Common Book of Documents. Counsel for the Musqueam argued that no party should be penalized in costs for productive, co-operative conduct. I agree and therefore **I direct that a total of only three units are to be awarded for each meeting of counsel attended by Squamish counsel.**

THE SQUAMISH PROPOSAL - PHASE II LEGAL COSTS

[861] The Squamish Proposal asked for counsel fees for four counsel for five days in Phase II. In my view, this request was excessive but, because the Burrard re-argued their Phase I case for approximately one day during Phase II, they are liable for some costs. **I therefore direct that the Squamish be awarded against the Burrard three units for one counsel for one day in Phase II.** However, since the Musqueam did not oppose the Squamish in Phase II, **I direct that no legal costs are to be awarded against the Musqueam in Phase II.**

[862] On the matter of limitations, which was considered in Phase II, the Squamish did not take issue with the Musqueam Constitutional Argument or with the Burrard Charter argument. Most of the Squamish submissions regarding limitations were in response to the Crown. **I therefore direct that no costs are to be awarded against the Musqueam or Burrard in respect of the arguments on limitations in Phase II.**

[863] **I also direct that all the Squamish Phase I and II legal costs are to be awarded against the Musqueam and Burrard separately. In other words, I direct they are not to be jointly and severally liable to the Squamish. Further, I direct that where the Assessor can apportion the costs of any item between Musqueam and Burrard issues, he or she should divide the costs according to that apportionment. If the Assessor is unable to apportion the costs as just described, they are to be awarded 50% against each band.**

SQUAMISH DISBURSEMENTS - PHASE I

[864] In my view, the Squamish are entitled to full reimbursement for all reasonable disbursements. I am satisfied that each of the five experts they retained was necessary. However, the reasonableness of their fees remains an issue for the Assessor. **Accordingly, I direct the Assessor to award the Squamish costs under Tariff A 3(4) for 100% of the reasonable fees charged by:**

- **Dr. Amoss in respect of her primary and rebuttal expert reports described in paragraph 112 of the Slade Affidavit and for her related testimony.**

- **Randy Bouchard in the period after September 1992[124] for his primary and responding expert reports described in paragraph 117 of the Slade Affidavit and for his related testimony.**

- **Dr. Kennedy[125] in the period after September 1992[3] for her primary and responding expert reports as described at paragraph 123 of the Slade Affidavit and for her related testimony.**

- **Dr. Galloway in respect of his rebuttal report described at paragraph 128 of the Slade Affidavit and for his related testimony.**

- **Dr. Stryd in respect of his rebuttal report described in paragraph 132 of the Slade Affidavit, even though it was not put in evidence.**

[865] The Burrard submitted that, because they called no expert evidence in Phase I, and because, once the trial began, they focused primarily on Amalgamation, they should not be responsible for any of the costs associated with the Squamish experts. However, this submission was not persuasive. While it is true that the Squamish experts dealt with the reports and evidence from the Musqueam experts, all the experts were dealing with issues which the Burrard also pleaded and which the Burrard pursued through Phase I. **I therefore direct that these disbursements are to be awarded 50% against the Musqueam and 50% against the Burrard unless the Assessor is satisfied that another apportionment of the award is more appropriate. The liability of the bands is not to be joint and several.**

[866] The Squamish also asked for 100% reimbursement for some disbursements which are not listed in Tariff A. This claim was made for their experts' work "behind the scenes" advising counsel on matters including the cross-examination of opposing experts, the answers required by the questions posed in the written examinations for discovery, the factual background, and the development of the theory of the case.

[867] Although this was not a unique case in the Federal Court[126], it was certainly exceptional. In addition to being long and complex and dealing with a wide range of new legal issues, Phase I was exceptional because the relevant events occurred between 1850 and 1923. This meant that, from the perspective of the Indians, written records were unlikely to exist, and from the Crown's perspective, if they existed they were likely to be hard to locate and difficult to read. The lack of a ready documentary record, along with the obvious lack of witnesses with first-hand knowledge of the relevant events, meant that all parties had a limited ability to instruct counsel. To deal with this problem, experts and researchers were retained by the Squamish and the Crown to undertake massive research directed to uncovering relevant facts, oral history evidence, and archival documents. In a very real sense, when these experts and researchers provided advice, they acted as surrogate clients and instructed counsel for the Squamish and the Crown in the preparation of their defences to the entitlement claims made by the Musqueam and Burrard. In my view, it must be accepted that, in cases of this kind, experts and researchers will be required to play a role which would ordinarily be played by the parties themselves. Even though, traditionally, experts' costs as advisors have been awarded only when they attended at trial, I have decided that a broader award is warranted in this case. Accordingly, costs are to be awarded for 50% of the reasonable fees charged by experts and researchers for their advisory work when not in court, and 100% of their reasonable fees when they served as advisors in court.

