CHIEF CHRIS LUKE, MARY BASIL AND WAYNE LOUIS suing on their own behalf and on behalf of all other members of THE LOWER KOOTENAY INDIAN BAND (Plaintiffs) v. HER MAJESTY THE QUEEN (Defendant)

[Indexed as: **Lower Kootenay Indian Band v. Canada**]

Federal Court, Trial Division, Dube J., June 13, 1991

J.A. McAfee, for the plaintiffs
M. Koenigsberg and M.T. Wolf, for the defendant

In 1934 the Lower Kootenay Indian Band surrendered certain lands to the Crown for leasing to a land reclamation company for a 50 year term. Throughout the years the band realized that the terms of the lease were unfavourable to the Indians in that it did not provide for the escalation of rental rates over time. They applied pressure on the Department of Indian Affairs to have it terminated. It was discovered by the Crown in 1948 that no order in council had been passed with reference to the surrender as required by s.51 of the 1927 *Indian Act*. This information was not conveyed to the Indians until 25 years later. The plaintiffs claimed that at the time of the surrender there was a collateral agreement to provide the band with additional lands to compensate for the loss of lands used by the Indians outside the reserve for the cutting of hay and that neither the company or the Crown carried out this agreement. The plaintiffs submitted that because of the Crown's failure to have the surrender approved by order in council the lease was null and void ab initio and that the Department should have terminated the lease, at least in 1948. The lease was terminated in 1982. The plaintiffs commenced an action against the Crown in 1982; it was discontinued and the band commenced a new action in 1990. A second surrender occurred in 1939 when the band executed a surrender of another portion of lands to a local dentist, transferring tide to him. This was not a lease but a transfer absolute. An order in council was registered in 1943. The plaintiffs claim that the Crown breached its fiduciary duty to the band with reference to the surrender and as a result of certain reclamation work completed by the dentist before the surrender was executed.

The plaintiffs sought a declaration that the Crown breached its fiduciary responsibility with reference to the two surrenders, and sought damages arising out of the breach.

Held: Declaration granted in reference to the 1934 surrender; damages assessed accordingly.

1. The Crown breached its fiduciary duty with reference to the 1934 surrender and lease. It had an obligation to be reasonably prudent and provident. Knowing that the band did not want to be locked into a long-term lease, the Crown should have secured a more realistic escalator clause or a review clause and ought not to have bound the band for fifty years to "Depression-era prices". Admissions by the Crown's own public servants were that the rates set in 1934 were not satisfactory and fair to the Indians.

2. The Crown was not liable to the band for not enforcing the collateral agreement to provide the band with additional lands to compensate for the land on which the Indians cut hay outside the reserve. The hay-cutting privileges were not under the control of the federal Crown. The hay in question grew on provincial Crown land turned over to the Breeders' Association for hay-cutting purposes. The lease could be terminated at any time by the provincial Crown. There was no evidence that these hay-cutting privileges were part and parcel of the surrender, or the lease, or any other agreement binding upon the Crown.

3. The Crown was not in breach of its fiduciary duty or negligent with reference to the second surrender, the absolute surrender in 1939. The surrender was approved by the band on conditions acceptable to the band. The surrender was in accordance with a band resolution. There was no evidence that this surrender was a bad deal for the Indians. The fact that the reclamation project commenced before the surrender was executed does not, by itself, constitute a breach of the Crown's fiduciary duty to the Indians. There was no evidence that the premature work caused any damage to the plaintiffs.

4. The Crown was in breach of its duty from 1948, when it was discovered that there was no order in council, until the termination of the lease in 1982. The Crown knew or ought to have known that the lease was null and void ab initio but took no steps to terminate the lease. The Crown was also negligent in failing to obtain the order in council in 1934. It was

part of the Crown's fiduciary obligation to follow the prescriptions of the *Indian Act*. Having decided to proceed under s.51, it was bound to proceed according to that section. Section 51 was the ultimate protection to ensure that the Indians were not taken advantage of by negligent administrators. The decision makers involved were improvident in agreeing to a fifty year lease without adequate provisions to protect the future interest of the Indians. Since the surrender and the lease were void ab initio, the Indians, had they been informed, might have obtained more satisfactory rentals from the reclamation company, or might have chosen to seek other more suitable arrangements with other parties. The Crown failed in its duty in not informing the Indians when it discovered there was no order in council.

5. The Crown breached its fiduciary duty in not taking steps to terminate the lease when it was contacted repeatedly by the band from 1974 onwards, with requests to do so where it was apparent that there were valid grounds for termination. The number of letters, meetings, reports, etc. passing between departmental officials and the band chief evidenced procrastination by the Department. Also, the land reclamation company had sufficiently breached several conditions of the lease so that the lease could have been terminated. The band could have benefitted from an earlier termination of what turned out to be a bad deal for them.

6. The British Columbia *Limitation Act*, R.S.B.C. 1979, c.236 prescribes an absolute thirty year limitation from the cause of action. The original cause of action arose in 1934 at the outset of the fifty-year lease. Applying that limitation from 1934, then this action launched only in 1982 would clearly have to be dismissed. But other causes of action may have arisen during that period. Applying the thirty year period from 1982 back to 1952 excludes the Crown's breach of fiduciary duty at the time of the 1934 surrender, but includes breaches committed since 1952, namely the violations of the lease by the reclamation company during that period and the Crown's failure to respond to the plaintiffs' demands for termination of the lease. The band learned of the absence of the order in council in 1974. At that time the company was violating the terms of the lease. A fresh cause of action accrued from 1974 and a new limitation period commenced to run from that date. A ten year limitation period (1974 to 1982) would suffice for the purposes of the judgment.

7. The accumulated amount of rent lost by the plaintiffs for the period from 1974 to 1982 was calculated to be $969,166. Damages were awarded to the plaintiffs in this amount, plus accrued interest from 1982 to the date of judgment.

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DUBE J: This action by the Lower Kootenay Indian Band of British Columbia is for a declaration that the Crown has been in breach of its fiduciary responsibility with reference to a surrender of Indian land in September 1934 and a second surrender in January 1939, and for damages to be determined by this court.

1. Historical Background

The Lower Kootenay Indian Band Reserve, situated near the Town of Creston, B.C., received an allotment of the reserves in question in 1916. At the time, the McKenna-McBride Royal Commission on Indian Affairs for the Province of British Columbia was of the view that the government of Canada should contribute pro rata to the cost of any work of reclamation valley lands in the area.

A local company, Creston Reclamation Co. Ltd., ("Creston"), became seriously interested in the project and incorporated itself for that purpose on December 14, 1925. The plan of Creston included the reclamation of the Creston Flats embodying part of Indian Reserve No. 1-C, all of Indian Reserves No. 2 and No. 3, and part of Indian Reserve No. 5. At that time, Creston proposed to include some 2,000 acres of Indian lands within the dyking area.

During the late 1920s and early 1930s many discussions took place and much correspondence passed between Creston and several representatives of the Department of Indian Affairs, in British Columbia as well as in Ottawa, up to the Minister then responsible for the Department. In 1934, a surrender was executed by the band to the Crown and a 50 year lease by the Crown to Creston. The band claims that they were not properly consulted and the terms of the lease were unfavourable to the Indians.

The plaintiffs claim that, at the time of the surrender, there was a collateral agreement to the effect that the band was to be provided with additional lands to compensate for the loss of lands used by the Indians outside the reserve boundaries for cutting hay, and that neither Creston nor the Crown ever carried out that agreement.

During that period, the band harvested several hundred tons of wild hay and timothy hay each year. The Indians were primarily stock-raisers. The wild hay was essential for their cattle and was also a valuable source of revenue to the Indians, as they were selling hay on the local market.

It was discovered in 1948 that no order in council had been passed with reference to the surrender, as stipulated under s.51 of the *Indian Act 1927*. That failure to obtain the order in council was only made known to the Indians some twenty-five years later.

In January 1938 the band executed a surrender of most of Indian Reserve No. 4 to one Dr. Peter Charles Bruner, a local dentist, transferring title to him of some 117 acres. This was not a lease, but a transfer absolute. An order in council was duly registered on March 9, 1943. The plaintiffs claim that the Crown was also in breach of its fiduciary duty owing to the band with reference to that surrender and as a result of certain reclamation work completed by Dr. Bruner before the surrender was executed.

Throughout the ensuing years, the band realized that the terms of the Creston lease were inadequate and unacceptable. They applied strong pressure on the Department to have it terminated, more forcefully so in the early seventies.

The plaintiffs claim by this action that, because of the Crown's failure to have the surrender approved by the Governor in Council, the lease was null and void ab initio and that the Department should have seized upon their knowledge of the absence of such an order in council to terminate the lease, at least in 1948. The lease was only terminated in 1982 when the parties settled on the court steps following an action by the band against Creston in the B.C. Supreme Court.

Early in the lease, Creston was late in its payments of rental to the band. Furthermore, in the course of the years, it was discovered that Creston was subleasing lands to local farmers and even to the Federal Department of Agriculture, contrary to the provisions of the lease. Again, the band brought these matters to the attention of the Department, as forcefully as it could, but obtained no redress from the Crown.

Finally, the band commenced an action against the Crown on August 1, 1982. It was discontinued and the plaintiffs commenced a new action on January 3, 1990.

2. The Five Basic Issues To Be Resolved

There are five basic issues to be resolved in this action. In several instances they are intertwined and the same evidence overlaps. There was only one witness at the hearing, Chief Chris Luke. The great bulk of the evidence consists in hundreds of documents dating back to the 1920s. There are letters, leases, surrenders, reports, memoranda, etc., most of which were created by people who are not alive today.

Fortunately, counsel for both parties were extremely cooperative and helpful in dealing with the documents. Only relevant documents were produced, and yet there are over 300 documents. There was no procedural objection from either side as to their production and, apart from the brief testimony of Chief Chris Luke, most of the hearing was spent on a review of the documents conducted by each party in the best possible light consistent with their respective submissions. Consequently, counsel did not raise hearsay objections and the documents were accepted at face value, again subject to each party's own interpretation. The five issues are as follows:

1) Was the Crown in breach of its fiduciary duty, and or negligent or both, vis-a-vis the band at the time of the surrender and the lease in 1934?

2) Is the Crown liable to the band for not having enforced the collateral agreement to provide the band with additional lands to compensate for the land on which the Indians were cutting hay outside the reserve?

3) Was the Crown in breach of its fiduciary duty, and or negligent or both, vis-a-vis the band at the time of the absolute surrender to Dr. Bruner in January 1939?

4) Was the Crown in breach of its fiduciary duty, and or negligent, or both, from 1948 until the date of termination of the lease in 1982, as the Crown knew, or ought to have known, that the lease was null and void ab initio and took no steps to inform the band or to terminate the said lease?

5) Was the Crown in breach of its fiduciary duty, and or negligent or both, in not taking steps to terminate the lease when it was contacted repeatedly by the band, from 1974 onwards, with requests to take steps to terminate the lease where it was apparent that there were valid legal grounds for such termination?

After having dealt with these substantial issues there will remain two outstanding matters to be resolved. First, the British Columbia *Limitation Act*, R.S.B.C. 1979, c.236 prescribes an absolute 30 year limitation from the date of a cause of action. If that limitation applies from the date of the surrender of 1934, clearly, this action launched only in 1982 must be dismissed. The statute also provides for two, six and ten year limitations which are, of course, of even less assistance to the plaintiffs. Secondly, counsel have asked that damages be assessed whatever my decision be on all the previous issues, including the effect of the British Columbia *Limitation Act*.

3. The 1934 Surrender and Lease

In August 1925, the government of British Columbia offered 10,000 acres on Kootenay Flats to Creston provided that company would undertake to dyke the Kootenay River so as to provide reclaimed land ready for cultivation. As the concession allowed Creston to undertake the work in units, their first effort would be to dyke approximately 8,000 acres situated in front of the Town of Creston and extending north to Wynndel. The proposed area includes approximately 2,000 acres of Indian lands, which area was described "as choice a tract as there is in the whole 8,000 acres".[1]

In 1926, Creston approached the federal Department of Indian Affairs with a proposal to buy the Indian lands in question, and in the alternative, to have the Department join them in a reclamation scheme as suggested by the Royal Commission.[2]

It was necessary for Creston, and therefore any other interested reclamation company, to overcome certain hurdles before any work could begin on the reclamation project.

First, approval had to be secured from the International Joint Commission as the Kootenay River flows across the boundary between the United States and Canada. On April 3, 1928, the Commission granted the authority to Creston for the construction of the proposed reclamation project provided:[3]

> That the said applicant make suitable and adequate provision to the satisfaction of this Commission for the protection and indemnity against injury by reason of such works of all interests on either side of the boundary.

Creston also had to obtain the requisite provincial approval, as later set out in the *Tempest-Webb Report*[4] at p.3:

> A communication dated April 12, 1928, from the Comptroller of Water Rights for the Province of British Columbia, states in part as follows, -
>
> > The scheme will not be carried out under any *Provincial Drainage or Dyking Act*. It will be carried out as if it were drainage works on privately held lands, governing which there is no Provincial legislation. The situation is that the Provincial Government has consented to the Company entering upon Crown lands for the purpose of reclaiming

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1 Letter dated March 19, 1927, to Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, from N.G. Guthrie, lawyer for Creston in Ottawa (tab 14 in exhibit 1A).

2 Letter dated November 9, 1926, to Mr. Scott from the Consulting Engineer (tab 2 in exhibit 1C).

3 Memorandum dated April 18, 1928, to the Honourable Charles Stewart, Minister of the Interior, from Mr. Scott reporting Minute of the International Joiant Commission (tab 31 in exhibit 1A).

4 *Report on Reclamation Project of Creston Reclamation Co., Ltd. on Kootenay River in the Vicinity of Creston, British Columbia*, by J.S. Tempest, Commissioner of Irrigation, Calgary, Alberta, and C.E. Webb, District Chief Engineer, Vancouver, British Columbia, dated August 20, 1928 (tab 33 in exhibit 1A) [hereinafter the *Tempest-Webb Report*].

> them, on the understanding that if the reclamation is successful a Crown Grant will be issued to the Company. Technically, no approval of the plans of the Company is required by any Provincial Government Department. It is a condition of the offer, however, that the plans be satisfactory to the Minister of Lands. Tentative plans have been submitted and have been approved by this branch subject to minor alterations. Application has been made under the *Water Act* for the diversion of Goat river directly into the Kootenay river. Plans have been submitted for this diversion and approved subject to certain amendments.

The result was that "a Syndicate of Creston citizens has now received from the Provincial Government of British Columbia an agreement, by order in council, to convey, free of charge to that Syndicate some 8,000 acres of land after the Syndicate has reclaimed this land and after the dykes have stood the test of high water for one year."[5]

Creston also applied for approval under s.7 of the *Navigable Waters Protection Act*.[6] The federal Department of Public Works approved the proposed reclamation scheme in the form of Order in Council P.C. 186 dated February 4, 1928, subject to the following conditions:[7]

> 1. The Company hereby agrees to be responsible for and save the minister of Public Works of Canada harmless from, all claims for damages which may result to the banks, dykes and lands along the Kootenay River.
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> 2. The Company further agrees to provide reasonable facilities for the passing of logs and other wood goods on the said Kootenay River affected by the reclamation works in said Unit No. 1.

Creston made its formal application for a 50 year lease of the lands in question, at a rental price of $1,000 per annum, to Dr. H.W. McGill, Superintendent General of Indian Affairs on May 12, 1934.[8]

On September 5, 1934, the Lower Kootenay Band of Indians assented to a surrender to the Crown for the leasing of the lands in question.[9] A draft lease with a graded scale of rentals beginning at $1,500 per year was subsequently forwarded to F.S. Ryckman, the Indian Agent in Cranbrook, B.C., by A.F. MacKenzie, Secretary, Department of Indian Affairs, with instructions to present it to Creston to obtain the proper signatures, and then to return it to the Department for final execution by the Deputy Superintendent General.[10] The draft lease was signed by Creston and returned to the Department via Ryckman on October 18, 1934.[11] Ryckman noted, however, that Creston had begun work on the Indian lands before the lease was signed. Creston offered the following explanation:[12]

> You [Ryckman] are correct in stating that no work should have been done on Indian lands until the lease was signed. Work, however, was not commenced until, as I understand it, your Department and the Reclamation Company were in agreement as to the terms of the lease and as to all other matters in connection.

Finally, the Director sent to Ryckman the executed lease, No. 344, in favour of Creston on October 29, 1934.[13] In accordance with the existing practice, a copy of the lease was not sent to the band.

> The procedure in connection with the issue of leases does not include one for the Indians but, at the same time, they may, when necessary have access to the copy of record in your office.

From the time Creston approached the Department of Indian Affairs with its reclamation scheme to the actual execution of the surrender and lease in 1934, much correspondence, including several

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5 Letter dated October 11, 1932, to the honourable T.G. Murphy, Superintendent General of Indian Affairs, from W.K. Esling, Member of Parliament for Kootenay West (tab 44 in exhibit 1A).

6 R.S.C. 1906, c.115.

7 Certified true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 4th of February, 1928 (tab 28 in exhibit a A).

8 Letter dated May 12, 1934, to Dr. McGill, Sufperintendent General of Indian Affairs, from C.F. Hayes, Secretary, Creston Reclamation Company (tab 65 in exhibit 1A).

9 Surrender documents signed September 5, 1934 (tab 78 in exhibit 1A).

10 Letter dated September 14, 1934 from A.F. Mackenzie, Secretary, Department of Indian Affairs, to F.S. Ryckman, Indian Agent, Cranbrook, B.C. (tab 80 in exhibit 1A).

11 Letter dated October 18, 1934, from Ryckman to the Department (tab 82 in exhibit 1A).

12 Letter dated October 17, 1934, from Creston to Ryckman (tab 82 in exhibit 1A).

13 Letter dated October 29, 1934, from the Director to Ryckman (tab 84 in exhibit 1A).

reports, were exchanged between Ottawa, the band, the local departmental officials and Creston. It is therefore necessary to review many of these documents so as to recapture the atmosphere which prevailed at the relevant time. This will also prove useful for, and in some instances vital to, the determination of the subsequent issues.

The Royal Commission on Indian Affairs for the Province of British Columbia passed the following minute in 1915 recommending that the federal government contribute pro rata, as guardians of the Indians, to the cost of such a reclamation scheme:[14]

> In connection with the constitution and establishment of the above New Reserves it was, on March 24th, 1915, upon motion, Ordered: That the Commission in dealing with the reserve lands of the Lower Kootenay Tribe or Band, places itself upon record (as in the terms of the Minute of 31/10/1914) as of opinion that the Government of the Dominion of Canada should contribute pro rata, as guardians of the Indians concerned, to the cost of any work of reclamation of valley land at Creston, or in connection with any lands which the Commission may recommend to be added to the Reserve thereat, on the same being approved of by such Government after such expert inquiry as it may cause to be made and that a copy of this Minute be attached to an Interim, Special or other Report of the Commission dealing with such lands as aforesaid.

The Minute was first brought to the attention of Mr. D.S. Scott, Deputy Superintendent General, Department of Indian Affairs, on April 23, 1915, by S. Bray, the Chief Surveyor.[15] Mr. Scott advised the Chief Surveyor that:[16]

> ... they should be careful to inform any companies interested in reclamation work that they must not expect assistance from the Department without proper arrangements having been made.

At the time of the Creston reclamation proposal, the federal government became concerned about its obligation to contribute pro rata to any reclamation work in view of this Minute. In a memorandum dated June 24, 1926, to the Deputy Minister, the Department of Indian Affairs was unable to state with certainty whether the approval of the Minute by way of order in council obligated the Department to pay pro rata to the cost of the reclamation scheme.[17] Mr. Scott was of the opinion that it did, but that an expert inquiry had to be conducted before any government approval be given.[18]

Meanwhile, W.E. Ditchburn, the Indian Commissioner in Victoria, wrote to E.H. Small, the Indian Agent in Cranbrook, B.C., to express his concerns about the disposition of Indian lands. This letter sets out some of the background leading up to the Royal Commission which recommended that additional land be granted to the reserves. It also sets out Mr. Ditchburn's view with regards to the disposition of Indian lands and the possibility of their future reclamation. That letter is worthy of reproduction in its entirety:[19]

> I beg to acknowledge receipt of your letter of the 22nd instant with which you enclosed a letter from a W.J.H. Biker, District Engineer, intimating that some Spokane interests have a good offer for the Reclamation Farm on the Kootenay Flats, and if their offer is accepted, he may be able to interest them in the Indian Reserves. You wish to know how to reply to Mr. Biker.
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> In reply I have to inform you that this Department has no intention whatever of disposing of any of the Indian Reserves of the Lower Kootenay Band. You should be aware of the fact that under Section 48 of the *Indian Act* no portion of an Indian reserve can be sold, leased or alienated until it has been surrendered by the Indians. So far the Kootenay Indians have not even expressed a desire to have any of their land disposed for them.

