Wewaykum Indian Band *v.* Canada, [2002] 4 S.C.R. 245, 2002 SCC 79

Roy Anthony Roberts, C. Aubrey Roberts and John Henderson, suing on their own behalf and on behalf of all other members of the Wewaykum Indian Band (also known as the Campbell River Indian Band) *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band) *Respondents/Appellants*

and between

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite, and Lloyd Chickite, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band) *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for Ontario, the

Attorney General of British Columbia, the Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band *Interveners*

Indexed as: Wewaykum Indian Band *v.* Canada

Neutral citation: 2002 SCC 79.

File No.: 27641.

2001: December 6; 2002: December 6.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the federal court of appeal

Indians — Reserves — Crown's fiduciary duty — Content of Crown's fiduciary duty before and after reserve is created.

Indians — Reserves — Crown's fiduciary duty — Two B.C. Indian bands claiming each other's reserve land — Both bands alleging that they would possess both reserves but for breaches of fiduciary duty by federal Crown — Bands seeking declarations against each other and equitable compensation from Crown in Federal Court — Whether Crown breached its fiduciary duty — Whether "equitable" remedies available — Whether defences of laches and acquiescence apply.

Limitation of actions — Federal Court — Indian claims — Two B.C. Indian bands claiming each other's reserve land — Both bands alleging that they would possess both reserves but for breaches of fiduciary duty by federal Crown — Bands seeking declarations against each other and equitable compensation from Crown in Federal Court — Whether bands' claims statute barred — Federal Court Act, R.S.C. 1985, c. F-7, s. 39 — Statute of Limitations, R.S.B.C. 1897, c. 123, s. 16 — Limitations Act, S.B.C. 1975, c. 37, ss. 3(4), 8, 14(3).

Two bands of the Laich-kwil-tach First Nation claim each other's reserve land. Each reserve has been possessed by the incumbent band since the end of the 19th century. Neither band claims title based on an existing aboriginal or treaty right but each band, resting its claim on contemporaneous documentation of the Department of Indian Affairs, says it would possess *both* reserves but for breaches of fiduciary duty by the federal Crown. The bands seek declarations against each other and equitable compensation from the federal Crown. The Cape Mudge Band, the Wewaikai, seeks Reserve 11 and the Campbell River Band, the Wewaykum, claims Reserve 12.

The claim of the Cape Mudge Band starts with the 1888 report of a federal government surveyor which recommended the creation of Reserves 11 and 12. These reserves were not identified as allocated to a particular band, but rather to the "Laich-kwil-tach (Euclataw) Indians". The 1892 schedule of Indian reserves published by the Department of Indian Affairs, listing reserve allocations to bands, repeated this allocation. By 1900, Reserves 11 and 12 were shown on the schedule as allocated to the "Wewayakai [Cape Mudge] band". On numerically ordered lists of reserves, the name We-way-akay was inscribed opposite Reserve 7 and ditto marks were inscribed below

that name opposite Reserves 8 to 12. The Cape Mudge Band on that basis claims both reserves although it was not, and never had been, in occupation of Reserve 11.

The claim of the Campbell River Band flows from a 1905 dispute between the two bands over fishing rights, which led to a dispute over possession of Reserve 11. In a 1907 Resolution, the Cape Mudge Band ceded any claim over Reserve 11 to the Campbell River Band subject to the retention of common fishing rights. The effect of the resolution was recorded in a change to the departmental schedule. The name of the "We-way-akum band" was entered opposite Reserve 11, but in what became known as the "ditto mark error", the ditto marks against Reserve 12, directly beneath it, remained unchanged. The Campbell River Band relies on the departmental schedule, as changed, as evidence of its right to both Reserve 11 and Reserve 12.