[868] The Burrard suggested that counsel for the Squamish and for the Crown were retained because of their expertise and therefore no costs should be awarded for expert advisors. However, although counsel were knowledgeable about the relevant law, they could not be expected to have had an expert's understanding of the history and culture of all the bands in this case.

[869] Against this background, I will deal with each Squamish advisor in turn.

KENNEDY AND BOUCHARD

[870] Mr. Bouchard and Dr. Kennedy were retained to consider issues raised by the Musqueam and Burrard. They were selected for this work, in part, because they had earlier prepared reports for the Squamish and because, according to the Slade Affidavit at para 99, they had:

...many years of experience in the study of British Columbia aboriginal peoples, and had conducted specific research respecting the land use and occupancy of the Squamish peoples and had made extensive collection of Squamish and Musqueam oral history, relating to genealogy as well as land use and occupancy.

[871] The Slade Affidavit described their work in the trial preparation stage as researching in archival sources, their own sources, secondary sources, and conducting interviews with Squamish elders to document Squamish oral history. Based on this work, they provided information to counsel to enable them: (i) to develop and refine the factual theory of the case, and (ii) to answer the questions posed in the written examinations for discovery.

[872] I have concluded that this work was necessary in the unusual circumstances of this case described above, but I have reservations about the reasonableness of the costs involved

for some of the work. **Accordingly, I direct the Assessor: (i) to consider whether these experts, as opposed to more cost-effective researchers, should have done all the work, and (ii) to ensure that the costs awarded for work under this heading are not duplicated when costs are awarded under Tariff A for the preparation of experts reports and related testimony. With these caveats, I direct that the Squamish may be awarded 50% of the reasonable total costs of work done by Mr. Bouchard and Dr. Kennedy after September 1992 advising Squamish counsel out of court, and 100% of the reasonable costs of advising Squamish counsel in court.**

DR. GALLOWAY

[873] Dr. Galloway was retained in 1994 as an advisor to prepare a background report on linguistics in an effort to determine whether the place names in Burrard Inlet could be associated with the Musqueam, Burrard or Squamish People. This work was reasonable and **I direct that his reasonable costs of advising be assessed and that 50% be awarded.**

DR. STRYD

[874] Dr. Arnoud Stryd, an archaeologist, was retained to determine if there was any archaeological evidence establishing Squamish presence or other aboriginal occupation in Burrard Inlet. In due course, Dr. Stryd advised that archeological evidence could not identify the particular aboriginal group which occupied Burrard Inlet in prehistoric times. However, I have concluded that this work was reasonable and **I direct an assessment of reasonable costs for Dr. Stryd's investigatory work and that an award of 50% of those costs be made.**

THE RESEARCHER

[875] **Finally, I direct that reasonable costs of the researcher be assessed and an award be made of 50% of those costs.**

[876] **On the matter of the apportionment of these awards for expert advice and research, I direct that the Assessor is to award these costs against the Musqueam and Burrard on a 50/50 basis unless he or she is persuaded that another apportionment of costs is more appropriate. There is to be no joint and several liability for this award.**

[877] **All other reasonable Squamish disbursements for Phase I are to be awarded at 100% of reasonable costs and apportioned equally between the Musqueam and the Burrard unless, in the Assessor's view, a different apportionment is more reasonable based on the issues raised by each band. There is to be no joint and several liability for this award.**

THE CROWN - DISBURSEMENTS PHASE I

[878] The Crown sought an award of 100% of its reasonable disbursements for Phase I, and asked that they be awarded 50% against the Musqueam Band and 50% against the Burrard Band. Unlike the Squamish, the Crown did not ask that the Musqueam and Burrard be jointly and severally liable. Further, the Crown did not ask for any legal costs for either Phase I or Phase II and sought no disbursements for Phase II.