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14 Letter dated June 28, 1926, from the Director to Ryckman (tab 84 in exhibit 1A).

15 Letter dated April 23, 1915, to Mr. Scott from S. Bray, Chief Surveyor (tab 2 in exhibit 1A).

16 Memorandum dated April 28, 1915, to Mr. Bray from Mr. Scott (tab 3 in exhibit 1A). See also letter dated April 30, 1915, to A. Megraw, Inspector of Indian Agencies in Vernon, B.C., from J.D. McLean, Assistant Deputy and Secretary (tab 4 in exhibit 1A).

17 Memorandum dated June 24, 1926, to the Deputy Minister from the Department of Indian Affairs (tab 7 in exhibit 1A).

18 Letter dated June 28, 1926, to Mr. Esling, M.P., from Mr. Scott (tab 8 in exhibit 1A). See also letter dated july 3, 1926, to Mr. Hayes from Mr. Scott (tab 9 in exhibit 1A).

19 Letter dated June 24, 1926, to E.H. Small, Indian agent in Cranbrook, B.C., from W.E. Ditchburn, Indian Commission for B.C. 9tab 6 in exhibit 1A).

> Up to 1916 the Lower Kootenay Indians only had approximately 3,400 acres of land in their reserves Nos. 1, 1A and 1B. Upon investigating into the requirements of the Indians, the Royal Commission on Indian Affairs considered that they had not sufficient and recommended a further 2,150 acres as Reserves Nos. IC, 2, 3, 4, and 5 The recommendations of the Royal Commission were approved by the Government of British Columbia and of the Dominion. The areas will be surveyed this season.
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> While the lands which the Lower Kootenay Band have at present afford but a poor living for them, it is anticipated that at some later date a general reclamation of the Kootenay Flats will be effected which will materially benefit the Indian lands, and the Indians will then be able to devote their attention to small farming and fruit growing which will necessarily better their condition. This, of course, will apply more to the younger generation.
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> In view of the above you should quite readily see that if your Department were to ask the Indians to surrender any of their lands for sale, such action would be extremely inconsistent with the claims put forth that the Indians had not sufficient lands for their requirements, as a result of which a large number of new reserves were allotted by the Royal Commission on Indian Affairs.
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> As the Indian Reserves of the Lower Kootenay Indians form such an extremely small part of the total area, it would appear to me that there is a tremendous area outside of the Reserves which could be taken up by private interests without ever thinking about the small areas which the Indians have.

The Deputy Minister of the Interior forwarded to Mr. Scott a copy of the *Tempest-Webb Report* before it was released (released on August 20, 1928) in answer to Mr. Scott's request for information on the reclamation project on the Kootenay Flats.[20] The Deputy Minister added that the Department was avoiding any responsibility in the matter, for the lands in question, apart from those included in the Indian reserves, fell within the jurisdiction of the provincial government. However, the Department was concerned about the international aspects of this project which would require the approval of the International Joint Commission.

A conference was held in Ottawa on June 23, 1927, between the Honourable Charles Stewart, Minister of the Interior, and R.H. Gale from Creston, with Mr. Scott present. Following the conference, Mr. Gale wrote to the minister in order to confirm the understanding and arrangements agreed upon:[21] the terms and conditions of the arrangements would not be made public at the time and Creston was to assist in any way possible in the matter of having the Indians agree to vacate the occupied lands. A second letter was sent by Mr. Gale to C.F. Hayes, President of Creston, informing him of the outcome of the conference.[22] It is noted therein that:

> After the matter had been discussed at considerable length, Mr. Stewart, finally gave me a definite undertaking and commitment that the Government would assist and make it possible for you to proceed, either by removing the Indians, who now own two thousand acres of the land to be reclaimed, and handing said lands over to you to do as you please with or by participating in the scheme. In other words, Mr. Stewart has definitely agreed and undertaken to give us the Indian lands or have the Government contribute its pro rata share of the cost of reclaiming said lands.
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> …
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> …I must ask you not to discuss the matter with them [Indians] and, under no circumstances, allow them to know what is going on. I, perhaps, should have explained that Mr. Stewart very strongly favors the idea of giving us the Indian Lands and thereby avoiding going to Parliament for money and, as it makes little or no difference to you which method of assistance is finally adopted, you must be prepared to assist Mr. Stewart in every way possible.

However, a few days later, the Minister responded to Mr. Gale's letter indicating that he had "painted the picture in too glowing colours".[23] Of particular interest is the last paragraph of this letter:

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20 Letter dated December 21, 1926, to Mr. Scott from the Deputy Minister of the Interior (tab 12 in exhibit 1A).

21 Letter dated June 23, 1927, to Mr. Stweart, Minister of the Interior, from Mr. Gale (tab 16 in exhibit A).

22 Letter dated June 23, 1927, to C.F. Hayes, President Creston Reclamation Co., from R.H. Gale (tab 17 in exhibit 1A).

23 Letter dated June 27, 1927, to Mr. Gale from the Minister of the Interior (tab 19 in exhibit 1A).

> It is most unfortunate that the Indians were ever given those lands, particularly with the proviso contained in the agreement in the event of reclamation taking place. That agreement was accepted in general by the Dominion Government.

Mr. Gale, however, was rather "shocked" at the content of the Minister's reply,[24] especially the phrase that "some other method of overcoming the difficulties which arise from the inclusion of the reserves in this scheme must be found". Mr. Gale was of the opinion that there were only two arrangements discussed and both were acceptable to Creston: removing the Indians or having the government join in the project. Mr. Gale then impressed upon the Minister to:

> ... kindly forget your prejudice, brush aside all technicalities, do away with the usual red tape and see that the arrangement agreed upon at Ottawa is lived up to and carried out without any delays. I have pledged myself, yes, and I have pledged you and the Government in this matter and there must not be any hitch now.

The Minister subsequently assured Mr. Gale that there would be no delay insofar as the Department of Indian Affairs was concerned.[25] Mr. Gale wrote back to thank the Minister for his assurances and added the following:[26]

> I cannot tell you how pleased I was to learn that you had been good enough to arrange to meet some of our Creston friends at Cranbrook and that you had fully confirmed the understanding arrived at between us on the occasion of my visit to Ottawa in June.
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> While I have not had any official information on the question I am given to understand that there would appear to be very little hope of success in the matter of removing the Indians and that there was every possibility of the Government having to assist by joining in the project. If this is the case I wonder how long it is going to take before the Reclamation Company can arrive at some definite agreement with you and arrangements completed for proceeding with the undertaking.

As agreed to at the meeting in Ottawa, Mr. Scott sent a telegram[27] to Mr. Ditchburn indicating that the Minister considered it urgent that they endeavour to exchange the Indian reserves which would be affected by the reclamation project for other suitable lands which would not be affected. Mr. Ditchburn was therefore to approach the Indians and reply to Mr. Scott as to the possibility of making such an arrangement. Mr. Ditchburn replies with a four page letter.[28] He had been informed by the Provincial Superintendent of Lands that there was no other land available which would suit the Indian purpose. However, it was Ditchburn's opinion that:

> ... the Indians would not consent to being moved unless they were fully compensated for the improvements which they have already on their reserves.

The next paragraph of Mr. Ditchburn's letter provides relevant background information concerning the non-Indian land subject to the reclamation scheme:

> With regard to my proposal for submission to the promoters of the scheme, I wish to point out that all the Crown land on the Lower Kootenay Flats, exclusive of the Indian Reserves, was turned over in 1919 by the British Columbia Government for the use of the Creston Stock Breeder's Association for hay cutting purposes, but the lease may be cancelled at any time if the land can be put to a more profitable use. By arrangement with the Stock Breeder's Association and the British Columbia Government, the Indians were given hay cutting rights on all lands between the Goat and Kootenay rivers outside of the Indian Reserves, and if the dyking scheme is gone ahead with they lose these rights as the reclaimed land would then become the property of the syndicate. Any benefit which would accrue to the Indian Reserves through their being dyked, could, therefore, be considered as a compensating factor for the loss they would sustain for the hay cutting rights which they would lose. The syndicate, however, would lose nothing as the actual dyking of the reserves would be paid for if the work is satisfactory.

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24 Letter dated July 12, 1927, to mr. Stewart from Mr. Gale (tab 21 in exhibit 1A).
25 Letter dated August 6, 1927, to Mr. Gale from Mr. Stewart (tab 22 in exhibit 1A).
26 Letter dated August 16, 1927, to Mr. Stewart from Mr. Gale (tab 23 in exhibit 1A).
27 Telegram dated June 23, 1927, to Mr. Ditchburn from Mr. Scott (tab 18 in exhibit 1A).
28 Letter dated June 28, 1927, to Mr. Scott from Mr. Ditchburn (tab 20 in exhibit 1A).

In a three page memorandum to the Minister regarding the departmental contribution to the reclamation project, Mr. Scott expressed that: "This development is not one which is considered by the Department as being of particular advantage to the Indians of the Lower Kootenay band".[29] However, it was his opinion that, should the Department decide to contribute to the project, it must be sustained by expert advice, as advocated by the Royal Commission. The Minister was also informed of the Indians losing their hay cutting rights if the lands were to be reclaimed. Mr. Scott suggested that:

> ... the amount of this loss should be estimated and charged against the Company as part of the Governmental contribution. Compensation for individual Indian improvements and the destruction or removal of houses should be estimated and paid for out of the Government's contribution.

Several months later, Mr. Scott writes to the Minister informing him that the time for presenting the Supplementary Estimates was approaching and that it was therefore necessary for the Department to decide "whether it is premature to provide funds for the project".[30] Therefore, Mr. Scott asked that J.T. Johnston, the Director and Chief Engineer of the Dominion Water Power and Reclamation Services for the Department of the Interior, undertake a more detailed inquiry with a view of meeting the proviso of pro rata contribution set forth in the Minute of the Royal Commission.[31]

In April, 1928, J.S. Tempest, Commissioner of Irrigation, Department of the Interior, in Calgary, and C.E. Webb, District Chief Engineer in Vancouver, were instructed by letter from Mr. Johnston to examine the reclamation project and to address these particular points: (1) the conditions surrounding the offer of provincial land to Creston; (2) the province's approval of the project and its plans; (3) the matter of maintenance; (4) the adequacy and sufficiency of Creston's surveys and plans; (5) the suitability of the engineering features; (6) the present value of the Indian lands, their probable value after reclamation and the estimated annual charge per acre for maintenance; (7) Creston's plans for financing; (8) the responsibility in the event of any claim for damages; and (9) the effect of the project construction on power development.[32]

In July, Mr. Webb informed Mr. Johnston that several different proposals had been put forward for reclamation on a large scale subsequent to the Creston proposal.[33] He refers to a letter from the Comptroller of Water Rights, dated June 7, 1928, wherein the latter states the following:

> Replying to your letter of yesterday's date, I have to advise you that, just at present, a larger and more comprehensive scheme is being developed for the reclamation of the Kootenay Flats, and, if it materializes, it will embrace the lands proposed to be reclaimed by the Creston Reclamation Company.
>
> While the larger scheme is being worked out, nothing is likely to be done by the Creston Company, and, should anything of a definite nature result in the near future, I shall be pleased to advise you.
>
> I shall be glad to show you the plans of the larger scheme, when you are next in Victoria.

Mr. Webb proposed calling on the Comptroller of Water Rights. However, this is the last we hear of this larger reclamation scheme, other than the letter from Mr. Johnston to the Deputy Superintendent General informing him of it.[34]

The *Tempest-Webb Report* was finally released on August 20, 1928.[35] It includes the history of the Creston reclamation project. Under the heading of "Indian Reserves Affected", at p.8, the report states as follows:

> In estimating the value of the Indian lands involved, from observations on the ground, it was noted from their elevation and proximity to the river, that these include some of the best

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29 Memorandum dated October 10, 1927, to the Minister from Mr. Scott (tab 24 in exhibit 1A).
30 Memorandum dated March 9, 1928, to Mr. Stewart from Mr. Scott (tab 26 in exhibit 1A).
31 Letter dated March 23, 1928, to J.T. Johnston, Director and Chief Engineer, Dominion Water Power and Reclamation Service, Department of the Interior, from Mr. Scott (tab 30 in exhibit 1A).
32 Letter dated April 2, 1928, to Mr. Webb and Mr. Tempest from Mr. Johnston (tab 24 in exhibit 1C). Sell also Memorandum dated June 29, 1928, to Mr. Stewart from Mr. Scott (tab 32 in exhibit 1A).
33 Letter dated July 4, 1928, to Mr. Johnston from Mr. Webb (tab 25 in exhibit 1C).
34 Letter dated July 24, 1928, to the Deputy Superintendent General, Department of Indian Affairs, from Mr. Johnston (tab 26 in exhibit 1C).
35 *Supra*, note 4.

> land in the project, which, under existing conditions, have a value for hay and pasture. Generally speaking, however, the Indian lands are more valuable than other lands included in the proposed reclamation area under existing conditions. Upon complete reclamation, however, all lands should have about the same value.
>
> The present value of Indian land might be said to be $10.00 to $15.00 per acre while after complete reclamation the return from crops grown under good cultivation should pay interest on a valuation of at least one hundred dollars per acre.
>
> ... So far as Indian Department lands are concerned, in view of the fact that portions of them now enjoy from their elevation, what might be termed partial natural drainage, they should not be charged the full pro rata charge of reclamation along with lands which are at present useless, being entirely submerged practically the year round.
>
> …
>
> ... However, if complete and satisfactory reclamation is carried out by the Creston Reclamation Company, it might be more satisfactory to the Department of Indian Affairs to pay for reclamation on an acreage basis, adjusted for relative benefits.

In view of the limited information contained in Creston's plans and specifications, it was "impossible to indicate the feasibility of the proposal or to obtain a basis for a close estimate of the cost of the project. The Creston Reclamation Company does not appear to have shown an estimated cost of the scheme."[36] The report recommended that: a topographical survey be carried out; more detailed plans be provided for the consideration of the Department's engineers; costs be estimated before the commencement of any work; the Department insist on no further liability regardless of the ultimate cost of the project; and the Department review the question of liability for damages that might arise from the construction of the project.

Mr. Scott was of the opinion that the findings of the report justified the Department's refusal to be rushed into a hasty appropriation of public funds for the reclamation project.[37]

As a result of this report, the Department of Indian Affairs sent a questionnaire to Creston. The Creston people were astounded at such a document, for they claimed that the plans had been approved in 1927 it Victoria, with copies to the Public Works Department in Ottawa, where they were approved. Moreover, the International Joint Commission had given its authorization to proceed with the project. Creston's Mr. McLean claimed that "the Department was just 'passing the buck' as it were."[38]

The Minister responded that even though plans had been approved at various stages, the Department of Indian Affairs' interest arose from the Royal Commission's Minute setting aside certain lands for the Indians and providing that "expert inquiry should be made by the Dominion Government into any scheme for reclamation of the valley lands at Creston.[39]

In October 1932, Mr. Johnston requested that Mr. Webb report on the reply received from Creston, mainly on the quality of the materials provided by Creston,[40] the reliability of their estimate of cost, and the effect of the project upon the Indians located on the reserves within the area to be reclaimed. Mr. Webb was also instructed to consult with C.C. Perry, the Assistant Indian Commissioner for British Columbia, who replaced Mr. Ditchburn in 1932,[41] and the local Indian Agent. (Me parties have been unable to locate this second report by Mr. Webb.)

As requested, Mr. Webb consulted Mr. Perry who was in full accord with the "suggestions and recommendations" contained in the *Tempest-Webb Report*.[42] However, Mr. Perry did not consider himself necessarily governed by any attitude previously assumed by W. Ditchburn:

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36 *Ibid*, at 5.
37 Memorandum dated December 5, 1928, to Mr. Stewart from Mr. Scott (tab 28 in exhibit 1C).
38 Letter dated May 11, 1929, to Mr. Stewart from D.D. McLean (tab 35 in exhibit 1A).
39 Letter dated May 28, 1929, to Mr. McLean from the Minister (tab 36 in exhibit 1A).
40 Letter dated October 20, 1932, to mr. Webb from Mr. Johnston (tab 45 in exhibit 1A).
41 Mr. Ditchburn passed away some time prior to May 16, 1933. See reference to the "lat Commissioner Ditchburn" in a Memorandum dated May 16, 1933 to the Deputy Minister from the Chief Surveyor (tab 57 in exhibit 1A at p.3).
42 Letter dated November 2, 1932, to Mr. Webb from C.C. Perry (tab 47 in exhibit 1A).

> ... and I do not see, personally, how any definite recommendation can be made in this office on so large an enterprise without some knowledge of the details which you are endeavouring to glean through your joint report with Mr. Tempest.

The Acting Secretary of the Department of Indian Affairs, T.R.L. MacInnes, then requested that Mr. Ryckman supply the Department with an estimate of the average annual production of hay on certain specified reserves of the Lower Kootenay Band, its estimated value, and the present value of the lands themselves.[43] He also asked that Ryckman give an estimate of the average annual revenue of these reserves from any other sources as well as an estimate of the revenue obtained from the Indians' hay cutting privileges on the lands between the Goat and Kootenay Rivers.

Mr. Ryckman responded several months later with the appropriate estimates.[44] He submitted that the estimates of the annual production and revenue from total hay cutting were $4,500 to $5,000 per year (presumably including the hay cutting privileges mentioned above). The Indians, however, do not cut all of their hay for they depend on this land to pasture their stock. Reserve No. 1-C West contained some of the best wild hay land on the Kootenay Flats and the other land, which was not so good for hay cutting, provided excellent pasture for the Indian stock. This was very important, for open range land in the Creston district was very limited.

Creston also prepared an estimate of the production from the Indian reserve lands which would be included in the reclamation.[45] Creston claimed that the estimate was closer to $920. Only a fraction of the amounts indicated are said to be cut on provincial land. Creston pointed out that the estimate was not based on that year's yield, but that it was as near to an average good year as possible. It was expected that the 1933 harvest would be more than 25 percent below the figures provided. This would be the result of the severe flooding of the Kootenay Flats that year.[46]

In the spring of 1934, the Secretary asked Ryckman to determine whether the Indians would have a sufficient supply of hay and pasturage on the remaining reserve lands to carry on their stock raising.[47] The plaintiffs submit that the Secretary was "very much alive to the problem facing the Band". The single paragraph of this letter bears reproduction:

> In considering the question of leasing a portion of the reserve lands to the Creston Reclamation Company, *it is necessary for the Department to be informed if the Indians will have a sufficient supply of hay and pasturage on the remaining reserve lands to carry on their stock raising without purchasing forage, having due consideration to the fact that they will not only be deprived of the hay which they now get from the portion of their reserve lands within the reclaimed area, but also on those Crown lands between the Goat and Kootenay Rivers*, on which by arrangement with the Stockbreeders Association and the British Columbia Government they now have hay cutting privileges. You are requested to take this under your consideration and advise the Department what you consider will be the effect on the Indians' stockraising activities as a result of the loss of the hay on these areas. (my emphasis)

A few days later, the Secretary asked Ryckman to carefully reconsider his estimates of January 26, 1933, for it had been intimated to the Department, particularly by Creston, [48] that his figures were considerably in excess of the average yield.[49] He was to make as accurate an estimate as possible of the tonnage for the 1934 season and report back to the Department. It is worthy of note that the 1934 surrender and lease were executed before Ryckman reported back to the Department with his revised estimates.

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[43] Letter dated November 30, 1932, to Mr. Ryckman from T.R.L. MacInnes, Acting Secretary (tab 48 in exhibit 1A).

[44] Letter dated January 26, 1933, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 49 in exhibit 1A). See also tabulation of estimates dated February 17, 1933 tab 53 in exhibit 1A).

[45] Estimate of the production from the Indian Reserve Lands to be included in the reclamation of Kootenay Flats to be undertaken by the Creston Reclamation Co. (tab 60 in exhibit 1A). See also letter dated May 12, 1934, to Dr. McGill from Mr. Hayes where Creston submits that this figure "will just about include the value of the hay cut on reserve lands, as well as provincial lands on which the Indian has cutting rights" (tab 65 in exhibit 1A).

[46] Kootenay Agency Inspection Report No. 9 dated May 16, 1933, from P. Pragnell, Inspector of Indian Agencies (tab 59 in exhibit 1A).

[47] Letter dated April 9, 1934, to Mr. Ryckman from Mr. Mackenzie (tab 58 in exhibit 1A).

[48] See letter dated May 17, 1934, to Mr. Hayes from the Deputy Superintendnet General: "Mr. Staples quesstioned the accuracy of the departmental estimate of revenue…" (tab 67 in exhibit 1A).

[49] Letter dated April 24, 1934, to Mr. Ryckman from Mr. MacKenzie (tab 63 in exhibit 1A).