[879] The disbursements claimed for Phase I included:

- the fees paid to researchers and a research director
- the fees paid to expert advisors
- document production costs
- the costs of computerized document and transcript management and retrieval systems
- technical support, computer hardware, data coding and entry costs
- other reasonable costs

[880] The issue is whether these disbursements were reasonably necessary for the proper presentation of the Crown's case in light of the circumstances at the time the expenses were incurred. In that regard, the Crown was faced with aboriginal title claims from the date on which it learned that the Musqueam and Burrard proposed to raise entitlement in the Mathias Litigation, until the aboriginal title claims were formally withdrawn. The Crown also had to consider issues related to the creation and administration of the Reserve and the Amalgamation of the Squamish bands. Given the unusual age of this case, which meant that the parties could not instruct counsel in the usual way, I am satisfied that it was reasonably necessary for the Crown to respond to these claims by undertaking research into and obtaining expert advice about matters which included:

- the territory occupied by each band
- the nature of any occupation
- whether occupation existed at the date of the assertion of British sovereignty
- the process for the creation of reserves in British Columbia pre- and post-Confederation
- the work of the JIRC and the law relevant to that work
- the administration of the Squamish reserves prior to Amalgamation
- the facts relating to Amalgamation

[881] The affidavits of Karl Burdak, sworn on March 7, 2001, and Juliet Donnici, sworn on March 5, 2001, indicated that the Crown was also required to undertake its preparation for trial in a fairly tight time frame and that it carried for all parties the burden of searching for relevant documents in the public archives. In my view, the Crown could not have accomplished these tasks without researchers, expert advisors, and computerized documents.

[882] In particular, the Crown:

- hired between approximately 5 and 10 researchers and associated support staff to gather and input documents into its computer

- retained a part-time research director

- retained two anthropologists, an archeologist, and a fishing expert as expert advisors

- obtained additional office space and computers

[883] These disbursements were necessary in that they were made to enable the Crown to produce the 13,000 relevant documents it listed for Phase I, to consider all parties' document productions, to answer written interrogatories and to draft their own written interrogatories, to prepare to cross-examine the Squamish and Musqueam experts and all the lay witnesses in Phase I, and to prepare written argument on Phase I issues.

RESEARCH COSTS

[884] The Burrard argued that they should not be assessed costs for work the Crown researchers undertook to deal with the Musqueam expert witnesses. However, I have not accepted this submission because the Musqueam experts dealt with issues which were also pleaded by the Burrard. As well, the Burrard asked that they be liable for a limited period[127] and only for that portion of the costs which could be attributed to the Phase I issues they actually pursued at trial. Again, I have rejected these submissions. Although the Burrard abandoned its aboriginal title claims at the outset of trial, the Crown was obliged to prepare to meet those claims at trial.

[885] The Musqueam expressed concern that the number of researchers and support staff might not be reasonable. Although I am satisfied that researchers and support staff were necessary, there could be an issue about the number retained. However, in my view, there is no issue that the part-time research director was required.

[886] **I therefore direct that the award of costs to the Crown is to include 50% of the reasonable costs for a reasonable number of researchers and support staff for the Crown's Phase I research as well as 50% of the reasonable costs of a part-time research director. I also direct that the Crown may recover its reasonable costs for research related to aboriginal title issues from the date(s) on which it became aware that the Musqueam and Burrard proposed to litigate their claims to entitlement to an interest in the Reserve in the Mathias Litigation, until the date on which they formally withdrew those claims.**

EXPERT ADVISORS

[887] The Burrard also asked me to direct an assessment of the reasonableness of the hiring of the four expert advisors. However, in my view, for the reasons given above in para. 867, they were retained for good reason. Accordingly, **I direct the Assessor to assess the reasonable costs of the four expert advisors and award the Crown 50% of those costs.**

COMPUTERS, OFFICE SPACE, AND ALL OTHER DISBURSEMENTS

[888] The Musqueam were concerned that the Crown not be awarded costs for charges which should have been included in overhead. I agree and, accordingly, **I direct that the Crown is to be awarded 100% of its reasonable disbursements, excluding those which, in the Assessor's opinion, should have been included in overhead.**

APPORTIONMENT

[889] **Further, I direct that the award of costs for all the Crown's disbursements is to be paid 50% by the Musqueam Band and 50% by the Burrard Band, unless the Assessor is satisfied that another division of costs more closely relates the work done by the Crown to the issues raised by a particular band.**

COSTS OF THE MOTION FOR COSTS

[890] **I direct that, as success was divided, no costs are to be awarded for this motion.**

(Sgd.) "Sandra J. Simpson"

Judge

Vancouver, B.C.

April 2, 2001

SCHEDULE "A"

LIST OF WITNESSES IN PHASE ONE

PHASE ONE

Musqueam

Dominic Point - a Musqueam Band member who testified about Musqueam oral history and traditions.

Howard Grant - a Musqueam Band member who testified about Musqueam oral history and traditions.

Delbert Guerin - a Musqueam Band member who testified about Musqueam oral history and traditions

Dr. Wayne Suttles - an expert in Salishan languages who undertook an etymological analysis of the place names in Burrard Inlet. He prepared an expert report entitled "Linguistic Evidence for Burrard Inlet as Former Halkomelem Territory".

Dr. Barbara Lane - an expert in ethnohistory who testified about the Crown policies of reserve

creation in British Columbia in the colonial and early post-Confederation periods. She prepared an expert report entitled: "Government Policies and Practices Regarding Indian Reserves in British Columbia, 1849-1876".

Dr. Michael Kew - an expert in anthropology and enthography who testified about Central Coast Salish culture and social and political organization. He also gave evidence about the genealogies of Musqueam Band members and the historical Musqueam associations with False Creek and Burrard Inlet. He prepared an expert report entitled "The Musqueam First Nation and its Territorial Rights in Burrard Inlet".

Squamish

David Jacobs - a Squamish band member who testified about Squamish oral history and traditions.

Louise Williams - a Squamish band member who gave commission evidence about Squamish oral history and traditions.

Allen Francis Lewis Louis - a Squamish band member who gave commission evidence about Squamish oral history and traditions.

David George Williams - a Squamish band member who gave commission evidence about Squamish oral history and traditions.

Dr. Pamela Amoss - an expert in anthropology who testified about Central Coast Salish culture and social and political organization. She prepared an expert report entitled "The Central Coast Salish" and also prepared a report in answer to Dr. Kew's report.

Dorothy Kennedy - an expert in anthropology, ethnography and ethnohistory who testified about Central Coast Salish social and political organization, the genealogies of Squamish Band members, the historical Squamish associations with False Creek and Burrard Inlet, and the Crown's reserve creation policies in the colonial and early post-Confederation period. She prepared expert reports entitled "Squamish Affiliation with the False Creek Reserve" and "The Identity of the False Creek Residents Thereon", and she also prepared two reports in answer to the reports of Drs. Kew and Lane.

Randy Bouchard - an expert in ethnography, ethnohistory and Salishan languages who testified about the historical Squamish associations with False Creek and Burrard Inlet. He prepared an expert report entitled "Squamish Occupancy of Burrard Inlet and False Creek", and he prepared another report in answer to the reports of Drs. Kew and Suttles.

Dr. Brent Galloway - an expert in Salishan languages who undertook an etymological analysis of the place names of Burrard Inlet. He prepared an expert report entitled "An Etymological Analysis of the 59 Squamish and Halkomelem Places Names on Burrard Inlet Analyzed in Suttles Report of 1996".

Burrard

Chief Leonard George - chief and member of the Burrard Band who testified about Burrard oral history and traditions.

Lillian George - a Burrard band member who testified about Burrard oral history and traditions.

SCHEDULE "B"

SCHEDULE "C"

John L. George - a Burrard band member and former hereditary chief of the Burrard Band. Excerpts from his examination for discovery were filed as evidence. His evidence related to Burrard oral history and traditions.

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[*] Special thanks are due to Mark East who, as my clerk, worked on these reasons tirelessly and with good humour. Throughout, he asked the right questions.