In a letter to Mr. Esling, Mr. Hayes refers to a meeting held in Ottawa at the end of April 1934 between C.O. Rodgers, President of Creston, F.V. Staples, a prominent shareholder, and Mr. Esling, with Dr. McGill and the Honourable H.H. Stevens also present. He claims that:[50]

> They were given very definite assurance the Indian lands could be had *on a fifty-year lease at a sum per annum in line with the revenue now made by the Indians in operating the lands to be dyked*.
>
> …
>
> ... when it was solemnly agreed that the lease price would be the amount of revenue secured from year to year by the Indians. (my emphasis)

Mr. Hayes indicated that Creston had made an application for lease on the basis of a payment of $1,000 per annum for the lands, on a 50 year lease. He also informed Mr. Esling that the local Indian Agent [Ryckman] was "rechecking" the situation and assured him that his report would be mailed by May 11th.

Mr. Hayes also wrote a very similar letter to Dr. McGill, also dated May 12, 1934. Creston was willing to round off the $920 to $1,000 "as it is a round sum and one which the Indian is getting the benefit of the doubt."[51]

Dr. McGill responded to this letter on May 17, 1934.[52] He claims that Creston is under a "misapprehension". The following paragraphs of that letter bear reproduction:

> When discussing the question of leasing, the Department's estimate of present revenue to the Indians per acre was mentioned *for the purpose of indicating that a lease could not be considered which would provide a lesser revenue and not for the purpose of fixing a rental at an equal amount*. Mr. Staples questioned the accuracy of the departmental estimate of revenue and was informed that a further report on this subject would be obtained from the local Indian Agent.
>
> …
>
> I have not yet received the Indian Agent's report referred to in your letter but I do not consider that I would be justified in recommending a surrender for lease for a term of fifty years at the rental suggested in that letter. (my emphasis)

However, in May 1934, Ryckman did report that the tonnage was too high in his previous report, and while reconsidering his original estimates as requested, he reduced them to $1,500.[53] He had obtained his original figures from the Indians, but was convinced that they overestimated the tonnage and the revenue. He also reported that the Indians would be satisfied if they could receive $1,000 cash per year, *the balance* to apply to the cost of the reclamation. But they were willing to lease on those terms only for 20 to 25 years. He made the following conclusions based on information received previously and his own personal observations made in previous years:

> ... I do not believe the total value of hay and other farm and garden products raised on the area in question, and this includes the Crown lands on which the Indians have hay cutting privileges, will exceed the sum of fifteen hundred dollars per year. May I also respectfully point out to the Department that neither Reserve No. 4 nor that portion of Reserve No. 1C lying west of the Kootenay river come within the area to be reclaimed, although these portions of Lower Kootenay Reserve were mentioned in my previous report.

The President of Creston, Mr. Rodgers, wrote to Dr. McGill indicating that there was some "underlying current" which was stalling their progress in obtaining the lease.[54] He claimed that the Department of Indian Affairs was attempting to "block" them by the "exorbitant figures" they presented as the revenues that the Indians derived from their lands.

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50 Letter dated May 12, 1934, to Mr. Esling from Mr. Hayes (tab 64 in exhibit 1A).
51 Letter dated May 12, 1934, to Dr. McGill from Mr. Hayes (tab 65 in exhibit 1A).
52 Letter dated May 17, 1934, to Mr. Hayes from Dr. McGill (tab 67 in exhibit 1A).
53 Letter dated May 30, 1934, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 68 in exhibit 1A).
54 Letter dated june 5, 1934, to Dr. McGill from C.O. Rodgers, President of Creston (tab 69 in exhibit 1A).

On August 15, 1934, Ryckman writes to the Secretary of the Department of Indian Affairs informing him that:[55]

> I beg to submit that it is my intention to spend several days on Lower Kootenay Reserve in late October or early November in order to gather all the data possible as to the amount of wild hay put up by the Indians on that portion of the Reserve that will come within the proposed reclamation area, and also on the remainder of the Reserve and on the hay cutting allotments ...

As mentioned earlier, Ryckman was not afforded the opportunity to carry out his on the spot review before the lease was executed.

In the early 1930s, the Department of Indian Affairs received several offers from other companies interested in either a reclamation project or leasing reclaimed lands. The first one of these "offers" was an application from Midland Dredging Corporation Ltd. ("Midland").[56] They were willing to lease for 50 years other lands in the area, agreeing to dyke and reclaim such lands. Midland would initially pay for construction costs, and consider such costs as an advanced payment on the rental. Under such an arrangement, the Indians would receive no benefit until the costs were amortized.[57] Although it appears the Indians were willing to lease their land on those terms, it was thought that they did not fully appreciate the arrangement. According to Mr. Scott, it was doubtful that such an arrangement would be accepted by the Department.[58] Mr. Ditchburn was definitely not in favour of this particular scheme even if the lands would be greatly enhanced.[59] He strongly recommended that the scheme not be entertained. He was of the opinion, however, that if.

> ... a general reclamation scheme of the Kootenay Flats is ever put into operation, all the Lower Kootenay Indian Reserves would then be benefited and in which event it might be possible to dispose of some of the Indian lands, but this could only be done if the Indians took up general agriculture instead of stockraising as a means of livelihood.

Mr. Scott, therefore, informed Mr. Ditchburn that no more action would be taken on the Midland offer for the time being.[60]

In 1930, Mr. Guy Constable, on behalf of the Kootenay Valley Power and Development Co. ("Power Co."), wrote a letter to Mr. Scott discussing the general reclamation of the Kootenay Flats.[61] He stated that he had participated in each and every step of progress made in the recent proposals for the reclamation of the Kootenay Flats and that he had been involved in securing for Creston the concession of 10,000 acres from the Province of British Columbia. For several years, the Power Co. had been conducting a study of the reclamation of these flats. Even though it was not an actual offer or proposal per se, the last paragraph of this four page letter bears reproduction:

> The pro rata contribution of the Indian Lands as recommended by the Royal Commission might be considered by you as undesirable. Practically, the alternative would be a long-term lease conditional on reclamation and the annual revenues as rental to be derived therefrom. This Company would be prepared to work on this latter basis, and in due course to submit proposals along such lines. Such a lease could be worked out on the basis of net rental to the Indians, the Company absorbing all the costs of reclamation, which doubtless would be the most satisfactory way to your Department. We have had a lot of experience with the costs of reclaiming these lands, the problems of settlement, and the production of value. Clearly these all have a very definite relation to rental values, and in any consideration of such, this Company stands prepared to offer the utmost in that direction, the primary consideration being not what can be made out of Indian areas, but to assure that their reclamation is carried out so that they fit in with the all embracing plans for the whole Valley.

There is no further reference in the documentary evidence to the Power Co. proposal.

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55 Letter dated August 15, 1934, to the Secretary of the Department of Indian Affairs from Mr. Ryckman (tab 76 in exhibit 1A).

56 Letter dated January 31, 1930, to Mr. Small, from the Midland Dredging Corporation Ltd. (tab 37 in exhibit 1A).

57 Letter dated February 8, 1930, to the Secretary, Department of Indian Affairs, from Mr. Small (tab 38 in exhibit 1A).

58 Letter dated February 14, 1930, to Mr. Ditchburn from Mr. Scott (tab 39 in exhibit 1A).

59 Letter dated April 30, 1930, to mr. Scott from Mr. Ditchburn (tab 41 in exhibit 1A).

60 Letter dated May 10, 1930, to Mr. Ditchburn from Mr. Scott (tab 42 in exhibit 1A).

61 Letter dated June 24, 1930, to Mr. Scott from Guy Constable of the Kootenay Valley Power and Development Co. (tab 31 in exhibit 1C).

The next "offer" came from Frank H. Putnam from Creston, B.C.[62] It was not a proposal to reclaim land. It was an offer to lease land, once reclaimed by Creston. He was willing to offer $3.00 per acre on a long-term lease of 20 to 25 years.

Of crucial importance is the determination of the information and knowledge placed before the Indians at their band meetings, as the plaintiffs submit that there is no evidence that any detailed information of the other alternatives or proposals were put before the band. Again, such a determination may only be arrived at from a review of the relevant documents.

The Indian Agent, Mr. Ryckman, attended most of the Indian band meetings. The first reported meeting is that of May 11, 1931.[63] At this meeting, Ryckman laid before the Indians an offer of reclamation of one of the reserves, in return for a part of the reserve being granted to the parties offering to undertake the work. At first, the Indians refused to listen to the offer. The Inspector, G.S. Pragnell, and Ryckman insisted upon explaining the offer to them. Initially, they did not understand the offer, but finally, they insisted that they be given further time to consider the offer and that a meeting be called at a later date. According to the Inspector:

> ... Personally, I shall be surprised if they agree to the deal, as during the course of the discussion, some stated that the offer was different to what it had originally been. Others stated that they were better off with the large tonnage of wild hay, than they would be with a smaller amount of land in grain. Others claimed that if any scheme was undertaken it would have to include the whole of the Creston reclamation scheme, and that, in that case it would have to take in the reserve anyhow, and that further a complete scheme would have to be submitted to the U.S. Government to prevent flooding at the boundary at Bonners Ferry ...

The next reported meeting is that of January 24, 1933.[64] Creston's proposal to reclaim approximately 2,000 acres of land on Reserves Nos. I-C, 2, 3, and 5 was thoroughly explained to the Indians. It was also explained to them that if the Department saw fit to allow Creston to proceed with the project, and upon successful completion of the project, the matter of leasing all, or part of the reclaimed land, would be dealt with later on the advice of the Department. Every voting member was in attendance. A vote was taken. The Indians voted 17 to 4 in favour of the Creston proposal. In his letter, Mr. Ryckman expressed that he was heartily in favour of this scheme as outlined by Creston. One particular paragraph of his report bears reproduction:

> I am pleased to report that the Lower Kootenay Indians appear to realize how necessary it now is for them to farm their land and not to depend on the sale of wild hay and a few weeks work with the white farmers during the berry season to provide their families with the necessities of life. There has been a most decided change in the attitude of these Indians in the past year or two and, for the first time since I have been within the Department they seem to be really anxious to do some constructive work on their Reserve.

The next reported band meeting is that of March 1, 1934.[65] A vote was taken to determine whether or not the Indians wished to sell that portion of their reserve that came within the proposed reclamation area. All but one member voted against selling. Another vote was taken as to whether or not the Indians wished to lease the land, and all voted in favour of a long-term lease of from 20 to 50 years.

Mr. Ryckman, in a letter to the Secretary dated May 30, 1934, while noting that his previous estimates in his report dated January 26, 1933, [66] were too high, reported that:[67]

> The Indians realized that the cost of reclamation must be met from the rental of their lands, and I feet quite certain *that they will be satisfied if arrangements can be made so that they will receive about one thousand dollars per year in cash*, the balance of the rentals to apply

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62 Letter dated January 26, 1933, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 51 in exhibit 1A).

63 Inspection Report, Kootenay Agency No. 6, dated May 11, 1931, by the Inspector of Indian Agencies, Mr. G.S. Pragnell (tab 43 in exhibit 1A).

64 Letter dated January 26, 1933, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 50 in exhibit 1A).

65 Letter dated March 12, 1934, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 62 in exhibit 1A).

66 See tab 49 in exhibit 1A.

67 Letter dated May 30, 1934, to the Secretary, Department of Indian Affairs, from mr. Ryckman (tab 68 in exhibit 1A).

on the cost of reclamation. *They do not, however, wish to lease on these terms for more than from twenty to twenty-five years*. (my emphasis)

The most important band meeting is that of September 5, 1934.[68] This meeting was called subsequent to the Departmental letter of August 21, 1934,[69] wherein the Acting Deputy Superintendent General requested that Ryckman call a band meeting in order to submit surrender papers to the Indians. A copy of the Departmental letter of July 26, 1934,[70] to Creston setting out the terms and conditions on which the Department was prepared to consider a lease was attached:

> ... for your [Ryckman's] information and as a basis of explanation to the members of this band when considering the subject of surrender. The Department understands that these terms are satisfactory to the Creston Reclamation Company, and in our opinion they are quite favourable insofar as the Kootenay Band is concerned.

The following paragraphs of the Department letter addressed to Creston bear reproduction:

> I am now in a position to indicate to you the *terms and conditions* under which, if accepted, the Department is prepared to recommend to the Indian owners of this reserve that they give the necessary surrender. *The present and potential revenue producing possibilities of the lands involved have been kept in mind, but I am convinced you will agree that the only logical and reasonable basis on which the question of rental could be considered would be the purpose for which it is desired to obtain a lease of these lands*, rather than the present partial or indifferent utilization thereof.
>
> In considering this matter the Department assumes that, in the event of the contemplated undertaking being proceeded with, your Company would wish to obtain a lease for a period of from thirty to fifty years, and we are now prepared to recommend to the Indians a long term lease of the lands in question, subject to the following terms as to rental and certain other incidental considerations. The rental terms, which we believe fair and reasonable, are as follows:
>
> | | | | | | |
> |---|---|---|---|---|---|
> | Five | years | at | $1,500.00 | per | year |
> | " | " | " | 2,000.00 | " | " |
> | 10 | " | " | 2,500.00 | " | " |
> | 10 | " | " | 3,000.00 | " | " |
> | 20 | " | " | 4,500.00 | " | " |
>
> *... In addition to the rentals as set forth above, the Department would also require your Company to undertake the following additional obligations:*
>
> …
>
> 2. That your company *shall co-operate* with this Department in an effort to obtain for the Indians of this reserve and through an arrangement with the Stock Breeders Association and the Provincial Department of Crown Lands, hay cutting privileges on Provincial Crown Lands ... *for the purpose of insuring a sufficient hay supply for the Indian stock, and in lieu of the hay cutting privileges now held by these Indians on Crown Lands*, which will, it is proposed, be later included in the reclamation area. (my emphasis)

Of the 19 voting members of the reserve, 12 were present and they all voted in favour of leasing the land on the terms laid down in the above Departmental letter of July 26, 1934, addressed to Creston.

The Crown submits that the Court ought to draw an inference, wherever justified, that Mr. Ryckman did appraise the Indians of what appears on the face of the document. In support of this submission, the Crown refers to the *Kruger*[71] decision. In that case, Urie J., for the majority referred to the finding of the trial judge and concluded as follows at 262 N.R. [pp. 4950 C.N.L.R.]:

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68 Letter dated September 5, 1934, to the Secretary, Department of Indian Affairs, from mr. Ryckman (tab 79 in exhibit 1A).

69 Letter dated August 21, 1934, to Ryckman from the Acting Deputy Superintendent General (tab 77 in exhibit 1A).

70 Letter dated July 26, 1934, to Creston from the Acting Deputy Superintendent General (tab 73 in exhibit 1A).

71 *Kruger v. Canada*, [1985] 3 C.N.L.R. 15, 17 D.L.R. (4th) 591, [1986] 1 F.C. 3, 58 N.R. 241 (hereinafter *Kruger* cited to N.R. [and C.N.L.R.]).

> ... That is open to a number of interpretations but, on all the evidence, Barber's [Indian Agent] consistent sympathy for the position of the Band and his outspoken advocacy of its interests was so apparent that I cannot conceive that he withheld any information from the meeting, provided he had that information himself...
>
> I can only say that, in my opinion, the finding was a reasonable inference to be drawn from the known facts.

Therefore, the Crown invites the court to make the inference that on all of the evidence, because of his knowledge, his close association, and his clear attempts to bring forward all of the Indians' interests, that he would have told them. I do accept that invitation, as Mr. Ryckman appears to me, from my assessment of the relevant documents, to have been sympathetic to and supportive of the Indians.

Several memoranda were sent to the Deputy Minister from the Chief Surveyor. In the first memorandum,[72] the Chief Surveyor begins by setting out Ryckman's estimate of the present annual revenue secured by the Indians from the Indian reserve lands which the Creston Reclamation Project wishes to include within their dykes.[73] The Chief Surveyor then makes reference to the numerous figures quoted (eight in all) as the initial cost per acre for reclamation. These figures vary from Creston's estimate in 1926 of $50.00, to Mr. Tempest's $66.00 in his report, as well as the cost of $70.00 to $75.00 spent by the English Co. whose scheme was unsuccessful. The Chief Surveyor came up with the approximate figure of $61,000 based on the lowest figure ($33.00 per acre) as the Department's initial cost.

In his second memorandum,[74] the Chief Surveyor states that he was:

> ... not convinced that the Indians of these reserves would benefit commensurably to the expenditure by the inclusion of these Indian lands within the reclamation area. These Indians are stock raisers rather than farmers, and it probably would be many years before they could be educated to the point where they could properly utilize land as expensive as this would be if the Department were to contribute its pro rata share of the capital cost of development and its subsequent maintenance.
>
> …
>
> I do not consider that the sale of the reserves as they now are to the Company, or the lease of the lands after reclamation at the rentals suggested by the Company, is a solution which would be satisfactory to the Department. I base this conclusion on the information contained in my memorandum of the 17th February last.

He proposes three methods the Department might consider as its contribution to the reclamation project: (1) payment of a proportionate share of capital cost from public funds; (2) payment of a proportionate share of capital cost from funds secured from the sale or lease of a portion of the reserve lands; and (3) no payment toward capital cost while assuming responsibility of annual maintenance and charges. However, he did not agree with the recommendation of the Royal Commission that the government should contribute pro rata to the cost of the reclamation, unless the contribution was made pursuant to several conditions which include: the time of development is acceptable to the government; arrangement is made for the return of the funds to the government; the pro rata contribution is not on an acre for acre basis; the government's share of capital cost is not expected to be provided for in advance of the cost properly chargeable to the other lands; a fair deduction is made for the loss of revenue from the lands; compensation for Indian improvements affected by construction; and, the government is protected from any possible claim for damages.

The Chief Surveyor strongly recommended that Creston be advised that the Department could not consider at the present time any contribution of public funds to the reclamation project, but that the Department was willing to examine any alternative proposals not involving the expenditure of public funds.

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[72] Memorandum dated February 17, 1933, to the Deputy Minister from the Chief Surveyor (tab 54 in exhibit 1A).

[73] Estimate of present annual revenue secured by Indians from Indian reserve lands which the Creston Reclamation Project wishes to include within their dykes dated October 17, 1933 (tab 53 in exhibit 1A).

[74] Memorandum dated May 16, 1933, to the Deputy Minister from the Chief Surveyor (tab 57 in exhibit 1A).

In a memorandum to the Department dated June 16, 1934, the Chief Surveyor was willing to recommend that Creston be informed that, if the Department could obtain hay cutting privileges for the Indians to ensure sufficient hay supply for their stock,[75]

> ... the Department is prepared to submit a surrender for lease to the Indians for a term of 30 to 50 years, on the basis of rentals mentioned in that memorandum, with the condition also that the Company will defray the expenditure necessary to re-establish the Indians, as set forth in the memorandum.

In yet another memorandum to the Deputy Minister, the Chief Surveyor sets out the different considerations in arriving at the terms of the proposed lease.[76] These considerations included: the present value of the lands and their present revenue; the future possibilities resulting from the improvement of conditions and prices, and the "probable future development of Canada"; the rentals offered in 1930 by Midland; and the fact that Creston had guaranteed a rental of $5.00 per acre in 1932 upon the government contributing its pro rata share of the capital cost.[77]

The bulk of the correspondence in 1934 centres around the actual selling or leasing of the lands in question. There was also much correspondence in the way of pressure from various individuals favouring the Creston reclamation proposal: Dr. McGill, Deputy Superintendent General of Indian Affairs;[78] Mr. Esling, Member of Parliament for Kootenay West;[79] Mr. Wells Gray, Minister of Lands for the Province of British Columbia;[80] and the Creston Reclamation Co.[81]

At that stage, it was clear that Creston had been informed that the government was not willing to contribute its pro rata share to the capital cost of reclamation for this particular project.[82] Nevertheless, Creston was still pressing for a decision to be made.

The Deputy Superintendent General did not consider Creston's offer of a yearly rental of $1,000 to be adequate, considering the present and potential revenues from these lands. He was willing to suggest to Creston a graded scale of rentals from $1,500 to $4,500 per year on a 30 to 50 year lease. The Company would have to cover the expenses for re-establishing the few Indian families located on the subject property. Creston would also provide replacement for lost hay cutting privileges:

> ... that the lease be contingent on the Indians being given the hay cutting privileges through arrangement with the Stockbreeders' Association and the Provincial Government on Crown lands West of the Kootenay River and immediately North of the Indian reserve No. IC, to ensure sufficient hay supply for their stock, in order to replace those hay cutting privileges which they hold on Crown lands under arrangement with the Provincial Government which are to be included in the reclamation area ...

According to the Deputy Superintendent General, the graded scale of rentals would allow Creston sufficient time to undertake the development and to subsequently be in a stronger position to meet higher rentals.