[1] Document 672 in court file T-1636-81

[2] Venne, Sharon Helen, ed., University of Saskatchewan Native Law Centre, 1981.

[3] Canada. *Report of the Royal Commission on Aboriginal Peoples*, vol. 1 (Ottawa: Queen's Printer, 1996), p. 33.

[4] These comments apply to Dorothy Kennedy, Randy Bouchard and Dr. Michael Kew.

[5] *An Act to Amend and Consolidate the Laws Affecting Crown Lands*, S.B.C. 1888, c. 66, brought into force by *An Act Representing the Consolidation of Statutes*, S.B.C. 1889, c. 1.

[6] When dealing with the period before 1869, I will describe the future location of the Reserve as the "False Creek Site". The term "False Creek" will be used to describe the inlet and its shores.

[7] It was established in 1827.

[8] Under colonial law, settlers could acquire Crown land in fee simple in a process called "pre-emption". However, land which was reserved for Indians was exempt from pre-emption.

[9] B.C. Gaz, v. VIII, November 27, 1869, at p. 1.

[10] This was the Mission reserve.

[11] This was the Burrard reserve.

[12] The site of the present-day Lions Gate Bridge.

[13] It is in the South Thompson River region in the southern interior of the Province.

[14] The Brew letter was attached to a letter written by Magistrate Bushby to Trutch about the proposed reserves at the False Creek Site and at the Mission site (CB130, 131). Bushby clearly wanted Trutch to be aware of Brew's opinion before he allocated a reserve to Chief Snatt in Burrard Inlet.

[15] It did not come into force in British Columbia until 1874, pursuant to *An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*, S.C. 1874, c. 21 (37 Vict.).

[16] Chief Capilano ("Reaplanon" in the petition) and his descendants figure prominently in the oral histories of the Squamish and Musqueam People, and extensive evidence was adduced at trial about the "tribal" ancestry of the Capilano family and name. Both the Squamish and Musqueam claimed Chief Capilano as their own, but it was evident that he was of mixed heritage. The Musqueam, in particular, emphasized Chief Capilano's Musqueam ancestry and his connections to Burrard Inlet (specifically to the Capilano reserve, which was named after him). The Musqueam cited Chief Capilano's associations with Burrard Inlet as evidence that the inlet was within traditional Musqueam territory. I have not discussed the wealth of evidence relating to Chief Capilano's ancestry because I have found that it has no direct relevance to the identity of the Indians at the False Creek Reserve.

[17] The False Creek Site is location no. 3 on the map found on the Declaration.

[18] He identified the site as being at what is today the intersection of Granville Street and S.W. Marine Drive in Vancouver.

[19] Major Matthews' work is discussed in more detail below, in connection with the evidence of Squamish elder August Jack.

[20] I have interpreted this passage to refer to the land between the Fraser River and the mountains on the north side of Burrard Inlet.

[21] These petitions are later discussed in more detail.

[22] Sechelt is on the mainland coast north of Vancouver.

[23] The northern tribes were the Haida and the Lekwiltok. They did not include the Squamish and the Sechelt Indians.

[24] Mr. Point testified that the Boundary Story was told infrequently because the Musqueam were sorry that Squamish lives had been lost.

[25] However, this is an uncertain conclusion because, as the next paragraph will show, Mr. Point's evidence to the effect that the Squamish seasonal rounds started in June may have been incorrect. The Fort Langley Journals show an earlier starting date.

[26] I have put this term in quotations because the evidence discloses that the non-Indian settlers who arrived in Vancouver included people of many backgrounds.

[27] Cross-examination of Mr. Point by counsel for the Crown, December 5, 1996, page 99.

[28] As will be discussed in points (ii) and (vi) in the section entitled "Profiles of the Residents of the False Creek Reserve", this evidence was refuted.

[29] On April 16, 1929, the Squamish Band Council had passed a resolution stating that only Squamish Band members would be entitled to claim a portion of the proceeds from the proposed surrender and sale of the False Creek Reserve (CB1062).

[30] The McKenna-McBride Royal Commission on Indian Affairs for British Columbia

[31] Kitsilano - the location of the False Creek Site.

[32] Major Matthews' rendition of the word "Sen'aqw".