In a letter to Creston, the Acting Deputy Superintendent General, while setting out the same terms as outlined above, added the following obligation:[83]

> That your Company *shall co-operate with this Department in an effort to obtain for the Indians* of this reserve and through an arrangement with the Stock Breeders Association and the Provincial Department of Crown lands, *hay cutting privileges* on Provincial Crown Lands west of the Kootenay River and immediately north of Indian Reserve No. 1C, for the purpose of insuring a sufficient hay supply for the Indian stock, and in lieu of the hay cutting privileges now held by these Indians on Crown lands, which lands will, it is proposed, be later included in the reclamation area. (my emphasis)

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75 Memorandum dated June 16, 1934, to the Department from the Chief Surveyor (tab 70 in exhibit 1A).
76 Memorandum dated June 16, 1934, to the Deputy Minister from the Chief Surveyor (tab 71 in exhibit 1A).
77 See tab 44 in exhibit 1A).
78 Memorandum dated June 16, 1934, to the Superintendent General from the Deputy Superintendent General (tab 72 in exhibit 1A).
79 Letter dated May 16, 1934, to Dr. McGill from Mr. Esling (tab 66 in exhibit 1A).
80 Letter dated March 22, 1934, to Mr. Murphy from Mr. Gray (tab 62a in exhibit 1A).
81 Letter dated May 12, 1934, to mr. Esling from Mr. Hayes (tab 64 in exhibit 1A).
82 See tab 72 in exhibit 1A.
83 Letter dated July 26, 1934, to Creston from the Acting Deputy Superintendent General (tab 73 in exhibit 1A).

Creston responded favourably to this letter but requested additional information as to how much it was estimated it would cost to reestablish the Indians.[84] No mention whatsoever was made by Creston regarding the obligation to co-operate with the Department to secure hay cutting privileges. Mr. MacKenzie, Secretary of the Department of Indian Affairs, wired a telegram to Ryckman requesting an estimate of the expenditure necessary to re-establish the Indians.[85] Mr. Ryckman wired back a night letter stating that it was difficult to estimate, but that $1,500 to $2,000 would be needed for the material for new buildings for the five families within the reclaimed area. This estimate did not allow for the cost of clearing land for cultivated crops or other improvements. Ryckman followed up with a letter two days later informing the Secretary that it was his intention to spend several days on the Lower Kootenay Reserve in late October or early November in order to gather all the data possible as to the amount of wild hay put up by the Indians.[86] He was also proposing to provide a closer estimate of the probable cost to re-establish the families in question.

However, seven days later, the Acting Deputy Superintendent General sends to Ryckman the surrender papers for submission to the band.[87] This appears to be the last piece of correspondence before the actual surrender. A copy of the above letter dated July 26, 1934,[88] to Creston setting out the terms and conditions (i.e. Creston "shall co-operate" with the Department) was attached as a basis of explanation to the Indians when considering the subject of surrender. The Acting Deputy was of the opinion that, not only were these terms satisfactory to Creston, but quite favourable to the Kootenay Band.

On September 5, 1934, Ryckman, while returning the signed surrender for lease[89] to the Secretary, reported that a band meeting was held and that:[90]

> ... Of the nineteen voting members of the Reserve twelve were present and I am pleased to report that *all voted in favour of leasing the land on the terms laid down in Departmental letter of July 26, 1934*,... (my emphasis)

After having received the signed surrender documents, Mr. MacKenzie forwarded a draft lease to Ryckman on September 14, 1934.[91] In his letter, MacKenzie stated that:

> *In order that this matter may not be further delayed, I send you herewith draft lease, in triplicate, which you might present at once* to the proper officer or officers of the Creston Reclamation Company, Limited, for the purpose of obtaining the necessary signature. These leases should then be returned to the Department for final execution by the Deputy Superintendent General. (my emphasis)

Approximately one month after the surrender was signed, the lease with Creston was executed.[92] However, as early as November of that same year, Mr. Ryckman was receiving complaints from the band and urgent requests for at least a portion of the lease money paid by Creston to the Department.[93] At the time, Creston was making its payments directly to the Department and not to the band.

It was only in December that C.C. Perry, the Assistant Indian Commissioner for B.C., in Victoria, was informed of the recent events leading up to the surrender and the lease.[94] Two years later, while considering the Bruner reclamation proposal, Mr. Perry wrote to the Secretary expressing his dissatisfaction with the way things were being done:[95]

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84 Letter dated August 6, 1934, to the Deputy Superintendent General from Mr. Hayes (tab 75 in exhibit 1A).
85 Telegram dated August 10, 1934, to Mr. Ryckman from Mr. MacKenzie (tab 75 in exhibit 1A).
86 Letter dated August 15, 1934, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 76 in exhibit 1A).
87 Letter dated August 21, 1934, to Mr. Ryckman from the Acting Deputy Superintendent General (tab 77 in exhibit 1A).
88 See tab 73 in exhibit 1A.
89 Surrender documents signed on September 5, 1934 (tab 78 in exhibit 1A).
90 Letter dated September 5, 1934, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 79 in exhibit 1A).
91 Letter dated September 14, 1934, to Mr. Ryckman from Mr. MacKenzie (80 in exhibit 1A).
92 Lease dated October 1, 1934, from her Majesty the Queen to Creston Reclamation Company Ltd. (tab 81 in exhibit 1A).
93 Letter dated November 21, 1934, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 43 in exhibit 1C).
94 Letter dated December 20, 1934, to mr. Perry from Mr. Ryckman (tab 45 in exhibit 1C).
95 Letter dated April 11, 1936, to the Secretary, Department of Idnian Affairs, from Mr. Perry (tab 10 in exhibit 1B).

> In reply thereto I beg to advise that no detailed information has been imparted to officials of this office concerning the concessions which have already been approved as relating to the Lower Kootenay reserves…
>
> …
>
> With great respect, I would point out that it is difficult to give the Department the benefit of my advice if I am not kept posted as to the local situation from the Department ...

The Victoria office had been initially involved, but was subsequently excluded from all negotiations and it does not appear from the correspondence that it had been kept abreast of the progressing situation.

Only four years after the surrender and lease, D.M. MacKay, who replaced Mr. Ditchburn as Indian Commissioner for B.C., was already of the opinion that the terms of the lease were not generous enough:[96]

> The Indians under the suggestion offered by Mr. Staples would have a right to seek a revision of the existing Lease and I am satisfied that if such an opportunity presented itself the Indians would take full advantage of it to seek much more generous terms for the use of their lands than exist under the present Lease.
>
> The safest and best course for the Company to take is to meet the rental due. Insofar as I am concerned, I am not prepared to recommend an extension of time.

4. The Hay Cutting Privileges:

In 1919, all the provincial Crown land on the Lower Kootenay Flats, exclusive of the Indian reserves, was turned over by the government of British Columbia to the Creston Stock Breeders' Association (the "Breeders' Association") for hay cutting purposes. The lease in question could be terminated at any time by the provincial Crown if the land could be put to a more profitable use. In 1920, through arrangement with the Breeders' Association and the government of British Columbia, Mr. Ditchburn was able to obtain for the Indians hay cutting privileges on all the lands between the Goat and Kootenay Rivers outside of the Indian reserves.[97] These so-called hay cutting privileges were not legally enforceable rights, according to Mr. Ditchburn.[98]

It was understood by all interested parties from the very beginning that, should the reclamation scheme proceed, the Indians would lose these hay cutting privileges outside the reserves, as the land in question, when reclaimed, would become the property of Creston. It was also acknowledged that the Indians' stock raising activities would be affected by the reclamation project, but it was not known to what extent.

The Chief Surveyor recommended that a surrender for a lease of 50 years be submitted on a graded scale of rentals beginning at $1500 per year, but only if the Department could obtain from the Breeders' Association and the provincial government hay cutting privileges on the Crown lands west of the Kootenay River.[99] The Deputy Superintendent General also suggested that the lease include a condition that the Indians be given hay cutting privileges.[100]

However, these privileges being over provincial Crown lands, neither the federal Crown nor Creston could deal directly with that condition. Accordingly, the actual proposal dated June 26, 1934, sent to Creston by the Acting Deputy Superintendent General included the following obligation:[101]

> 2. That your Company *shall co-operate* with this Department in an effort to obtain for the Indians of this reserve and through an arrangement with the Stock Breeders Association

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96 Letter dated October 31, 1938, to A. Irwin, Indian Agent, from D.M. MacKay, Indian Commissioner for B.C., in Cranbrook (tab 85 in exhibit 1A).

97 Letter dated May 15, 1920, to Mr. Scott from Mr. Ditchburn (tab 108 in exhibit 1D).

98 Letter dated June 22, 1920, to R.L.T. Galbraith, Indian Agent, Fort Steele, B.C., from Mr. Ditchburn (tab 110 in exhibit 1D).

99 Memorandum dated June 16, 1934, from the Chief Surveyor (tab 70 in exhibit 1A).

100 Memorandum dated June 16, 1934, to the Superintendent General from Deputy Superintendent General (tab 72 in exhibit 1A).

101 Letter dated July 26, 1934, to Creston from the Acting Deputy Superintendent General (tab 73 in exhibit 1A).

> and the Provincial Department of Crown Lands, hay cutting privileges on Provincial Crown Lands west of the Kootenay river and immediately north of Indian Reserve No. 1C, for the purpose of insuring a sufficient hay supply for the Indian stock, *and in lieu of the hay cutting privileges now held by these Indians on Crown Lands, which lands will, it is proposed, be later included in the reclamation area*. (my emphasis)

At the time, before the lease was executed, the Department was aware of Creston's position regarding the hay cutting privileges, as appears from Creston's letter of October 17, 1934 to Ryckman:[102]

> You refer to the question of hay-cutting privileges for the Indians. No doubt you are aware that the only land we win absolutely control is the land which we are renting from your Department, and we can hardly be expected to pay rent for the land and, at the same time, permit you to retain possession of it. I would trust, therefore, that you will not hold up these leases pending arrangements for the cutting of hay.

The Crown submits that, in 1934, it was thought to be impossible to secure the hay cutting privileges, and so the best effort was to get Creston "to co-operate": Creston did try to obtain additional hay cutting privileges on Crown lands but did not succeed.

The Crown also submits that there is no evidence of complaints from the Indians about the additional hay cutting privileges, except for the hearsay from Chief Chris Luke that "his uncle or somebody" told him that they thought they should get such hay cutting rights.

5. The 1939 Bruner Surrender

On October 30, 1935, Dr. Peter Charles Bruner filed an application to the International Joint Commission for the approval of his reclamation project on 3440 acres of flooded lands on the west bank of the Kootenay River, between the United States boundary and Kootenay Lake in the Province of British Columbia.[103] The proposal included all of the Lower Kootenay Indian Reserve No. 4 which contains some 217 acres.

Robert Howe, the Acting Indian Agent, was directed by the Secretary to report to the Department as to the effect the reclamation project would have on the adjoining reserves and:[104]

> ... whether it would or would not be to the detriment of the band to permit this reserve to be included in the project, either by sale or lease to the Company, *in view of having due regard to the fact that the area of reserves held by this band has been considerably reduced by the Creston Reclamation project*. You should also discuss the effect which would be caused by the loss of hay cutting rights on the lands outside of this reserve, included in the project. (my emphasis)

Mr. Howe reported back that if the Indians were deprived of all of Reserve No. 4, they would not have sufficient hay for their needs, as very little hay was produced on the other reserves.[105] He also reported that a meeting of the band was held and that a vote was recorded against the sale or lease of Reserve No. 4. However, the Indians requested that he submit to Dr. Bruner, as an alternative, the following proposition: in exchange for Reserve No. 4, 70 acres of reclaimed reserve land within the 217 acres, upon two conditions. First, that Dr. Bruner guarantee the security of the dykes or agree to indemnify the Indians for any damages resulting from any breakage. Secondly, that the 70 acres exchanged be plowed and ready for seeding for the first season. Mr. Howe was of the opinion that 70 acres of reclaimed and plowed land would be of far greater value to the Indians than the 217 acres of Reserve No. 4 in its present wild state.

Andrew Irwin, the Indian Agent who replaced Mr. Ryckman, reported that summer that the Indians seemed quite anxious to accept Dr. Bruner's offer to reclaim the 217 acres, in its present condition in exchange for 70 acres of reclaimed land.[106]

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102 Letter dated October 17, 1934, to Mr. Ryckman from Mr. Hayes (tab 82 in exhibit 1A).

103 Application of Peter Charles Bruner to the International Joint Commission dated October 30, 1935 (tab 1 in exhibit 1B).

104 Letter dated December 17, 1935, to Robert Howe from Mr. MacKenzie 9tab 3 in exhibit 1B).

105 Letter dated January 29, 1936, to the Secretary, Department of Indian Affairs, from Mr. Howe (tab 5 in exhibit 1B).

106 Kootenay Indian Agency Report for the month of May, 1936 (tab 72 in exhibit 1C).

It was noted by the departmental Secretary that the approval of Dr. Bruner's project by the Joint Commission did not make it imperative that Indian Reserve No. 4 be included "unless terms satisfactory to the Department are arranged."[107] This view was also shared by the Chief Surveyor, but he noted that Assistant Indian Commissioner Perry, Inspector Pragnell, Acting Indian Agent Howe and Indian Agent Irwin were all in favour of the exchange of lands.[108]

Late that summer, Dr. Bruner pressured the Department of Indian Affairs for a decision on the inclusion of Indian Reserve No. 4 in his reclamation scheme. His solicitors wrote that:[109]

> If the Doctor is going to reclaim this land it is high time that he was starting it, otherwise he will not have it completed before the high water of 1937 and in that case it would be far better to leave it for another year before he starts. This, in our opinion, would make it an unreasonable adventure, too much money tied up for too long a period.

On September 15, 1936, Dr. Bruner's solicitors requested permission to do some clearing on the reserve. They were advised by the Department this could not be done until the Indian owners had approved by way of surrender, and the Department was not willing to submit a surrender to them until there was a clear and definite understanding.[110] It was further submitted to them that 75 acres would remain in the Indian's possession, the Department would be released from any responsibility, and tide to the balance of the reserve would be conditional upon successful completion of reclamation or would revert back to the Indians. They were also advised that:

> ... if the terms and conditions as set out were approved by Dr. Bruner and advice to this effect is sent us by telegram, the necessary surrender documents would be prepared at once and forwarded to our Local Agent with instructions to submit them to the Indians for approval, or otherwise, without delay.

The solicitors replied by telegram dated September 29, 1936:[111]

> Conditions set out in letter satisfactory except Bruner will only plow disc and harrow the land that is clear from brush and trees.

On September 29th, 1936, Mr. Webb visited the Kootenay Flats and found that Dr. Bruner's reclamation project was already under way on the land adjacent to the Indian reserve. Certain instructions in regard to the work had been given to Dr. Bruner by the Provincial Department of Lands.[112]

In January 1937, Indian Agent Irwin reported that the band unanimously voted in favour of accepting 70 acres out of the 217 acres of Reserve No. 4 from Dr. Bruner, such land to be broken, properly cultivated and left ready for seeding.[113]

Mr. MacInnes, the Secretary, informed Dr. Bruner that the Department would immediately take action "with a view to submitting a surrender to the Indian owners of this Reserve for the purpose of obtaining a release on the terms and conditions which have already been tentatively approved."[114]

However, during a visit to Reserve No. 4, Indian Agent Irwin and the Indian Commissioner MacKay found that Dr. Bruner had proceeded with his project before obtaining the necessary approval of the Department.[115] The acreage of the reserve had not yet been reclaimed but a very large part of it had been placed under cultivation, and at the time of the visit, gave promise of a very good wheat yield. The Indian Commissioner was of the opinion that:

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107 Letter dated July 8, 1936, to Mr. Irwin from Mr. MacKenzie, (tab 74 in exhibit 1C).

108 Memorandum dated July 15, 1936, to J.C. Caldwell, Chief, Reserve Division, Indian Affairs Branch, Department of Mines and Resources, from the Chief Surveyor (tab 75 in exhibit 1C).

109 Letter dated August 11, 1936, to the Department of Indian Affairs from I.W. MacArdle, solicitor (tab 76 in exhibit 1C).

110 Memorandum dated May 3, 1938, to Mr. Caldwell from the Surveyor General, Chief, Hydrographics Service (tab 36 in exhibit 1B).

111 Telegram dated September 29, 1936, to the Deputy Superintendent General of Indian Affairs from Mr. McArdle (tab 78 in exhibit 1C).

112 Letter dated October 5, 1936, to Mr. Perry from Mr. Webb (tab 80 in exhibit 1C).

113 Report for the month of January 1937, of Kootenay Agency (tab 22 in exhibit 1B).

114 Letter dated February 4, 1937, to Mr. McArdle from Mr. MacInnes (tab 24 in exhibit 1B).

115 Letter dated August 25, 1937, to the Secretary, Department of Indian Affairs, from Mr. MacKay (tab 25 in exhibit 1B).

> … [if] assurances were not given to Dr. Bruner by the apartment that the proposed agreement was acceptable and would be approved, then I should recommend that none of the Reserve be alienated. In this case, I would suggest that Dr. Bruner be given a free lease to half of the acreage of the Reserve under cultivation for a period of years in payment of the reclamation services rendered.

Lawyers for Dr. Bruner subsequently prevailed upon the Department to transfer all of Reserve No. 4 to Dr. Bruner, except for 75 acres to be retained for the benefit of the Indians.[116]

The Indian Commissioner for B.C. reported that the band was very reluctant to discuss the matter of the Bruner Reclamation.[117] They complained that Dr. Bruner was permitted to include their reserve within his project without their consent. He notes that the Indians "were not consulted in the way they should have been". He also reported that on March 12, 1938, the Indians of the Lower Kootenay Band passed a resolution asking to retain what practically amounted to half of Reserve No. 4. The resolution is reproduced in part:[118]

> We hereby agree in consideration of the work done by Peter Charles Bruner, ..., in the matter of reclamation and clearing of Indian lands situated on Lower Kootenay Indian Reserve No. 4, to surrender to the said Peter Charles Bruner such acreage as will allow us to retain seventy-five acres already broken and under cultivation in the Easterly portion of said Indian Reserve prior to this date, and in addition all lands still uncleared or unbroken for cultivation prior to this date situated in the said easterly portion of the said Indian Reserve number four. It being understood as part of this agreement of surrender that the Department and Indians are definitely released from any responsibility direct or indirect ...
>
> Title when issued to the lands conveyed to the said Peter Charles Bruner shall be conditional, and the area covered thereby will revert to the Band should the reclamation project fail, ...
>
> It is also agreed that easement or tide shall be given to that portion of the land occupied by the dyke ..., and reasonable access to the lands and works conveyed to the said Peter Charles Bruner. (my emphasis)

Indian Agent Irwin, in his report for the month of March 1938, wrote that the Indians agreed, at the March 12th band meeting, that:[119]

> ... as settlement in full for Indian Reserve No. 4 in the Lower Kootenay district recently reclaimed and cropped by Dr. Peter Bruner in 1937, one-half of the land thus cropped, which was 130 acres and one-half of the land still to be broken, apart from the acreage that is taken up with the dyke. The resolution also called for a settlement with respect to 20 acres of the 1937 crop which represents the difference between 65 acres, the one-half of the land that was seeded and the 45 acres for which a settlement was received.

On May 3, 1938, the Surveyor General drafted an eight page memorandum which very thoroughly covers the progress of the Bruner Reclamation.[120] He made several recommendations including, inter alia, that the March 12, 1938, Indian resolution be used as a basis of settlement, and if Dr. Bruner agrees to the terms, that a surrender be submitted for lease or sale, and most important:

> That title when issued, *preferably in the form of a lease, be conditional*, so that the land will revert to the Indians if the reclamation project should fail, be abandoned, or not properly cared for. (my emphasis)

A surrender for sale of the 217 acres of Reserve No. 4 to Dr. Bruner was approved by the band on January 6, 1939,[121] providing that the land reverts to the Indians should the project fail. The requisite government approval to the surrender was obtained on February 3, 1939.[122] The Crown argues that the fact that Dr. Bruner "jumped the gun" and started his reclamation project before the

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116 Letter dated September 16, 1937, to the Department from Mr. McArdle (tab 28 in exhibit 1B). See also letter dated February 9, 1938, to the Department from Mr. McArdle (tab 31 in exhibit 1B).

117 Letter dated March 21, 1938, to the Secretary, Department of Indian Affairs, from Mr. MacKay (tab 34 in exhibit 1B).

118 Resolution of the Indians of the Lower Kootenay Band dated March 18, 1938 (tab 33 in exhibit 1B).

119 Report of ootenay Agency for month of March 1938 (tab 35 in exhibit 1B).

120 Memorandum dated May 3, 1938, to Mr. Caldwell from the Surveyor General (tab 36 in exhibit 1B).

121 The Lower Kootenay Band of Indians to The King Surrender of 217 acres, Lower Kootenay Indian Reserve Number Four (Lot 10002) signed January 6, 1939 (tab 42 in exhibit 1B).

122 Order in Council, P.C. 271, dated February 3, 1939 (tab 43 in exhibit 1B).

surrender was approved by the band, resulted in a better deal for the Indians. In any event, there is no evidence that the Indians got the worst of it because of the overhasty commencement of the dyking.

6. No Order-In-Council

Pursuant to s.51 of the *Indian Act*,[123] a surrender of a reserve, or of a portion of a reserve, must be submitted to the Governor in Council for acceptance or refusal. It is common ground that the 1934 surrender was never submitted to, nor accepted by the Governor in Council: an order in council with respect to the 1934 surrender has never been found.

It was not until 1948 that the government first realized that the surrender had not been accepted by the Governor in Council. In the left margin of a letter dated September 5, 1934, to the Secretary from Mr. Ryckman,[124] there is a barely legible handwritten note which reads as follows:

> N.B. Though a lease issued it does not appear that the surrender [? was ever?] accepted by the Gov in Council 31/12/48. L.B. [initials of Len Brown]

That discovery was not brought to the attention of the Indian band at the time, but only in 1974 when the Indian band was pressuring the government to cancel the lease.

The plaintiffs claim that the obtaining of an order in council pursuant to s.51 of the *Indian Act* is more than a technicality, it is essential for the protection of the interests of the Native people. They therefore claim that the 1934 lease was void ab initio due to the Crown's failure to obtain such an order. They submit that in 1948, when the Crown realized that there was no order in council, it was duty bound, at least, to notify the band so as to allow the Indians concerned to govern themselves accordingly.

They also claim that it is irrelevant whether the Crown "could have" proceeded without surrender by way of s.93 of the *Indian Act* regarding uncultivated lands: the Crown did proceed by way of a surrender and did not perfect the surrender according to law. It is now pure speculation as to what the terms might have been had the Crown proceeded pursuant to s.93.

The Crown concedes that it failed in its statutory duty to perfect the lease. Nevertheless, the Crown claims that the Indians cannot now seek an equitable remedy for they do not come to court with "clean hands". How the Indians would have dirtied their hands at, or after, this surrender has never been explained to my satisfaction.

In that respect, the Crown argues that one aspect of the fiduciary relationship in a surrender situation is that of agency. The Crown, while acting on behalf of the Indians, enters into a lease with a third party, Creston. The Indians, though recipients of the benefits from the lease, are not a party to the lease. It is the duty of the Crown to do all under its control to perfect the deal, and such duty is owed to Creston as well as to the Indians. It is a well established common law principle that "no person can take advantage of the nonfulfilment of a condition, the performance of which has been hindered by himself.[125] Therefore, the Crown submits that it was in the power of the Indians to "resurrender" the lands on exactly the same terms, if that were necessary to cure the situation.

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123 R.S.C. 1927, c.98

51(1) Except as in this part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a ajority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

(2) 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.

(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

(4) *When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal*. (my emphasis)

124 Letter dated September 5, 1934, to the Secretary, Department of Indian Affairs, from Mr. Ryckman (tab 79 in exhibit 1A).

125 *McDonald v. Bell et al*. (1965), 53 W.W.R. (N.S.) 449 at 461.

The Crown's syllogism begs the question for it presupposes that the Indians "benefitted" from the surrender and "hindered" its performance.

In the same blush, the Crown submits that, if in 1948 the Department had advised the Indians there was no order in council, and the Department proposed to secure one, the only recourse for the band would have been to bring forth an application for a writ of prohibition. The Crown claims that the writ would have been denied for the reasons as stated above.

The Crown further contends that their failure to obtain an order in council to perfect the surrender did not result in any damage to the Indians. From the time of the execution of the lease, the parties proceeded as though there was a valid lease. The Indians repeatedly asked for the overdue rent. They subsequently sought to have the lease cancelled by the Crown on any possible technicality, while Creston had incurred all the reclamation risk and cost and had been paying them rent. The Crown says it was acting on behalf of the Indians when they entered into the lease, and also when the "mistake" was made, but the Indians still reaped the benefit of the lease.

As mentioned earlier, the Crown submits there was no need for an order in council to lease "uncultivated" lands pursuant to s.93 of the *Indian Act*, for it could be done without the consent of the Indians. This option was considered by the Department as early as 1927.[126] It was also invoked by Mr. Scott in 1928 as a device guaranteeing the Department "control of the situation".[127]

> ... *If the Indians refuse to surrender for leasing the Department might well invoke the powers of Subsection 3 of Section 93* Chap. 98 Revised Statutes. This section enables us to lease land for the benefit of the Indians, if not cultivated, or land which the band or individual Indians neglect to cultivate. This section gives us control of the situation. (my emphasis)

Therefore, the Crown submits that, as the Department found out through Mr. Ryckman and other Indian agents that the Indians, on balance, were in favour of the reclamation scheme, the Department had decided to proceed by way of surrender, even if most of the land was uncultivated.

In my view, it is clearly irrelevant whether the Department could have proceeded by way of s.93. In fact, it did not. It chose the surrender route but failed to follow it through. The surrender was never approved by cabinet and the Indians were therefore denied a protection to which they were entitled by law.

The jurisprudence in the matter leads me to the conclusion that a surrender not perfected by order in council under s.51 of the *Indian Act* is void ab initio. The following three decisions bear revisiting: *Easterbrook*,[128] *St. Ann's Island*[129] and *Cowichan*.[130] The principles enunciated in those decisions are relevant to the case at bar and they may be abridged as follows.

In the *Easterbrook* decision, the Indians had purported to lease, for a term of 999 years, certain Crown land reserved for the Indians which they had not surrendered to the Crown, as was required by law. The Supreme Court of Canada agreed with the learned trial judge that the lease was "null and void ab initio, and that the King was entitled to recover forthwith the possession of the lands described with their appurtenances."[131] It was also held that the receiving of annual rent could not serve to validate a lease which was void ab initio.

In the *St. Ann's Island* decision, Cameron J., of the Exchequer Court came to a very clear finding that "s.51 [of the *Indian Act*] requires an order in council as the necessary preliminary to the validity of the lease of 1925, and that no such order in council referable to that lease was passed at any time".[132] He concluded that "as the lease of 1925 was never authorized by an order in council, there has been noncompliance with the imperative provisions of s.51 *and that the lease and the provisions for renewal therein are wholly void*."[133] (my emphasis)

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126 Memorandum dated October 10, 1927, to the Minister from Mr. Scott (tab 24 in exhibit 1A).
127 Memorandum dated June 29, 1928, to Mr. Stewart from Mr. Scott (tab 32 in exhibit 1A).
128 *Easterbrook v. His Majesty the King*, [1931] S.C.R. 210, 4 C.N.L.C. 304 (hereinafter Easterbrook)
129 *St. Ann's Island Shooting & Fishing Club Ltd. v. The King*, [1949] 2 D.L.R. 17, 5 C.N.L.C. 594 (Ex. Ct.); conf. [1950] S.C.R. 211, 5 C.N.L.C. 608 (hereinafter *St. Ann's Island* cited to D.L.R.).
130 *The King v. Cowichan Agricultural Society*, [1950] Ex. C.R. 448, [1951] 1 D.L.R. 96, 5 C.N.L.C. 376 (hereinafter Cowichan).
131 *Supra*, note 128, at 218.
132 *Supra*, note 129, at 25.
133 *Ibid*. at 28.

In the *Cowichan* decision, the Exchequer Court adopted the reasoning of Cameron J., and held that it must be "considered settled law that s.51 of the *Indian Act* requires a direction by the Governor-in-Council before there can be a valid lease of surrendered Indian Reserve lands ... and that a lease of such lands without the direction of the Governor-in-Council is void."[134] The court was also of the opinion that there could not be an estoppel to defeat the express requirements of a statute, particularly when they are designed, as s.51 of the *Indian Act* is, for the protection of the interests of special classes of persons.

In these two cases, it was the Crown who pleaded the invalidity of the leases for the lack of an order in council. It is hardly in a position now to submit that the Indians in this case should be estopped from putting forth the very same argument.

In the cases referred to by the plaintiffs, the leases in question were still in existence when the court declared them to be null and void ab initio for noncompliance with the statutory requirements. In the case at bar, the lease was terminated following an out-of-court settlement between the plaintiffs and Creston in 1982. Nevertheless, for the purposes of the instant action, I find that the 1934 surrender, and consequently the lease to which it provided sustenance, are void ab initio. This finding does not affect Creston, not a party to this action, but it does have a major impact on the resolution of this claim against the Crown. That impact will have to be considered in the light of the relevant statute of limitations relating to fiduciary breaches.

7. Subsequent Events (After 1974)

In 1974, Chief Chris Luke approached the Department for a cancellation of the lease with Creston. The band had received information to the effect that Mr. A. Staples, Director of Creston, had the subject property for sale, "said sale to include the portion of the Lower Kootenay Indian Reserve farmed by Mr. Staples and included in the Creston Reclamation master lease. The asking price for this portion is listed at Twenty Dollars ($20.00) per acre when included in the sale."[135]

The band protested to the Department, arguing that the lessee could not transfer the lease to a third party without first obtaining the consent of the lessor (the Department of Indian Affairs). The relevant paragraph of the lease is reproduced:[136]

> Provided further *that the said Lessee shall not, nor will during the said term, grant or demise, transfer* or set over, or otherwise by any act or deed, procure or cause the said lands and premises hereby demised, or intended so to be, or any part thereof, or any estate, term or interest therein to be granted, assigned, transferred or set over to any person or persons whomsoever, *without the consent in writing of the said Lessor, first had and obtained*, which said consent in writing, it is also declared and agreed, shall be necessary to a second and subsequent assignment or transfer of the premises or any part thereof, or any term or interest therein, shall or will said Lessee do or suffer any act or deed whereby the said term or any unexpired part thereof, shall or may be taken in execution, seized or sold. (my emphasis)

The band requested that the Department refuse to allow or sanction th e transfer of any portion of the reserve land covered by the 1934 lease. The band also claimed that Creston had been reaping a healthy profit on its original investment over the past 40 years and that the $2.34 per acre the band was receiving in rent was substantially inferior to the going rate of $30.00 to $50.00 per acre for good agricultural land in the area. It was made clear by the band that they wanted to be kept abreast of the steps taken by the Department.

On May 1, 1974, D.M. Hett, District Supervisor, Kootenay-Okanagan District, wrote to W.E. Millin, Head of Property Management, British Columbia Region (who later became the Assistant Regional Director, Economic Development, British Columbia Region), concurring with the band that the present rental "is completely inadequate on today's money value."[137] He could not, however,

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134 *Supra*, note 130, at 454-455. See also *Esquimalt and Nanaimo R.W. Co. v. Fiddick* (1909), 1 W.L.R. 509, where the Full Court of British Columbia declared in 1909 that a Crown grant, without the assent of the Lieutenant-Governor-in-Council as prescribed by law, was a nullity.

135 Letter dated April 19, 1974, to D.M. Hett, Supervisor, Kootenay-Okanagan District, Vernon, B.C., from Chief Chris Luke (tab 95 in exhibit 1A). See also letter dated April 25, 1974, to Mr. Hett from Chief Chris Luke (tab 96 in exhibit 1A).

136 Lease dated October 1, 1934 (tab 81 in exhibit 1A).

137 Letter dated may 1, 1974, to W.E. Millinm, Head of property Management, British Columbia Region, from Mr. Hett (tab 907 in exhibit 1A).

identify any weakness in the wording of the lease, but requested that Mr. Millin review the lease and consider any possibility of cancellation or renegotiation.

Mr. Millin addressed these same concerns to the Department of Justice[138] who answered that the lease could "only be legally cancelled prior to the expiration of the term if the Lessee is in breach of any of the covenants of the Lease for a period of 40 days."[139] The relevant paragraph of the lease is the following:[140]

> Provided Always, and it is hereby agreed, *that if the rent hereby reserved, or any part thereof shall at any time or dines diving the said term, be in arrear or unpaid for the space of forty days next after the days or any of them whereon the same shall become due*, according to the reservations thereof hereinbefore mentioned, whether the same be demanded or not, or in case of breach or nonperformance of any or either of the covenants herein contained on the part of the Lessees, to be observed and performed; then and in such case or either. of them, *it shall be lawful for the said Lessor at any time after the expiration of the said forty days, into and upon the said lands, tenements and premises, or any part thereof, in the name of the whole, to reenter, and the same to have again, repossess and enjoy, as if this Indenture had never been made*, and every clause, matter and thing therein contained, and the term hereby granted shall cease, determine and be absolutely void to all intents and purposes whatever, and the said Lessor shall thereupon hold the said land and premises with the appurtenances utterly discharged of this lease and of all covenants and provisoes herein contained, without the payment or allowance by the Lessor of any sum of money whatever to the said Lessee, or to any tenants or occupiers of the said land, for any houses, buildings and improvements erected thereon or made by the said Lessee, or by the tenants or occupiers of the said land and premises, or any part thereof. (my emphasis)

The Justice officials were also of the opinion that Creston could take no legal action against the Crown for refusing to consent to any Creston transfer for there "is no provision that such consent shall not be unreasonably withheld."

Mr. Millin reported back to Mr. Hett and recommended that the consent clause be used as "a lever to open negotiations with the present lessee to update the rental and enter into a new lease with the proper protective covenants for the Band."[141]

In reference to the alleged contravention of the lease by Creston in 1945 due to the nonpayment of rent, the Department of Justice confirmed Millin's opinion that "once the outstanding rental had been accepted, the lease document defect had been corrected and was in good standing. Therefore, we cannot break the lease on these grounds."[142]

On January 24, 1975, W. Keff, District Superintendent of Economic Development, Kootenay-Okanagan District, informed Walter Faryna, Supervisor of Lands, British Columbia Region, that Creston had subleased, in the guise of a share-cropping arrangement, portions of the reserve land in question without the consent of the Crown.[143] Mr. Kerr was of the opinion that:

> …The Band wishes to terminate the head lease if at all possible, *due to the extremely low rent where they realize some two dollars and change per acre*. As this provision is not exactly a covenant of the lease, it may be difficult to cancel it I realize, *however I would expect that the Band should be able to assume the subleases and realize the $100 per acre or so that Creston Reclamation are realizing from their subleasing arrangements*. (my emphasis)

In another letter to Mr. Faryna, Mr. Kerr also noted that some of the buildings on reserve lands were in the possession of the Department of Agriculture.[144] Mr. Kerr was aware of the delicate situation as he stated that "I am somewhat concerned about letting the cat out of the bag". He also expressed his concern with regards to whether or not Creston was still a company in good standing.

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138 Letter dated May 8, 1974, to the Department of Justice from Mr. Millin (tab 98 in exhibit A).
139 Letter dated May 22, 1974, to Mr. Millin from the Department of Justice (tab 99 in exhibit 1A).
140 Lease dated October 1, 1934 (tab 81 in exhibit 1A).
141 Letter dated June 3, 1974, to Mr. Hett from Mr. Millin 9tab 100 in exhibit 1A).
142 Letter dated August 23, 1974, to W. Kerr, District Superintendent of Economic Development, Kootenay-Okanagan District, from Mr. Millin (tab 101 in exhibit 1A).
143 Letter dated January 24, 1975, to Walter Farnya, Supervisor of Lands, British Columbia Region, from Mr. Kerr (tab 102 in exhibit 1A).
144 Letter dated February 6, 1975, to mr. Farnya from Mr. Kerr (tab 103 in exhibit 1A).

While noting the insufficiency of information available at the time, the Department of Justice responded to Mr. Faryna's request for advice regarding termination of the lease.[145] Justice was of the opinion that a breach of the restriction against assignment could entitle the lessor (the Crown) to re-enter the premises, provided the Crown had not waived its right to forfeit the lease by accepting rentals after any subleasing without leave of the Crown had taken place. Justice recommended that, should the Crown wish to re-enter the premises, it ought to commence an action for possession of said lands. The Crown was also advised by Justice that Creston was not a company in good standing with the Registrar of Companies, the last report having been filed on November 25, 1974.[146]

On October 31, 1938, Mr. Mackay wrote to Mr. Irwin, the local Indian Agent, the following on the right of Indians to forfeit the lease:[147]

> I have received your letter of October 25th, File 2- 10, in which you advise that the rental on Lease 334 is now past due and that the Company have applied to have the payment carried over for another year.
>
> In this connection Mr. Frank Putnam, M.L.A. visited this Office ... and I advised him that the terms of the Lease with respect to rental payments would have to be met, or the Lease was subject to cancellation, and I would advise the Secretary of the Company to this effect.
>
> The Indians under the suggestion offered by Mr. Staples would have a right to seek a revision of the existing Lease and I am satisfied that if such an opportunity presented itself the Indians would take full advantage of it to seek such more generous terms for the use of their lands than exist under the present Lease.
>
> The safest and best course for the Company to take is to meet the rental due. Insofar as I am concerned, I am not prepared to recommend an extension of time.

In a March 10, 1975, letter to Mr. Faryna, Chief Chris Luke expressed the band's discontent with the lease and requested information regarding proceedings to be taken.[148] He also stated that "if there is no legal steps or advice for the Lower Kootenay Band to take, the band will take action in reclaiming all lands that are under lease to the Creston Reclamation Co. Ltd." Chief Chris Luke was subsequently informed by Mr. Faryna that Mr. Kerr had been contacted to set up an appointment with the band and the Department of Justice in order to establish a plan of action.[149] Mr. Faryna strongly recommended that the band not take any action to reclaim the land without first obtaining advice from Mr. Kerr and the Department of Justice. Mr. Kerr was requested to advise the Revenue Section to return all future rental payments until the matter had been resolved.

Even though the British Columbia Regional Office was requested to investigate the matter,[150] the closing of the District Office in 1975 seems to have created a break in the development of the on-going investigation to cancel the lease. The Department of Justice vowed that it was more than willing to cooperate with the band in this matter, but there existed the problem of someone to assist the band in gathering evidence which would be admissible in a court of law without the assistance of a District Office.[151] Suggestions were made about hiring a person with the requisite experience, contracting with a private firm or training a band employee.[152] A lawyer was finally retained by the Department.[153]

A meeting was scheduled between the local member of Parliament, Bob Brisco, M.P., Kootenay West, Chief Chris Luke, Mr. Poupore and the Assistant Deputy Minister of Indian and Northern Affairs, Mr. Mackie, for July 5, 1976. Mr. Brisco sent a copy of the brief, which would form the basis of their discussions with the Assistant Deputy Minister, to Chief Chris Luke. He was also

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145 Letter dated March 6, 1975, to Mr. Farnya from the Department of Justice (tab105 in exhibit 1A).
146 Letter dated March 14, 1975, to Mr. Kerr from Mr. Farnya (tab 107 in exhibit 1A).
147 Letter dated October 31, 1938, to Mr. Irwin from mr. MacKay (tab 85 in exhibit 1A).
148 Letter dated March 10, 1975, to Mr. Farnya from Chief Chris Luke (tab 106 in exhibit 1A).
149 Letter dated April 7, 1975, to Chief Chris Luke from Mr. Farnya (tab 108 in exhibit 1A). See also letter dated March 14, 1975, to Mr. Kerr from Mr. Farnya (tab 107 in exhibit 1A).
150 Letter dated December 1, 1975, to the Director General, Indian and Eskimo Affairs, British Columbia Region, from G.A. Poupore, Director, Lands and Membership (tab 109 in exhibit 1A).
151 Letter dated December 9, 1975, to Mr. Poupore from Mr. Farnya (tab 110 in exhibit 1A).
152 Letter dated December 22, 1975, to Mr. Farnya from mr. Poupore (tab 111 in exhibit 1A).
153 Letter dated April 28, 1976, to Chief Chris Luke from Bob Brisco, M.P., Kootenay West (tab 112 in exhibit 1A).

asked to bring any additional information which he thought might be important.[154] The brief sets out some of the facts known at the time surrounding the problem at hand, and of particular importance is the "revelation" that there was no order in council to be found either accepting or refusing the 1934 surrender, so that the surrender was null and void.

Certain portions of this brief are reproduced below to demonstrate the position of Mr. Brisco, who at the time was in complete agreement with the band:

> ... It is to be noted that estoppel does not apply in this case since it would defeat the express requirements of a statute. The passage of considerable time between the making of the defective surrender and the discovery of the defect in no way diminishes the right of the Lower Kootenay Band from invoking the provisions of s.51(4) of the *Indian Act* (P-S.C. 1927). The inability to apply estoppel in this case is reinforced by the fact that s.51 was created for the protection of a special class of persons.

The brief referred to the *St. Ann's Island* decision where the Supreme Court of Canada ruled that, by virtue of s.51 of the *Indian Act*, in the absence of a specific acceptance by the Governor-in-Council, a lease pursuant to a surrender of Indian lands to the Crown is not binding, regardless of whether the terms of the surrender contemplated the making of a lease.