[33] As will be discussed in detail below in the section entitled "Reserve Administration", the Squamish community of Indians resident on the False Creek Reserve was administered by the Department as a separate "band" under the *Indian Act* prior to the 1913 Sale.

[34] According to Dorothy Kennedy (EX-S31, p. 72).

[35] Andrew became chief after Chief George's death in 1907.

[36] Dorothy Kennedy's evidence demonstrated a connection between Barnett's research and the fact that many of the later permanent residents of the False Creek Reserve, including Chief George, retained ties to upper Squamish River villages.

[37] The practice of exogamy suggests that one parent would have been a Squamish person who was born in the village and the other parent would have been either a Squamish person from another village or a non-Squamish person who had been accepted into the Squamish community after marriage.

[38] Counsel for the Squamish have tendered evidence, through their experts, lay witnesses, and the documentary record, of other Squamish individuals not included in Tables 1

and 2 of Exhibit S31 who also claimed to have been residents of the Reserve at some time prior to 1913. These people were not included in this analysis simply because Ms. Kennedy's evidence proved sufficient to lead to my conclusion that the Reserve was a Squamish community.

[39] Kennedy offered only "possible" Squamish identifications for five of the eight unidentified Indians. These five Indians were listed on the Skinner plan (a single man described as a "non-resident" and another family of four). Because of Ms. Kennedy's uncertainty, I have not accepted her identification of these people for the purpose of this analysis.

[40] Including Arnold Guerin, Christine Charles, Andrew Charles, and Leona Sparrow.

[41] Chief George's Indian name appears in the record in many different transcriptions, including "Sh-praem" (CB154-7), "Chiphaim" (CB241-5), "Chup.key.im" (CB243-16), "Chipwheim" (CB353-2), "Chupnum" (CB402-2), "Chip-kay-am" or "Chip-kay-m" (CB1222-9, 10), "Schpreme" (CB77-7), "Chprem" (CB102-3), "Chpeame" (CB196-5).

[42] the 1850s

[43] This is another transcription of Chief George's name.

[44] "Old" Jim Salemton

[45] I have interpreted this statement to mean that Old Jim spoke both Squamish and Halkomelem.

[46] Sally Xwhaywhat was August Jack's mother. After her husband died, she remarried and bore Dominic Charlie. Accordingly, August Jack and Dominic Charlie were half-brothers.

[47] The False Creek Reserve

[48] She signed the petition as Mary Peter.

[49] Schedule to the *Constitution Act, 1982*, being Schedule B of the *Constitution Act, 1982* (U.K.), 1982, c. 11

[50] *An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia*, S.B.C., 1875 (38 Vict.).

[51] This conclusion is discussed below in the section that considers the effect of the *Land Act*.

[52] The JIRC did give the Musqueam a shared interest in a non-residential fishing site called Inlailawatash, at the northern tip of Indian Arm. However, there is no information in the record about why this allocation was made.

[53] As noted earlier, IR No. 4 became a shared Burrard and Musqueam reserve after

Amalgamation in 1923. It then became a Burrard reserve after the Musqueam Band relinquished its interest in 1927.

[54] This acreage estimate was later revised upward to approximately 80 acres.

[55] The facta in the Federal Court of Appeal disclosed that the Province's approval of Green's allocations was given after the *Land Act* was amended to delete the mandatory notice requirement. This may not have been drawn to the attention of the trial judge.

[56] Affirmed (June 24, 1912) (B.C.C.A.) [unreported], dismissed (March 7, 1913) No. 3283 (S.C.C.) [unreported].

[57] In response to Chief Justice Hunter's inquiry about the relevant provincial land legislation in B.C. in 1870, counsel for the petitioning Gosnell incorrectly told the Chief Justice that the *1870 Land Ordinance* applied when, in fact, it had been replaced by the *1875 Land Act* (p. 8).

[58] See *Wewayakum*, para 260; *Dunstan v. Hell's Gate Enterprises Ltd.*, (1989) D.L.R. (4th) 568 at 591 (B.C.S.C.), overturned on other grounds, (1987), 20 B.C.L.R. (2d) 29 (B.C.C.A.).

[59] There later came a time when the Province asked for compensation for the conveyance of the Reserve. However, compensation was not mentioned in the *Terms of Union* and the issue about possible payment for the Reserve had not arisen in 1889.