The brief continued as follows at p.5:

> Several illustrations can be given to support the fact that *not only did the Crown fail to seek the optimum possible terms for the Lower Kootenay Band when negotiating the lease, but also neglected the lease once it was signed*. The lease is an unusually lengthy one, lasting for a term of fifty years, and providing for a fixed amount of remuneration to the Lower Kootenay Band for the use of the land. Prudent business practices would shun a commitment over such a long period without the inclusion of some kind of 'escalator' or 'review' clause to apply to the monetary provisions of the lease. Moreover it should be noted that the monetary terms of the lease were negotiated during the Great Depression and that only a negligent negotiator would expect the severe economic conditions of those years to last forever, and hence *fix payment rates in the lease at Depression-era prices*. The history of prices for farm rental land in the Creston area over the past forty-two years has proved this to be correct. While in the Great Depression $2.34 per acre as a lease charge might have been a fair price, today it is nothing compared to the prices being charged at points in the Creston Valley ($30-$40 per acre). The rate of payment currently being received by the Lower Kootenay Band under the terms of the lease is only 5% of the going rate in the Creston Valley. *These facts indicate that the Crown was merely doing what was most convenient and expedient, and raises doubts that the Crown intended to pursue the best interest of the Lower Kootenay Band*. (my emphasis)

Following the meeting, Mr. Poupore wrote to Mr. Millin indicating that he would continue to review "the rationale of 1934 which allowed the Creston Reclamation Co. lease to be granted for a 50 year term at what now appears to be grossly inadequate rent."[155]

Mr. Millin responded by expressing his agreement with the band concerning the amount of potential revenue that the band was losing every year which he estimated at $100,OW per year.[156] According to Millin, the lands were being intensely cropped by Creston and should have been renting for approximately $60 per acre as opposed to the present $2.50. The band had commenced a very successful reclamation program on some of their land. This was an example of the extreme inequity with respect to the Creston lease, for the band made a profit of $7,000 from a partnership on some 100 acres, which is far in excess of the entire rental realized from the Creston lease. Mr. Millin was confident that sufficient covenants of the lease had been broken, or not adhered to, to warrant cancellation of the lease and was willing to become personally involved in resolving the matter. In a letter to Creston, Mr. Millin expressed his position to the effect that there seemed to be two alternatives open: "cancellation of the old document and/or negotiation of more appropriate terms to reflect present day conditions".[157] Mr. Millin also stated in a letter to Chief Chris Luke that either a proper rental was to be paid to the band (at least $60 to $70 per acre) or he would request cancellation of the lease.[158]

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154 Letter dated June 29, 1976, to Chief Chris Luke from Mr. Brisco with brief attached (tab 113 in exhibit 1A).
155 Letter dated july 5, 1976, to Mr. Millin from Mr. Poupore 9tab 115 in exhibit 1A).
156 Letter dated July 22, 1976, to Mr. Poupore from Mr. Millin (tab 116 in exhibit 1A).
157 Letter dated july 30, 1976, to mr. Staples from Mr. Millin (tab 117 in exhibit 1A).
158 Letter dated September 3, 1976, to Chief Chris Luke from Mr. Millin 9tab 119 in exhibit 1A).

Meanwhile, the band had passed a resolution[159] on August 26, 1976, to the effect:

> That the Council of the Lower Kootenay Indian Band is demanding from the Depart. of Indian Affairs and Northern Development a cash settlement in the amount of one million dollars ($1,000,000) this for the illustrations given by the Depart. of Ind. Affairs in its lack, failure to seek the optimum possible terms for the Lower Kootenay Indian Band when negotiating the so-called lease, but also neglected the lease once it was signed;
> …
>
> and furthermore this above mentioned figure is reflecting back rent retroactive signing of the so-called surrender to Creston Reclamation Company Ltd., September 5, 1934.

Chief Chris Luke continued to press for cancellation of the lease which he suggested should take effect "no later than *October 31st, 1976*."[160] On November 17, 1976, he wrote to Mr. Millin that, if the Department did not cancel the lease with Creston, the band would have no alternative but to take action.[161]

On November 5, 1976, F.J. Walchi, Director General for the British Columbia Region, had informed Creston that the Department of Indian Affairs would be taking the necessary legal proceedings to cancel the lease because Creston had entered into a sublease agreement with the Department of Agriculture, contrary to the terms of the lease.[162]

However, Creston disagreed with the Department's assessment of the situation.[163] Creston claimed that during the first 20 years of the lease, there was little or no profit, and that profits were relatively insignificant in relation to the rental paid under the lease. Profits had increased progressively as a result of effective dyking and a gradually improving market. Creston claimed that it was the "recent improvement in farm profit which has motivated the Kootenay Indian Band to agitate for the cancellation of the above Lease in marked contrast to their unbroken silence during all the lean years". Due to the efforts and investment by Creston, the lands which would be reverting to the band when the lease expired in eight years would be a valuable asset. The solicitor for Creston was instructed to advise Mr. Walchi that:[164]

> ... upon abandonment by the Department and the Indian Band of any claim for forfeiture of the Lease and upon your agreement to extend the terms of the Lease for 20 years from the date of its expiry, our client, for these considerations, will agree to a present increase in rental to $9,000 per annum for the next eight years, the rental under the renewal lease to be adjusted every five years thereafter upwards or downwards by an agreement or, failing agreement, by arbitration to reflect the fair rental value of the land as agricultural land.

On November 26, 1976, Mr. Millin sent to Chief Chris Luke a copy of the November 5, 1976, letter informing Creston that the Department was cancelling their lease, along with Creston's reply. Chief Chris Luke was informed by Mr. Millin that:[165]

> ... This was what we were waiting for. Now that we have their position in writing, we can give the file to our lawyers (Justice Department) to start legal action. This will be done by November 26.

Mr. Millin also added that:

> ... if we can hold out a while longer while the Justice lawyers go over the case our chance for success will be greatly improved.

However, the Director, Department of Justice, Vancouver Regional Office, was of the opinion that the sublease from Creston to the Crown in right of Canada dated July 6, 1972, signed on behalf of Her Majesty the Queen by the Deputy Minister of Agriculture, was obviously consented to, approved and encouraged by the Crown. He suggested that any action to terminate the lease

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159 Band Council Resolution dated August 27, 1976 (tab 118 in exhibit 1A).
160 Letter dated September 20, 1976, to Mr. Millin from Chief Chris Luke (tab 120 in exhibit 1A).
161 Letter dated November 17, 1976, to Mr. Millin from Chief Chris Luke (tab 123 in exhibit 1A).
162 Letter dated November 5, 1976, to Creston from F.J. Walchi, Director General, British Columbia Region (tab 122 in exhibit 1A).
163 Letter dated November 19, 1976, to Mr. Walchi from David Tupper, solicitor for Creston (tab 125 in exhibit 1A).
164 *Ibid*. at p.6.
165 Letter dated November 26, 1976, to Chief Chris Luke from Mr. Millin (tab 127 in exhibit 1A).

based on this argument "would probably be struck out as frivolous, with costs awarded against you."[166]

Mr. Millin requested a second opinion from Ottawa and approval for the necessary funds to enable the band to hire its own solicitors.[167]

On April 29, 1977, the Department of Agriculture wrote to the Department of Indian and Northern Affairs indicating they no longer have a valid contract with Creston and they cannot secure one until the matter with Creston is resolved.[168] They also suggested that the Department of Indian and Northern Affairs write to Creston informing them that they could proceed with a renegotiation of 1972-1976 contract.

Peter Clark, Assistant Regional Director, Lands, Membership & Estates, British Columbia Region (who later became the Director, Reserves and Trusts, British Columbia Region), wrote to Chief Chris Luke indicating that the Department of Indian and Northern Affairs agreed with the opinion of the Department of Justice.[169] He mentioned that court actions were costly and that a better way to resolve the problem was "by negotiation with the lessee of a lease which will satisfy both parties". He was of the opinion that Creston's proposal was worthy of review and consideration.

Chief Chris Luke disagreed.[170] He could not understand why the Department of Indian Affairs had not been informed of the "sublease" with the Department of Agriculture. He also wrote that it was "absurd and insulting to consider extension of this particular lease ... however, as guardians of our interests it is your responsibility to rectify the mistakes of years ago, and to assist us with our efforts toward the obtainment of a better present and more meaningful future."

Mr. Clark seems to have changed his mind, for in a letter to T.B. Marsh, the Regional Director, Department of Justice, Vancouver Regional Office, he set out the existing circumstances to the effect that Creston had gradually withdrawn from active agricultural farming operations and was left with a longstanding lease of Crown land.[171] Creston had entered into management contracts or agreements with other local companies. Presently, Wynnland Farms Ltd. was cultivating and cropping the reserve lands at their own discretion and erecting buildings on the subject property. Wynnland Farms had no authority to either "take over" the lease or to enter onto and use the reserve. Mr. Clark noted that the question surrounding Agriculture Canada was not as significant in this matter as the occupation by Wynnland farms (and previously by Eastman Farms): "at least Agriculture Canada has a conscience as to the occupation and use of these Reserve Lands." Finally, he stated that he is "firmly of the opinion that this Department is being made to look absolute fools by Creston Reclamation." He instructed the Regional Director to review the matter and to contact Wynnland Farms.

In an attempt to salvage the sublease with Agriculture Canada and to protect the experimental farm, Mr. Clark came up with the idea of an occupancy permit. He wrote to Chief Chris Luke on November 25, 1977, informing him that it has been:[172]

> ... proposed that a sublease ftom Creston to Agriculture Canada be consented to by this Department in the form attached. This would require that Agriculture Canada pay $400.00 per annum for the remainder of the Head Lease in return for this consent. In addition, we propose that Agriculture Canada have a permit approved by the Band Council for 20 years commencing the lst of January, 1978. This permit would require Agriculture Canada to pay to the Band a permit fee of $1,000 per annum.
>
> Agriculture Canada have consented to this in principle and it now requires your approval to complete the documentation. I think that this is an excellent agreement and beneficial to all parties.

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166 Letter dated December 14, 1976, to Mr. Farnya from the Director, Department of Justice, Vancouver Regional Office (tab 129 in exhibit 1A).

167 Letter dated February 9, 1977, to Chief Chris Luke from Mr. Millin (tab 131 in exhibit 1A).

168 Letter dated April 29, 1977, to the Department of Indian and Northern Affairs from Agriculture Canada (tab 134 in exhibit 1A).

169 Letter dated August 11, 1977, to Chief Chris Luke from Peter Clark, Assistant Regional Director, Lands, Membership & Estates, British Columbia Region (tab 139 in exhibit 1A).

170 Letter dated August 18, 1977, to Mr. Clark from Chief Chris Luke (tab 41 in exhibit 1A).

171 Letter dated September 23, 1977, to T.B. Marsh, Regional Director, Department of Justice, Vancouver Regional Office, from Mr. Clark (tab 142 in exhibit 1A).

172 Letter dated November 25, 1977, to Chief Chris Luke from Mr. Clark (tab 147 in exhibit 1A).

On December 6, 1977, Mr. Brisco, M.P., wrote to Chief Chris Luke regarding the lease with Agriculture Canada. He was quite prepared to believe "that experiments conducted on a variety of crops at this particular site will ultimately be of benefit to all farmers in the Creston Valley, particularly the Lower Kootenay Band."[173] He also expressed his feeling that Mr. Clark had demonstrated "action and sincerity." He hoped that the band would agree to the lease and said that if he felt that some unfair advantage were being taken of the band, that he would be "very quick to speak out."

The terms of the above mentioned sublease to the Department of Agriculture were reiterated by Mr. Clark in a letter to Mr. Marsh,[174] in the following manner:

> ... I have informed the Band that in my opinion the Department has the authority to consent to a sublease without the approval of the Band Council by Resolution but that it would be more satisfactory if such approval were received. The proposed permit would, of course, need the approval by Band Council Resolution and I have requested such approval be given accordingly.

In order to clarify his previous letter, Mr. Clark writes once again to Chief Chris Luke.[175] The following paragraphs are reproduced:

> We are proposing that Agriculture Canada have a lease with this Department of the 20 acres, that they are presently occupying, for a 20-year period with all proceeds going to your Band. The amount is yet to be confirmed but it is suggested that they pay an annual fee of $1,000. This is equivalent to a rental of $50 per acre per annum. This will, of course, require the approval of your Band Council.
>
> In addition, in order to protect the present experimental works being undertaken by Agriculture Canada, and accepting for the time being that the lease to Creston Reclamation Company Ltd. is in good standing, we are consenting to a sublease for the remainder of the head lease.

However, Chief Chris Luke and the band council were not in agreement with the terms and conditions offered by Agriculture Canada. He claimed that accepting such terms would defeat "the purpose of cancellation of the overall lease agreement to Creston."[176]

On March 15, 1978, the Department of Indian Affairs and Northern Development consented to a lease between Creston and Her Majesty the Queen in right of Canada without the consent of the band.[177] The sublease to the Department of Agriculture was for a term of seven years, eight months and 29 days from January 1, 1977 to September 29, 1984, yielding a total rent of $3,100 payable to Creston.

After more than six months following the visit of Mr. Clark to the reserve, Chief Chris Luke writes to him indicating the band's complete disappointment in the way things were proceeding.[178] He has been requesting a thorough investigation into the matter since 1971 with no avail.

On May 12, 1980, Mr. Clark informs Chief Chris Luke "that a thorough investigation was carried out between 1975-1978 without producing any evidence suitable to consider termination proceedings."[179] The band is subsequently informed that they will be receiving "a contribution for purposes of examining the situation,"[180] after which the band acted upon by retaining counsel.

In 1981, the band filed an action against Creston in the Supreme Court of British Columbia. On May 4, 1982, two years before the lease's natural expiration, Creston settled with the band and surrendered unto Her Majesty the Queen all its interests in the reserve lands under the 1934 lease.

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173 Letter dated December 6, 1977, to Chief Chris Like from Mr. Brisco M.P. (tab 114 in exhibit 1D).
174 Letter dated December 6, 1977, to Mr. Marsh from Mr. Clark (tab 148 in exhibit 1A).
175 Letter dated December 15, 1977, to Chief Chris Luke from Mr. Clark (tab 149 in exhibit 1A).
176 Letter dated December 9, 1977, to D.L. Sperry, solicitor, from Chief Chris Luke (tab 150 in exhibit 1A).
177 Lease-Agreement dated March 1, 1978, with consent of the Department of Indian Affairs and Northern Development dated March 15, 1978 (tab 151 in exhibit 1A).
178 Letter dated April 28, 1980, to Mr. Clark from Chief Chris Luke (tab 157 in exhibit 1A).
179 Letter dated May 12, 1980, to Mr. Clark from Chief Chris Luke (tab 158 in exhibit 1A).
180 Letter dated December 9, 1980, to Chief Chris Luke from D. Mullen, Department of Indian and Northern Affairs, Head, Finance & Administration, Central District (tab 159 in exhibit 1A).

On May 6, 1982, the band eventually agreed by resolution[181] to a permit authorizing a sublease to the Department of Agriculture. The actual permit was signed by Mr. Clark on May 21, 1982.[182] It was proposed, for greater certainty, that the permit be issued on the same terms and conditions as contained in the Agriculture Lease. In cross-examination, Chief Chris Luke said that he understood that the Department could consent to the sublease under the terms of the head lease, but that it was preferable if the Indians agreed. However, he also understood that the Department required the band to consent to the occupancy permit, which it subsequently did. He understood that the agreement by the Indians to sublease to the Department of Agriculture was without prejudice to the Crown terminating the lease with Creston on any other valid grounds.

8. Fiduciary Obligations

Following the decision of the Supreme Court of Canada in *Guerin v. The Queen*,[183] it now appears clear that there is a general fiduciary obligation owed by the Crown in right of Canada towards Indian bands in respect of their lands. The existence of such an equitable obligation was held to be the sine qua non for liability on the part of the Crown. In view of Dickson J., (as he then was):[184]

> ... 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 inalienable except upon surrender to the Crown.

The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact the Crown is under an obligation to deal with the land on the Indians' behalf when their interest is surrendered.

Therefore, only upon surrender of reserve lands does the fiduciary obligation arise "to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf."[185] This view was adopted by Addy J., in *Apsassin v. Canada*[186] who refused to find a fiduciary obligation with respect to reserve lands prior to surrender. The purpose of the surrender is "clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."[187]

Dickson J., in *Guerin* was also of the view that the Crown would be held to the fiduciary's strict standard of conduct. The duty of a fiduciary is that of "utmost loyalty"[188] to the party for whose benefit it acts. Unconscionability, being the key to the breach of this duty,[189] must be determined against the backdrop of all the circumstances.

The written terms of the surrender in *Guerin*, almost identical to those in the case at bar, were to the Crown "in trust to lease ... upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people."[190] Dickson J., while considering that the written terms of the surrender were conditions of the fiduciary obligation and that a "failure to adhere to the imposed conditions will simply itself be a prima facie breach of the obligation,"[191] did not hold that the written terms of the surrender had been breached. However, the so-called "oral terms," which the band understood would be embodied in the lease, were part of the backdrop of the circumstances that would determine whether the Crown had acted unconscionably. Even though the oral terms in *Guerin* were not conditions of the surrender, nor of the fiduciary obligation, they did serve to "inform and confine the field of discretion within which the Crown was free to act."[192]

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181 Band Council Resolution dated May 6, 1982 9tab 57 in exhibit 1C).

182 Department of Indian Affairs and Northern Development Permit signed by Mr. Clark on May 21, 1982 (tab 59 in exhibit 1C).

183 [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120, 55 N.R. 161 (hereinafter "Guerin").

184 *Ibid*. at 385 [p.131 C.N.L.R.]

185 *Ibid*. at 385 [p.138 C.N.L.R.]

186 (1987), [1988] 1 C.N.L.R. 73, [1988] 3 F.C. 20 (T.D.) (hereinafter *Apsassin*) presently under appeal to the Federal Court of Appeal, A-1240-87 [reported sub nom. *Blueberry River Idnian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.* (1987), 14 F.T.R. 161].

187 *Guerin*, *supra*, note 183, at 183 [p.136 C.N.L.R.].

188 *Ibid*., at 389 [p.140 C.N.L.R.].

189 *Ibid*., at 388 [p.140 C.N.L.R.].

190 *Ibid*., at 369 [p.126 C.N.L.R.].

191 *Ibid*., at 387 [p.139 C.N.L.R.].

192 *Ibid*., at 388 [p.140 C.N.L.R.].

The plaintiffs submit that, according to Addy J., in *Apsassin*, there rests "an onerous fiduciary duty upon the Department of Indian Affairs to ensure that all reasonable efforts were made to obtain the best price possible for the land at the time of sale."[193] In such a situation, where there exists such a fiduciary duty, Addy J., was of the opinion that "there also rests upon the person by whom the duty is owed, an onus of proving that it has been discharged."[194] However, he hastened to add at p.47 F.C. [p.93 C.N.L.R.] that:

> ... wherever advice is sought or whenever it is proffered, regardless of whether or not it is sought or whether action is taken, there exists a duty on the Crown to take reasonable care in offering the advice to or in taking any action on behalf of the Indians. Whether or not reasonable care and prudence has been exercised will of course depend on all of the circumstances of the case at that time and, among those circumstances, one must of course include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the Indians of which the Crown might reasonably be expected to be aware. Since this situation exists in the case at bar, the duty on the Crown is an onerous one, a breach of which will bring into play the appropriate legal and equitable remedies.
>
> Where there does exist a true fiduciary relationship such as in the case at bar, following the 1945 surrender, the same high degree of prudence and care must be exercised in dealing with the subject matter to which the fiduciary duty relates, as in the case of a true trust (refer *Guerin et al. v. The Queen et al*., *supra*, at page 376 [pp. 130-31 C.N.L.R.]). The test to be applied is an objective one; good faith and clear conscience will not suffice. It is also similar to a trust in another respect: where a trustee is in any way interested in the subject matter of the trust, there rests upon him a special onus of establishing that all of the rights and interests both present and future of the beneficiary are protected and are given full and absolute priority and that the subject matter is dealt with for the latter's benefit and to the exclusion of the trustee's interest to the extent that there might be a conflict. A similar onus rests on the Crown in the case at bar regarding the equitable obligation which is owed the plaintiffs.

The plaintiffs claim that the Crown did not ensure that all reasonable efforts were made to obtain the best price on behalf of the Indians. The Crown did not approach other reclamation companies or interested parties. It proceeded without giving time to Ryckman to produce a further estimate of the annual production and revenue on and off the reserve lands, as requested by the Department.

In *Apsassin*, Addy J., also held at p.46 [F.C.; p.92 C.N.L.R.] that:

> ... With the exception of any special obligations which might be created by treaty, there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender nor, a fortiori, is there any remaining after the surrendered lands have been transferred and disposed of subsequently.

The Crown, while agreeing that there are obligations that continue after the surrender, in the case of a lease, submits that those obligations are circumscribed and limited to the obligation to ensure that the terms of the lease are carried out. However, it claims that the more onerous fiduciary duty, as described by Addy J., in *Apsassin*, is predicated upon the existence of a conflict of interest on the part of the Crown which creates a prima facie case that you are not acting in the best interest of the Indians.