[60] *Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145 (S.C.C.), Laskin J., at 203.

[61] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[62] The history of these reserves is well documented in *Papers relating to the Indian Land Question,* 1850-1875 (CB1374); the Kamloops and Shuswap reserves are also discussed in Justice MacDonald's reasons in *Jules v. Harper Ranch Ltd.,*[1989] 3 C.N.L.R. 67 (B.C.S.C.).

[63] See Kennedy, Dorothy, *A Reference Guide to the Establishment of Indian Reserves in British Columbia, 1849-1911* (Ottawa: Indian and Northern Affairs Canada, 1994), pp. 48-56. See also *Papers relating to the Indian Land Question, 1850-75, 1877, supra,* CB1374, pp. 20-28.

[64] However, there is evidence that consultations with affected Indians took place.

[65] Section 49A of the *1906 Indian Act, as amended by S.C. 1911, c. 14,* also known as the *Oliver Act.*

[66] *An Act respecting the Songhees Indian Reserve, S.C. 1911, c. 24*.

[67] The breaches of fiduciary duty alleged by the Squamish are listed in the introduction to Part V.

[68] *Hodgkinson & Simms*, [1994] 3 S.C.R. 377 at 461. This description of a private law fiduciary duty, which I have paraphrased, is in the dissent delivered by Sopinka and McLachlin J.J.

[69] Leave to appeal to S.C.C. refused; [1985] 2 S.C.R. *viii.*

[70] The *1970 Indian Act* defined reserve lands which have been surrendered as "surrendered lands".

[71] *Apsassin*, p. 369

[72] For comprehensive discussion of these cases, please refer to *Fairford* at paragraphs 41 to 50.

[73] This possibility was discussed by McLachlin J. in *Apsassin* at paras. 38 and 39 in relation to the alienation of the Indian interest in lands.

[74] Burrard I.R. No. 3 was the residence of virtually all the Burrard People. As will later be discussed, some members of the Burrard Band also had residences on Mission I.R. No. 1.

[75] This was, in my view, the combined effect of sections 2 and 4 of the *1876 Indian Act* and sections 4 and 14 of the *1886 Indian Act*.

[76] The balance of the reserves were unoccupied.

[77] The census actually listed 21 communities including Supple Jack's village on the Military Reserve. However, the JIRC did not make his settlement a reserve (CB282-4).

[78] This title was later changed to "Indian Agent".

[79] In this position, he was the Department's most senior official in British Columbia.

[80] In practice, this right to reside may have been subject to the wishes of the chiefs and bands on the individual reserves.

[81] The Provisions are taken from the *1886 Indian Act* because it was in force when the JIRC's Minutes of Decision became effective in 1889. However, the Provisions in the 1876, 1880, and 1906 *Indian Act*(s) were substantially the same.

[82] *The Town of Hay River v. The Queen et al.* (1979), 101 D.L.R. (3d) 184 (F.C.T.D.) at 186.

[83] The Schedule referred to was in the Department's *Annual Report*.

[84] Seymour Creek I.R. No. 2

[85] This reference is to the Pacific Great Eastern Development Company, which was affiliated with the Pacific Great Eastern Railway Company.

[86] The False Creek Reserve.

[87] The commissioners of the McKenna-McBride Commission.

[88] The exception was Mission I.R. No. 1.

[89] Under the *1906 Indian Act*, in a legal surrender and sale overseen by the Department, 50 percent of the proceeds would have gone into the False Creek Band's capital account. The full amount would not have been distributed to members of the band.

[90] This was a reference to the PGE Sale.

[91] This is a town in the Squamish River valley.

[92] At this time, there were 14 men of the Burrard Band who were eligible to vote.

[93] It is noteworthy that, at this time, Chief Jimmy Harry was considering an offer for the sale of his reserve (CB898, 899). He later reversed his position and supported Amalgamation (CB974-1).

[94] This estimate is based on a September 1923 (post-Amalgamation) pay list (CB986) which said that there were 105 Squamish men who were heads of families, and on a pay list of November 1923 (CB1439) which showed a total of 14 Burrard men who were family heads.