The learned judge found that there was such a conflict of interest in the *Apsassin* case. There is no allegation of such a conflict in the instant case. In the case of a conflict of interest, the onus is that of a trustee, which is more onerous, to show that the Crown is acting in the best interest of the cestui que trust. In the absence of that conflict of interest, there is no prima facie case, and it is for the plaintiffs to show that the Crown did not act in their best interest.

Addy J., referred to the *Kruger*[195] decision, an expropriation case, where the parties assumed, and the Federal Court of Appeal confirmed, that the rules applying to conflicts of interest between trustees and cestui que trust were equally applicable to fiduciaries.

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193 *Supra*, note 186 at 75 [p.138 C.N.L.R.].
194 *Ibid*.
195 *Supra*, note 71.

Addy J., when dealing with other breaches not involving a conflict of interest, said at p.79 [p. 141 C.N.L.R.] that 'Unlike the issue of sufficiency of the sale price of I.R. 172, the onus of proof of these allegations rests upon the plaintiffs." Therefore, the defendant submits that the onus is clearly on the plaintiffs to show that the Crown did not act prudently and reasonable under the circumstances in the negotiations leading up to the lease and in the years that followed. So long as the Crown's discretion is exercised honestly, prudently and for the benefit of the Indians, there is no breach of their fiduciary duty. Whether the Crown obtained the best possible price is not the test in this case. It would have been the test had there been a conflict of interest. Again, I agree with that proposition.

The conflict of interest situation in *Apsassin* was created when the Crown was seeking the transfer of Indian lands upon surrender to the Veterans Administration, another branch of the federal government. Such is not the case with reference to the 1934 lease to Creston nor the 1938 surrender to Dr. Bruner. The more onerous test would, however, apply to the Crown's dealing with the sublease to the Department of Agriculture in the 1970s.

Both parties referred to a recent decision of the Supreme Court of Canada, *R. v. Sparrow*.[196] In that case, the Court considered the scope of s.35(1) of the *Constitution Act* with reference to the plaintiff s fishing rights and reaffirmed its position in *Guerin* to the effect that:[197]

> ... 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.

The Crown also advanced the argument that the fiduciary obligations owed to the Indians "do not float above in the air." They must be grounded in a dependency. They only exist where the Indians cannot, by statute, act for themselves. The obligations only crystallize when the Crown is interposed. It is only upon surrender that it is clear that the Indians cannot act for themselves, for the fiduciary obligation owed to the Indians by the Crown is sui generis.[198] In any instance in which the Indian people can and do act for themselves in relation to this lease, there is no fiduciary obligation on the Crown to act. The Indians are fully entitled to avail themselves of federal and provincial laws in order to enforce their rights.[199] In the view of Addy J.:[200]

> Although, as previously stated, three justices of the Supreme Court (Ritchie, McIntyre and Wilson JJ.) held that there existed, previous to surrender, a fiduciary duty regarding the lands, *neither they nor anyone else at any time suggested that there might continue to subsist some general continuing legally recognized fiduciary duty regarding lands, once they have been disposed of*. (my emphasis)

But the surrender in *Apsassin* was absolute, whereas the Creston transfer was a lease. In my view, the Crown's fiduciary duty was crystallized for the duration of that lease and did not float away after the 1934 surrender, and more so where the proposed surrender was aborted ab initio because of a neglectful omission on the part of the Crown.

The Crown submits that it did not act hastily or imprudently, but that it consulted experts, engineers, surveyors and department officials at all levels. In fact, the negotiations with Creston lasted from 1926 to 1934. And, in the absence of any conflict of interest, it had no obligation to obtain the best possible rentals: it acted fairly and in the best interests of the Indians.

On the other hand, the plaintiffs submit that, even though the Crown was not legally bound to follow the McKenna-McBride Royal Commission recommendation concerning a pro rata contribution, the Crown had at least a moral duty to consider it. It is worthy of note that, following the report of that Commission, *The British Columbia Indian Lands Settlement Act*,[201] a federal statute, was assented to on July 1, 1920. Section 2 reads as follows:

> 2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfill every act, deed, matter or

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196 [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385 56 C.C.C. (3d) 263, 46 B.C.L.R. (2d) 1, 111 N.R. 241 (hereinafter *Sparrow*).

197 *Ibid*. at 1108 [p.180 C.N.L.R.].

198 *Guerin*, *supra*, note 183 at 387 [p.139 C.N.L.R.].

199 *Apsassin*, *supra*, note 186 at 47 [p.92 C.N.L.R.].

200 *Ibid*. at 46 [p.92 C.N.L.R.].

201 S.C. 10-11 George V, c.51.

> thing necessary for the carrying out of the said Agreement between the Governments of the Dominion of Canada and the Province of British Columbia *according to its true intent, and for giving effect to the report of the said Royal Commission, either in whole or in part*, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province. (my emphasis)

It is therefore clear that the Crown was not legally bound to contribute pro rata to the reclamation project. Nevertheless, it should have been a consideration when the terms of the lease were being negotiated, for the band would have to carry the additional burden resulting from the Crown's refusal to contribute. If the capital cost for Creston had been reduced by way of such a contribution, higher rental payments to the band could most likely have been obtained.

9. Findings On The Five Basic Issues

1) Was the Crown in breach of its fiduciary duty, and or negligent or both, vis-a-vis the band at the time of the surrender and the lease in 1934?

My answer has to be in the affirmative. Although, there was no conflict of interest on the part of the Crown and the Crown, therefore, was not subject to the more onerous burden of securing the best possible rental rates for the Indians, it was nevertheless under the obligation to be reasonably prudent and provident, and more so where it had decided not to award the pro rata contribution recommended by the Royal Commission. Knowing well that the Indians were very reluctant to be locked into a long-term lease, the Crown should at least have secured a more realistic "escalator" clause or a "review" clause and ought not to have bound the band for fifty years to "Depression-era prices", as described by the local Member of Parliament, Mr. Bob Brisco in his 1976 brief.[202]

The Crown's own public servants quickly realized that the rates set in 1934 were not satisfactory and fair to the Indians. As early as October 31, 1938, or only four years after the surrender, the new Indian Commissioner for British Columbia, Mr. D.M. MacKay, wrote to Mr. A. Irwin, the local Indian agent, to the effect that the terms of the lease were "not generous enough" and that the Indians should seek a revision of the terms.[203]

On May 1, 1974, Mr. D.M. Hett, District Supervisor for Kootenay-Okanagan District, wrote to Mr. W.E. Millin, Assistant Regional Director of Economic Development for British Columbia Region, concurring with the band that the present rental "is completely inadequate on today's money value."[204] On January 24, 1975, Mr. W. Kerr, District Superintendent of Economic Development for the Kootenay-Okanagan District, wrote to Mr. Walter Faryna, Supervisor of Lands for the British Columbia Region, that the band was receiving an extremely low rent and that they should be able to assume the subleases and realize the $ 100 per acre or so that Creston was realizing from their subleasing arrangements.[205] On July 5, 1976, Mr. G.A. Poupore, Director of Lands & Membership for the Department of Indian Affairs, wrote to Mr. Millin and described the fifty year lease to be on terms "at what now appears to be grossly inadequate rent."[206] Mr. Millin agreed and wrote on July 22, 1976, that the band was "losing some $100, 000 every year under the lease".[207] These are all admissions of agents of the defendant, knowledgeable and responsible officers of the Crown.

2. Is the Crown liable to the band for not having enforced the collateral agreement to provide the band with additional lands to compensate for the land on which the Indians were cutting hay outside the reserve?

The answer is no. Those so-called "hay cutting privileges" were not under the control of the federal Crown. The hay in question grew on provincial Crown land turned over by the government of British Columbia to the Breeders' Association for hay cutting purposes. That lease could be terminated at any time by the provincial Crown. It is the local Indian agent, Mr. W.E. Ditchburn, who obtained from the Breeders' Association these privileges for the Indians. And the total band revenues for hay cutting, as estimated by Indian agent Ryckman, included the so-called hay cutting privileges which were but a fraction of the whole (at least according to Creston).[208]

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202 *Supra*, note 154.
203 *Supra*, note 96.
204 *Supra*, note 137.
205 *Supra*, note 143.
206 *Supra*, note 155.
207 *Supra*, note 156.
208 *Supra*, note 45.

Moreover, there is no evidence, apart from Chief Chris Luke's own hearsay remarks on the matter, that the Indians ever made any claim or complaint with respect to these privileges. The Crown attempted to have Creston "cooperate" and try to obtain similar arrangements with the Breeders' Association, but Creston was not successful. The band was aware of that cooperation clause and approved it at their meeting of September 5, 1934.[209] There is no evidence that these privileges were part and parcel of the surrender, or the lease, or any other agreement binding upon the Crown.

3) Was the Crown in breach of its fiduciary duty, and-or negligent or both, vis-a-vis the band at the time of the absolute surrender to Dr. Bruner in January 1939?

The answer is in the negative. The Bruner surrender being absolute, the issue of the adequacy of rental rates does not arise. The surrender of the 217 acres of Reserve No.4 to Dr. Peter Charles Bruner was approved by the band on January 6, 1939, on conditions acceptable to the band. The surrender was in accordance with a band resolution which allowed the band to retain 75 acres "already broken and under cultivation."[210] There is no evidence emanating from any document that this was a bad deal for the Indians. The surrender was based on the May 3, 1938, memorandum of the Surveyor General who approved of the transaction.[211]

The sole fact that Dr. Bruner "jumped the gun" and commenced the reclamation project before the legal documents were signed does not, by itself, constitute a breach of the Crown's fiduciary duty towards the Indians. There is no evidence that the premature commencement of the works caused any damage to the plaintiffs. On the contrary, one would be led to believe that it resulted in a somewhat better deal for the Indians.

4) Was the Crown in breach of its fiduciary duty, and or negligent, or both, from 1948 until the date of termination of the lease in 1982, as the Crown knew, or ought to have known, that the lease was null and void ab initio and took no steps to inform the band or to terminate the said lease?

In my view, the Crown was both negligent and in breach of its fiduciary duty. It was also clearly negligent in failing to obtain the order in council in 1934. It seems obvious to me that it was part of the Crown's fiduciary obligations to follow the prescriptions of the *Indian Act* which, after all, is the basic legislation that governs the activities of the Department of Indian Affairs. Having decided to proceed under s.51, the Crown was duty bound to proceed according to that section. Clearly, that section is more than a technicality. It is the ultimate protection to ensure that Indians are not taken advantage of by unscrupulous or negligent administrators. I am not implying, of course, that the public servants involved were unscrupulous. I am saying that those at the decision-making level were improvident in agreeing to a fifty year lease without adequate provisions to protect the future interest of the Indians. We shall never know, but the Cabinet of the day, or subsequent Cabinets, might have refused to ratify a surrender which some of its own public servants described as providing totally inadequate rental rates for the band.

Since the surrender, and therefore the lease, were void ab initio, had the Indians been so informed earlier, they might have been successful in obtaining more satisfactory rentals from Creston, or they might have decided to treat the lease as being void and chosen to seek other, more suitable, arrangements with other parties. In any event, the Crown failed in its duty in not informing the plaintiffs, as it was duty bound to do, as soon as it discovered that there was no order in council.

5) Was the Crown in breach of its fiduciary duty, and or negligent or both, in not taking steps to terminate the lease when it was contacted repeatedly by the band from 1974 onwards, with requests to take steps to terminate the lease where it was apparent that there were valid legal grounds for such termination?

Again, the answer is in the affirmative. By 1974, all those who were interested knew, or ought to have known, that the lease rentals were inadequate and that the Indians wanted to terminate the lease. There were obvious grounds for such termination, apart from the legal fact that the lease was null and void ab initio. The long recital of letters, memoranda, meetings, reports and legal opinions passing between various departmental officials, amongst themselves and to Chief Chris Luke (purposely reported in extenso in these reasons), demonstrates clearly that the Department was procrastinating. By that time, Creston had sufficiently breached several conditions of the

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209 *Supra*, note 68.
210 *Supra*, note 118.
211 *Supra*, note 120.

lease so that the lease could have been terminated. Suffice it to mention the so-called "share cropping arrangements" under which Creston had sublet portions of the reserve to other parties who had established themselves on the subject property in violation of covenants of the lease, or the arrears in payment of rentals by Creston, or the sublease to the Department of Agriculture, all in violation of the lease.

Again, as under question 4, supra, had the Crown moved with some degree of alacrity, the band could have benefitted from an earlier termination of what had turned out to be a bad deal for them. Eventually, after years of dilatoriness on the part of departmental officials, the band took action on its own and was successful in 1982 in forcing Creston to settle and to terminate the lease. The Crown was remiss in its duty by failing to take any effective action against Creston from 1974 onwards.

10. The B.C. Limitation Act

Pursuant to s.39 of the *Federal Court Act*,[212] the laws relating to prescription in the province would apply to these proceedings, thus the *British Columbia Limitation Act*.[213] See the *Kruger*,[214] *Apsassin*[215] and *Sterritt*[216] decisions. The relevant provisions of the Act are the following:

> 1. In this Act
>
> 'trust' includes express, implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does not include the duties incident to the estate or interest of a secured party in collateral.
>
> …
>
> 3.(1) After the expiration of two years after the date on which the right to do so arose a person shall not bring an action
>
> (a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;
>
> …
>
> 3.(2) After the expiration of 10 years after the date on which the right to do so arose a person shall not bring an action
>
> …
>
> (b) against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;
>
> …
>
> 3.(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.
>
> …
>
> 6.(1) The running of time with respect to the limitation period fixed by this Act for an action
>
> (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or
>
> (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use,
>
> is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.
>
> …
>
> 6.(3) The running of time with respect to the limitation periods fixed by this Act for an action

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212 R.S.C. 1985, c.F-7.
213 R.S.B.C. 1979, c.236.
214 *Supra*, note 71.
215 *Supra*, note 186.
216 *Sterritt v. Canada*, [1989] 1 C.N.L.R. 198, 27 F.T.R. 47 (F.C.T.D.) (hereinafter Sterritt")

(a) for personal injury,
(b) for damage to property;
(c) for professional negligence; (d) based on fraud or deceit;
(e) in which material facts relating to the cause of action have been wilfully concealed;
(f) for relief from the consequences of a mistake;
(g) brought under the Family Compensation Act; or
(h) for breach of trust not within subsection (1)

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

…

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

8.(1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7 or 11(2), no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose, or in the case of an action against a hospital, as defined in section 1 or 25 of the Hospital Act, or hospital employee acting in the course of employment as a hospital employee, based on negligence, or against a medical practitioner based on professional negligence or malpractice, after the expiration of six years from the date on which the right to do so arose.

…

9.(1) On the expiration of a limitation period fixed by this Act for a cause of action to recover any debt, damages or other money, or for an accounting in respect of any matter, the right and tide of the person formerly having the cause of action and of a person claiming through him in respect of that matter is, as against the parson against whom the cause of action formerly lay and as against his successors, extinguished.

Thus, there are four limitation periods under the Act: two, six, ten and thirty years. Section 3(1)(a) prescribes a two year limitation for injury to property, which clearly does not apply here. Section 3(4) stipulates a six year limitation for any other action not provided for in this Act or any other Act and has no effect in the instant case. The ten year limitation, pursuant to s.3(2), does not apply for it is clear from the *Guerin* decision that the alleged breach of duty is not a breach of trust, and the defendant cannot be considered to be a trustee pursuant to the *Limitation Act*. However, the thirty year limitation provided under ss.8(1) and 9(1) would, in my view, govern this action.

The thirty year limitation was applied by Addy J., in the *Apsassin* case (presently under appeal). The plaintiffs would distinguish that decision on the ground that the surrender in *Apsassin* was absolute, whereas the Creston surrender was for a lease (which continued until 1982), and that the limitation did not start to run before the end of the lease. I cannot accept that argument and for the following reasons.

Pursuant to s.6(3), the running of time is postponed and does not commence to run against the plaintiff until "those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts." Those facts must demonstrate that the plaintiffs cause of action has a reasonable prospect of success and that he, in his own interest and taking his circumstances into account, is able to bring an action.

However, the subsection does not apply here. There has not been any damage to property. There has not been any fraud or deceit on the part of the Crown. Even though the defendant submitted

that the absence of the order in council was a "mistake," it is not the sort of mistake contemplated by this Act.

If the "postponement" provision of s.6(3) did apply, it is still subject to ss.8 and 9 of the Act. Subsection 8(1) provides that, notwithstanding a postponement of the running of time under s.6, "no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose." Once a limitation period fixed by this Act for a cause of action to recover damages has expired, s.9(1) extinguishes that right to bring an action. The province of British Columbia is apparently the only province in Canada with a statute providing for what is termed an "ultimate" limitation period.

In 1963, the House of Lords in *Cartledge*[217] held that, on the true construction of the statute, the date upon which the cause of action arose was the date when the breach occurred and the damage was suffered. Time began to run at this moment, and not from the date when the plaintiff knew or ought to have known of the damage. As Lord Pearce put it at p.351:

> Past cases have been decided on the basis that the time runs from the accrual of the cause of action whether known or unknown and no case has been cited in which the plaintiffs lack of knowledge has prevented the time from running where that lack of knowledge has not been induced by the defendant.

The House of Lords acknowledged the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence, but held that to apply the "discoverability rule" would be in effect to amend the statute. Therefore, the rule could be changed only by legislation.

The English Parliament quickly remedied part of the problem disclosed in *Cartledge*. It provided for postponement of the running of time until the plaintiff had, or reasonably should have had, knowledge of the damage. This amendment applied only to damage resulting from personal injury and not in respect of damage to property.

The provisions of the B.C. *Limitation Act* refer to the date upon which the right to bring an action arose. However, by providing in s.6 for postponement of the running of time until the facts were known, it has eliminated the injustice which could result where the accrual of the cause of action was unknown. Unlike the English statute, the B.C. Act made an amendment in respect of damage to property as well, but imposed an ultimate limitation of thirty years.

However, in 1976, in the absence of legislative action in that country, the English Court of Appeal took it upon itself to remedy the situation. *Sparham-Souter*[218] was a case dealing with damage to building foundations. The Court of Appeal held that the cause of action accrued and time began to run only when the plaintiff discovered, or ought with reasonable diligence to have discovered, the damage, for only then could the plaintiff be said to have suffered the damage which was a prerequisite of the cause of action.

In *Pirelli*,[219] an action in tort for negligence in the design or workmanship of a building, the House of Lords overruled the *Sparham-Souter* decision. It held that the cause of action accrued at the date when damage occurred, whether or not the damage could have been discovered with reasonable diligence at that date by the plaintiff. Once again, the House of Lords acknowledged the injustice, but considered themselves bound by the *Cartledge* decision, the only solution being that of legislative intervention.

The Supreme Court of Canada, in *Kamloops*,[220] was called upon to either adopt or reject the House of Lords decision in Pirelli. The Court decided to reject it. Wilson J., was of the view that the problem presented by *Sparham-Souter*, that is, the "postponement of the accrual of the cause of action until the date of discoverability may involve the courts in the investigation of facts many years after their occurrence,"[221] was the better of two evils. However, the Court noted that the purpose of ss.3 and 6 of the B.C. *Limitation Act* was not necessarily to give legislative effect to the *Sparham-Souter* decision, for the Act had come into force some time before that decision.

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217 *Cartledge v. E. Jopling & Sons Ltd*., [1963] 1 All E.R. 341 (H.L.) hereinafter *Cartledge*).
218 *Sparham-Souter v. Town & Country Dev. (Essex)* Ltd., [1976] 2 All E.R. 65 (C.A.) (hereinafter Sparham-Souter).
219 Pirelli Gen. Cable Works Ltd. v. Oscar Faber & Partners, [1983] 1 All E.R. 65 (H.L.) (hereinafter *Pirelli*).
220 *Kamloops v. Nielson*, [1984] 2 S.C.R. 2, [1984] 5 W.W.R. 1, 54 N.R. 1 (hereinafter *Kamloops* cited to W.W.R.).
221 *Ibid*. at 49.

The majority of the British Columbia Court of Appeal in *Bera v. Marr*[222] concluded that the use of words "the right to do so," that is the right to bring an action, in the *Limitation Act*, refers to the accrual of the cause of action whether known or unknown, as stated by Lord Pearce in *Cartledge*. Thus, in the view of Esson J.A.,[223] the discussion of the limitations issue in Kamloops is limited, for it does not involve the interpretation of the words of the Act. It merely recognizes that the discussion with respect to the English cases has no direct application to British Columbia for the question is fully and explicitly covered by the Act.