[95] The majority in favour became overwhelming in July of 1923 when an additional 22 Squamish Indians, who had not previously voted, added their signatures to the July 23, 1923 petition for amalgamation.

[96] CB895

[97] Transcript July 8, 1997, p. 156.

[98] The letter was undated, but the Departmental copy indicated that it was received on September 5, 1923.

[99] Although they were promised compensation for their homes, Chief Leonard George testified that, as far as he was aware based on the band's oral history, no compensation was paid.

[100] February 12, 1997, pp. 18-19.

101 Chief George, Denny Jim, Joseph Thomas, Felix Thomas, and Andrew Jack.

102 The Burrard Band had 43 members and the other bands together had a total of 412 members.

103 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1997] 2 S.C.R. 203.

104 *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119.

105 *Statute of Limitations*, R.S.B.C. 1897, c. 123, as amended. Prior to 1897, a number of earlier English limitation statutes were incorporated into British Columbia law through the *English Law Act*, R.S.B.C. 1888, c. 69.

106 Section 18 provided that the *Limitation Act* came into force on July 1, 1975.

107 It is noteworthy that the Squamish were responding to section 14(3) when they commenced their Omnibus Action.

108 *Guerin*, p. 382.

109 At paragraph 571 I concluded that, although individuals' views varied, the Department's position on reserve administration remained consistent.

110 Since, as described in paragraph 756, the Musqueam did not allege postponement by reason of equitable fraud, they could not rely on section 3(3)(a) of the *Limitation Act*. Accordingly, their submissions on this issue had no relevance to their Action. However, I considered them to see whether they assisted the Burrard.

111 *Squamish Indian Band v. Canada*, [1994] F.C.J. No. 623 (T.D.) (QL) at para. 6.

112 The majority of the Court did not consider the limitation arguments.

113 Overturned on procedural grounds regarding a lack of agreed facts (1999), 173 D.L.R. (4th) 679 (B.C.C.A.); leave to appeal to S.C.C. refused, August 3, 2000, [1999] S.C.C.A. No. 539.

114 As discussed in paragraphs 805 and 806, it also appears that the Supreme Court of Canada rejected this argument in *Apsassin*.

115 varied on other grounds, [2000] O.J. No. 4804 (C.A.) (QL). The Ontario Court of Appeal upheld the trial judgment respecting the applicability of the various limitations defences raised by the defendants in the case. The trial decision in *Chippewas* preceded Chief Justice Isaac's reasons in *Wewayakum*. However, the Ontario Court of Appeal released its reasons in *Chippewas* after the Federal Court of Appeal's decision in *Wewayakum*.

116 Campbell J. did not consider Section 39(1) because it only applies to proceedings in the Federal Court of Canada.

[117] Because these were pre-Confederation statutes of the "unified" Crown, there was no issue of a post-Confederation provincial limitation statute purporting to legislate in an area of exclusive federal jurisdiction. These statutes were continued as federal law after Confederation in 1867.

[118] Justice Campbell's conclusions about the two pre-Confederation statutes were upheld on appeal by the Ontario Court of Appeal (paras 236-242).

[119] Justice Gonthier, writing for the majority of the Court, expressly adopted McLachlin J.'s conclusions with respect to the application of the *Limitation Act* (para. 23).

[120] The clear and plain intention of Section 39(1) was apparently not raised as an issue at trial (para. 163).

[121] *An Act to Amend the Supreme and Exchequer Courts Act and to make better provision for the Trial of Claims against the Crown*, 50-51 Vict., c. 16, ss 18-19 (1887).

[122] *Federal Court Rules Amendment Regulation*, SOR/95-282.

[123] $100 was the unit value when the motion for costs was heard. However, effective April 1, 2001, the unit value will increase to $110.

[124] Mr. Bouchard and Dr. Kennedy were retained by the Squamish Band in September 1992, in anticipation of the Musqueam Action, which was commenced in December 1992.

[125] Dorothy Kennedy earned her Ph.D. after Phase I.

[126] *Wewayakum* was somewhat comparable.

[127] The period suggested ran from the commencement of the Burrard Action on April 30, 1993, until July 2, 1996, when counsel for the Burrard advised the Crown in writing that his clients were abandoning their claim based on aboriginal title.