In *Bera v. Marr*, Esson J.A., for the majority, held that the test set out at s.6(3) of the B.C. *Limitation Act* is an objective test. It essentially repeats the same test as the Court of Appeal in *Sparham-Souter*, i.e., that the date on which the plaintiff should, with reasonable diligence, have discovered the damage. In the actual words of the Am the test is that the running of time is postponed until the plaintiff has within his means of knowledge facts that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, and not until the plaintiff has taken appropriate advice. He finds support for his view in the language of Wilson J., at p.27:

> It seems to me that the purpose of ss.3(1)(a) and 6(3) was to give legislative effect to the reasoning in Sparham-Souter by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action.

Of particular importance in the *Bera v. Marr* decision am Esson J.A.'s, policy reasons for his view which are found at p.27:

> There are strong policy reasons for not construing the date as of which the right to bring action arose in a manner different from that which has heretofore been given to them in the *Limitation Act*. To do so would be destructive of a balanced legislative scheme. Sections 6 and 8 are obviously designed to work together with s.3(1) to provide relief against the injustice which can be created by hidden facts and, on the other hand, to provide reasonable protection against stale claims. *All of this is premised upon the "right to do so" meaning the date of accrual of the cause of action without reference to knowledge. If that premise is disturbed, s.6 will be made more difficult of application and s.8 will cease to provide any real protection against stale claims*. (my emphasis)

The decision of the B.C. Court of Appeal in *Bera v. Marr* was rendered before the Supreme Court of Canada decision in *Central Trust Co. v. Rafuse*.[224] The principal question in that case was whether a solicitor was liable to a client in tort as well as in contract for the damage caused by the solicitor's failure to meet the requisite standard of care in the performance of the services for which the solicitor had been retained. If there was in fact a failure to meet the requisite standard of care, there was also the issue of whether the action was statute-barred by the Nova Scotia *Statute of Limitations*.[225] Le Dain J., writing on behalf of the Court, held that the action was not statute-barred for a cause of action arises when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

Le Dain J., in *Rafuse*, contrary to the B.C. Court of Appeal, interpreted the decision in *Kamloops* as laying down a general rule that:[226]

> ... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*, R.S.N.S. 1967, c.168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence.

In arriving at that conclusion, the Court noted that Wilson J., had not commented explicitly on the House of Lords' opinion that the introduction of the discoverability rule should be a legislative as opposed to judicial decision. However, the Supreme Court, at p.223, found that "it is an obvious

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222 *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1.
223 *Ibid*. at 25.
224 [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 37 C.C.L.T. 117, 69 N.R. 321 (hereinafter *Rafuse*).
225 R.S.N.S. 1967, c.168.
226 *Supra*, note 224 at 224.

implication of her reasons and conclusion that she disagreed with the views on this question expressed in *Cartledge* and *Pirelli*."

In *Rafuse*, the respondents had given a certificate of title to a trust company on January 17, 1969, to the effect that the mortgage was a first charge on the property, thereby implying that it was a valid mortgage. In fact, the mortgage was void in that it was contrary to s.96(5) of the Nova Scotia *Companies Act*. Therefore, the earliest that the appellant discovered or could reasonably have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May, 1977, when the validity of the mortgage was challenged in an action for foreclosure. "Accordingly the appellant's cause of action in tort did not arise before that date and its action for negligence against the respondents is not statute-barred."[227]

As mentioned earlier in *Apsassin*, my brother Addy J., held at p.83 [p.144 C.N.L.R.], inter alia, that a cause of action based on a nonfraudulent breach of fiduciary duty relating to the sufficiency of the amount received by the Department of Indian Affairs for the sale of certain lands on March 30, 1948, was statute-barred and extinguished by virtue of ss.8 and 9 of the B.C. *Limitation Act*:

> ... Since I have found that there was but a nonfraudulent breach of fiduciary duty which related to the sufficiency of the amount received by the Department of Indian Affairs March 30, 1948 and have found no continuing negligence, breaches of trust or other breaches of duty, whether fiduciary or statutory, the issues regarding limitations are considerably simplified.

He also held that the sections were not in violation of either the *Charter of Rights and Freedoms* or the *Bill of Rights*.

In that case, the action was held to have arisen on March 30, 1948, the date on which the sale was executed. The action had been commenced five and a half months beyond the 30 year limitation period, that is, on September 19, 1978, and was therefore barred and the cause of action extinguished. The learned judge found that the damages that "might have resulted from the insufficiency of the sale price, expired on March 30, 1978."[228]

In reference to s.8 of the *Limitation Act*, Addy J., stated that "although the effects of ss.6 and 7 are cumulative, those sections are not to be taken into account in calculating the 30 year period mentioned in subsection (1). Thus, neither disability nor knowledge come into play with respect to the 30 year ultimate limitation."[229]

In *Sterritt*,[230] also a case dealing with the sale of land, I struck out a statement of claim on the basis of this very same thirty year limitation rule, following the *Apsassin* decision. However, the actual finding in *Sterritt* must be considered in the context of the facts that were actually before me. In *Sterritt*, the statement of claim was seeking a declaration that the 1948 surrender of Indian land by the plaintiffs was null and void and that the defendant was in breach of its fiduciary obligation to the plaintiffs in agreeing to and executing the surrender. Following the Apsassin decision, I held that there was no cause of action relating to the 1948 surrender itself, however, I also stated that there might be a cause of action with reference to the land that was sold within the 30 year period previous to the statement of claim. The fact that the statement of claim was focused on the 1948 surrender, it could not stand, as drafted, and so was struck out as disclosing no reasonable cause of action. I granted leave to draft a new statement of claim addressing claims that fell within the 30 year limitation period.

The question of when the cause of action arises was also dealt with by Addy J., in *Apsassin*. He referred to the decision of the B.C. Court of Appeal in *Bera v. Marr* for the proposition that the date on which the cause of action arises is when damages have been incurred, and not when the plaintiffs should have or did discover the damage. The B.C. Court of Appeal, at p.25, also quoted from Lord Pearce in *Cartledge* to the effect that "the time runs from the accrual of the cause of action whether known or unknown."

Therefore, the Crown submits, on the basis of the *Bera v. Marr* and *Apsassin* decisions, that all causes of action alleged by the plaintiffs that arose prior to April 1, 1952, 30 years before the commencement date of the plaintiffs' first action, are statute-barred by s.8 and extinguished by s.9 of the B.C. *Limitation Act*. This would include all alleged breaches of duty to the plaintiffs that

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227 *Ibid*.
228 *Supra*, note 186 at 85 [p.146 C.N.L.R.].
229 *Ibid*. at 84 [p.145 C.N.L.R.].
230 *Supra*, note 216.

caused damages prior to April 1952, including the entering into an improvident lease with Creston, the failure to secure additional hay cutting rights and the Bruner surrender and sale.

As to the fourth cause of action, the Crown argues that the failure to advise the band that no order in council had been obtained, arose when the plaintiffs suffered damages: it matters not whether the defect could not be cured in 1934, nor in 1948 or at the same time, as under the plaintiffs' own expert analysis of damages in the Nilsen report, they could have received a return in excess of what they were receiving under the Creston lease as early as 1938.

As to the alleged breaches of duty in the 1970s, the Crown claims that the appropriate limitation period is that of two years pursuant to s.3(1) of the *Limitation Act* which deals with an action for damages in respect of injury, including economic loss whether based on contract, tort or statutory duty. The Crown also claims that it owes a "statutory duty" to the plaintiffs under s.18 of the *Indian Act* with respect to the holding of reserve lands by the Crown.[231] If that statutory duty has been breached, the appropriate limitation is two years.

As to the postponement provisions under s.6, the Crown submits that they would have no effect, for long before 1976 the plaintiffs knew or ought to have known all the facts they needed to bring a cause of action, including access to a copy of the lease and to the Register of Lands set up by the *Indian Act*. Pursuant to s.6(5), the burden of proving that the running of time has in fact been postponed rests on the person claiming the benefit of the postponement, the plaintiffs in this case.

Chief Chris Luke said that in 1980 and 1981, when he saw his second solicitor, that he had very few documents at hand. In the 1976 period, the Department was continuously holding out to the band that they were going to take steps to resolve the matter. The Crown submits that relying on the Department to take actions under the Act is no excuse, for the band could have sought other advice if not satisfied with the Department.

The Crown also raises the defence of laches which rests on the notion that a plaintiff, with full knowledge of the facts, and being in a position to complain about an alleged infringement by the defendant, acquiesced to such infringement.

As mentioned earlier, the plaintiffs argue that, in *Apsassin* and *Sterritt*, the Court did not have to consider whether the damages occurred on a year by year basis, for there was an absolute surrender and sale. In the case at bar, we do not have an absolute surrender, and the land was leased as opposed to being sold. The *Bera v. Marr* and the *Rafuse* decisions deal with the question as to when the limitation period starts to run. In Rafuse, the Supreme Court of Canada referred to the decision of *Bera v. Marr* and held that time does not run until damages have accrued. In the case at bar, should the thirty year limitation apply, from 1982 back to 1952, there was still a cause of action then because the 1948 discovery of the Crown's failure to obtain an order in council was only disclosed to the plaintiffs in 1974. According to the plaintiffs, there were no damages in 1936. However, in 1938 there were $400 in damages. According to the calculations of the Crown's own expert and those of the plaintiffs, damages accrued on a year by year basis after that date.

The Crown submits that even if the damages do accrue on a yearly basis, that is not the test to be applied in determining whether a cause of action has arisen, for the running of the limitation period starts when damage first accrues. The Crown also submits that, in *Bera v. Marr*, the Court did not accept the plaintiffs' argument because it appeared to be frittering away the protection which the Statute was intended to afford. Under that proposition, no trustee could ever avail himself of the protection of a statute of limitation if he is to be held liable for a new breach every day after its commission for not attempting to repair it. However, what if there were several breaches, each breach giving rise to a new cause of action?

The plaintiffs further argue that the application of the thirty year limitation period would have the effect of extinguishing the Aboriginal rights of the plaintiffs. In the recent decision of the Supreme Court of Canada in *Sparrow*,[232] the Court dealt with Mr. Sparrow's Aboriginal right to fish. The Court held that the test of extinguishment is that "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."[233] The Court found that there was nothing in the *Fisheries Act* that demonstrated a clear and plain intention to extinguish the Aboriginal right to fish. The plaintiffs claim that the Crown is trying to take away their rights to recover damages by way of the

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231 Guerin, supra, note 183 at 384 [p.137 C.N.L.R.].
232 *Supra*, note 196.
233 *Ibid*. at 1099 [p.175 C.N.L.R.].

Limitation Act. The *Limitation Act* does not state explicitly that Native rights are to be extinguished. In *Sparrow*, at p. 1108 S.C.R. [p. 180 C.N.L.R.], the Supreme Court of Canada said:

> That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

And at page 1110 [p. 181 C.N.L.R.]:

> ... The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s.35(l).

The Crown replies that what is in issue here is not the extinguishing of an Aboriginal right, as described in *Sparrow*, but the extinguishing of the right to bring an action. *Sparrow* does not hold that the words of a particular statute must be explicit. It says that the onus of proving that the Sovereign intended to extinguish the Indian right (i.e. to title) lies on the Crown, and that the intention must be clear and plain. The B.C. *Limitation Act* does not extinguish any of the plaintiffs' Aboriginal rights. The effect of the Act in the instant case is to extinguish the right to bring an action for breach of a fiduciary duty resulting in damages.

In the *Guerin* decision, the Supreme Court of Canada held that the limitation period did not apply because there was equitable fraud as a result of the failure of the Crown to disclose and provide the information to the band.

In *Kruger*, Urie J.A., writing for the majority, decided to deal with the question of limitations, should he be found to have been in error on any of the substantive issues, even though, strictly speaking, it was unnecessary for him to do so in light of his findings. The learned judge said that the limitation provision would not apply:[234]

> ... where there has been a fraudulent concealment of the existence of the cause of action until the expiry of the prescription period when, with reasonable diligence, the plaintiffs could have discovered it had there not been such a concealment.

However, the learned judge found that there was no equitable fraud in that case and, since the action was not brought within the time limited by the applicable statute, it could have been dismissed on that ground.

As mentioned earlier, there is no "equitable fraud" on the part of the Crown in this case, and no such allegation was pleaded in the plaintiffs' action. So, there remains to be determined which limitation period applies to each breach and at what time.

In my view, the original cause of action arose in 1934 at the outset of the 50 year lease. The mere fact that it is a lease does not automatically renew the cause of action every year and I know of no authority for such a proposition. But other causes of action may arise during that period. Applying the 30 year limitation to the instant case, as I feel I must follow the Apsassin decision, I therefore go back to April 1, 1952, thirty years before the commencement of the first action, so as to determine what cause of action arose during that period.

Clearly, that excludes the Crown's breach of fiduciary duty at the time of the 1934 surrender. But, in my view, it includes breaches committed since 1952, namely the repeated violations of the lease by Creston during that period and the Crown's failure to respond to the plaintiffs' demands for cancellation of the lease.

In 1974, Chief Chris Luke started to press the Department for cancellation of the lease. Shortly thereafter, he learned for the first time of the absence of an order in council. At that time Creston was violating covenants of the lease. A fresh cause of action accrued and a new period of limitation commenced to run from that date. As it turns out, a ten year limitation period win suffice for the purposes of this judgment (1974 to 1982).

I had proposed to assess damages on all possible time limitations and on all claims, in case the *Apsassin* decision, or my own judgment, be reversed or varied on appeal. I now realize these hypothetical assessments are not practical as too many variations would be involved. Should it be

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[234] *Supra*, note 71 at 264 [p.52 C.N.L.R.].

necessary to deal with further assessments, they will be addressed in due course in accordance with any specific variations determined on appeal.

11. Damages

One of the two experts called for the plaintiffs, Mr. A.S. Walls, submitted calculations based on the year 1974 and on the amount of $100,000 a year that the Indians would have lost because the lease was not terminated in that year. The lease was terminated in 1982. The yearly $100,000 loss arises from the estimate of loss suggested by the Assistant Regional Director of Economic Development for the British Columbia Region, Mr. W.E. Millin, 1976.

The calculations tendered by the expert Walls have the obvious merit of being clear and simple. They are also based on a plain admission on the part of the responsible official of the defendant that the plaintiffs were "losing" $100,000 a year. That admission, although not binding on the Crown, is not inconsistent with the value of land rentals during that period. The entire area was leased at around $100,000 per annum in 1982, after the band had obtained possession, which equates to $52 per acre per annum. These calculations are as follows:

Lower Kootenay Band claim #2

Principal of $100,000 per Year

Year	Principal	Accrued Interest	Total	Interest Rate	Interest Earned
1974	100,000	-	100,000	10.00%	10,000
1975	100,000	10,000	210,000	10.00%	21,000
1976	100,000	31,000	331,000	9.75%	32,273
1977	100,000	63,273	463,273	8.50%	39,378
1978	100,000	102,651	602,651	10.00%	60,265
1979	100,000	162,916	762,916	13.00%	99,179
1980	100,000	262,095	962,095	14.00 %	134,693
1981	100,000	396,788	1,196,788	20.00%	239,357
1982	100,000	636,145	1,536,145	16.00%	245,783
	900,000				881,928

	Year	Interest Rate	Interest Earned	Total
Total principal and interest owing as at December 31, 1982				1,781,928
	1983	11.50%	204,922	1,986,850
	1984	12.50%	284,356	2,235,206
	1985	11.00%	245,873	2,481,079
	1986	11.50%	285,324	2,766,403
	1987	9.50%	262,808	3,029,211
	1988	11.25%	340,786	3,369,997
	1989	13.25%	446,524	3,816,521
	1990 (4 mos.)	14.25%	181,285	3,977,806

However, the sum of $100,000 as a yearly basis for lost revenues does not take into consideration other factors which were properly dealt with by the plaintiffs' second expert, M.C. Nilsen, President of Nilsen Realty Research Limited, a senior appraiser with a vast experience in real estate appraisals. He prepared three separate calculations relating to the accumulated rent (plus interest), lost by the plaintiffs, based on certain assumptions as to the market rental value of the above lands, as well as on assumptions regarding the years when the lease between the Crown as lessor, and Creston, as lessee, could have been abandoned. The hypothetical years of abandonment are 1934, 1954 and 1974.

With reference to the period commencing in 1974, Mr. Nilsen calculated the total amount accumulated up to 1982 resulting from the investment of the difference between market rent and the rent actually received by the plaintiffs under the terms of the lease. He made a number of other assumptions, namely that the rent is assumed to be paid annually in advance in accordance with the terms of the existing lease, and that the band had possession of the land and was able to either rent or utilize the land themselves (the measure of this benefit is the market rental value of

the land less appropriate deductions). He obtained his 1974 to 1982 basic market rental value from a number of different sources extracted from the documents above referred to, including the letters from Messrs. Kerr and Millin, the two departmental officials referred to earlier.

Using those bench marks, he further assumed that the rent would rise incrementally between 1934 and 1982 from $5 per acre per annum to arrive at a rental value of between $50 and $60 per acre per annum in the 1975-1980 period. He assumed that rents would rise in the same general pattern as the Consumer Price Index for Canada. He also assumed that under the existing lease the lessee would be responsible for maintenance of the dykes, etc., even though no mention is made of this in the lease. He therefore deducted an allowance of 20% of market rent for such maintenance. He also assumed that the difference between the market rent (net of deductions) and the rent received under the lease could have been invested and have accumulated compound interest.

Based on an average rental value of $50 per acre, less the above mentioned deductions, he comes to the conclusion that the accumulated amounts as of December 31, 1982, would be of $969,166 as follows:

ASSUMPTIONS:

Lease Abandoned 1974 **Maintenance 20.00%**
Area (Acres) **1920**
Inflation Base: **C.P.I./Rental Values**
Review Periods (Yrs): **5**

Year	Actual Rent	Market Rent	Difference	Interest Rate	Annual Interest	Accumulated Total	Market Rent Per Acre
1975	4500	76800	72300	6.00%	$4.338	$76,638	50
1976	4500	76800	72300	8.00%	$11,915	$160,853	50
1977	4500	76800	72300	7.50%	$17,486	$250,640	50
1978	4500	76800	72300	7.50%	$24,220	$347,160	50
1979	4500	76800	72300	10.00%	$41,946	$461,406	50
1980	4500	76800	72300	13.00%	$69,382	$603,088	50
1981	4500	76800	72300	13.00%	$87,800	$763,188	50
1982	4500	76800	72300	16.00%	$133,678	$969,166	50

The defendant's expert, Karl H. Harck, proceeded by way of direct comparison with other parcels of land in the area leased during the time frames in question. Proceeding by way of comparables is a proven and reliable method for appraising the value of real estate in a city, or in other areas where the market is active and the transactions are numerous. It may not be satisfactory when dealing with remote areas where few transactions take place. With reference to the subject property, the expert Harck has come up with only four transactions during the 1974-1982 period. Prices per acre vary from $19.23 in 1977 to $84.27 in 1982. In fact, during 1982 there were three transactions of $56.18, $59.51 and $84.27 per acre respectively. As to the $19.23 lease, it was the disputed lease to the federal Department of Agriculture, hardly a transaction at arm's length. From these sparse data he concludes that the accumulated values "under the various scenarios" for the years 1974 to 1982 are of $506,400 as follows:

EARNINGS USING MARKET RENTS 1974-1982

Year	Price /Acre	Market Rent	Maint. & Pumping	Contract Rent	Residual	Rate	Earned Amount	Accum. Total
1974	$20.00	$38,400	$7,680		$4,500	$26,220	7.00%	$1,835 $28,055
1975	$20.00	$38,400	$7,680		$4,500	$26,220	6.00%	$3,257 $57,532
1976	$21.00	$40,320	$8,064		$4,500	$27,756	8.00%	$6,823 $92,111
1977	$21.00	$40,320	$8,064		$4,500	$27,756	7.50%	$8,990 $128,857
1978	$21.00	$40,320	$8,064		$4,500	$27,756	7.50%	$11,746 $168,359
1979	$30.00	$57,600	$11,520		$4,500	$41,580	10.00%	$20,994 $230,933
1980	$30.00	$57,600	$11,520		$4,500	$41,580	13.00%	$35,427 $307,940
1981	$30.00	$57,600	$11,520		$4,500	$41,580	13.00%	$45,438 $394,957
1982	$30.00	$57,600	$11,520	$4,500	$41,580	16.00%	$69,846	

TOTAL	**$428,160**	**$85,632**	**$40,500**	**$302,028**	**$204,355**
$506,383					

I am of the view that the Nilsen report reflects much more accurately the rentals that the plaintiffs lost for not being allowed to retake possession of their land in 1974. Again, that report is based on credible statements from responsible public servants who were personally involved during the period in question. The Nilsen appraisal then makes appropriate deductions and comes up with a fair and realistic appraisal. On the other hand, the Harck report rests on a very skimpy basis of comparables which cannot possibly sustain a valid projection over a period of eight years.

I will therefore grant judgment to the plaintiffs in the amount of $969,166 plus accrued interest from 1982 (at the appropriate bank rates) to the date of judgment and costs.