In 1912, the McKenna McBride Commission visited the proposed reserves in the Campbell River area. It acknowledged that Reserve 11 was properly allocated to the Campbell River Band and noted the error with respect to Reserve 12 which, because of the ditto marks, appeared in the schedule as being also allocated to that band. In their respective submissions to the Commission, in accordance with actual incumbency, the Campbell River Band made no claim to Reserve 12 and the Cape Mudge Band made no claim to Reserve 11. However, the "ditto mark error" on the schedule was not corrected.

In 1924, by Orders-in-Council, the British Columbia government and the federal government adopted the McKenna McBride recommendations with respect to Reserves 11 and 12. In 1928, the Indian Commissioner recommended that Reserve 12, which had always been claimed by the Cape Mudge Band, should officially be recognized as belonging to that band and the federal schedule modified accordingly.

Both bands retained legal counsel to investigate. In 1936 and 1937, each band issued a declaration listing its reserves. Neither band listed the other's reserve it now claims.

In 1938, British Columbia issued Order-in-Council 1036 which transferred administration and control of the subject lands to the Crown in right of Canada. In 1943, Indian Affairs published a corrected schedule of reserves listing Reserve 11 for the Campbell River Band and Reserve 12 for the Cape Mudge Band. No formal amendments were made to orders-in-council that had appended the previous faulty schedules. The dispute resurfaced in the 1970s and, in 1985, the Campbell River Band initiated its action against the Crown and the Cape Mudge Band. The Cape Mudge Band counterclaimed for exclusive entitlement to both reserves and, in 1989, added a claim against the Crown. After 80 days of evidence and submissions, the Federal Court, Trial Division dismissed both bands' claims and the Federal Court of Appeal upheld that decision.

Held: The appeals should be dismissed.

The legal requirements to create a reserve within the meaning of the *Indian Act* include an act by the Crown to set apart Crown land for use by a band, an intent to create a reserve on the part of persons with the authority to bind the Crown, and practical steps by the Crown and the Indian band to realize that intent.

Reserve Creation in British Columbia

When British Columbia joined Confederation in 1871, Article 13 of the *Terms of Union* provided for the creation of reserves. Federal-provincial cooperation

was thus required because Crown lands from which reserves would be established were retained as provincial property yet the federal government had jurisdiction over Indians and lands reserved for Indians. The reserve-creation process was completed in 1938 by virtue of B.C. Order-in-Council 1036 which transferred to the federal Crown administration and control of land on which the reserves were to be established. When the subject lands were transferred, the federal Crown intended to set apart each reserve for the beneficial use and occupation of the present incumbent. Each band accepted the *status quo* and made use of the reserves allocated to it.

The surrender provisions of the *Indian Act* did not apply to these pre-1938 adjustments because (i) the resolution of a "difference of opinion" between sister bands of the same First Nation to which the land had been allocated in the first instance should not be characterized as a surrender, (ii) the lands were not Indian Reserves within the meaning of the *Indian Act* prior to 1938, and (iii) in any event the operation of the surrender provisions of the *Indian Act* had been suspended (to the extent they were capable of application) by Proclamation of the Privy Council made December 15, 1876.

Rectification of Orders in Council

The Federal Court purported to "rectify" the faulty Schedule to Order-in-Council 1036. Judicial correction of perceived errors in legislative enactments, in the rare instances where they can be justified, is performed on the basis that the corrected enactment expresses the intent of the enacting body. The clerical error is generally apparent on the face of the enactment itself. Here, however, the mistake was made at the federal level in the Department of Indian Affairs. It was noted but not corrected by the McKenna McBride Commission. The Schedules in their uncorrected

form were attached by the provincial government to its Order-in-Council 1036. The permissible constitutional scope of the provincial "intent" in relation to "lands reserved for Indians" was limited to the size, number and location of reserves to be transferred by it to the administration and control of the Crown in right of Canada. The federal Order-in-Council has been interpreted, in practice, without regard to the "ditto mark error". In these circumstances, rectification was not an appropriate remedy. The solution to these appeals does not lie in the law of rectification but in the law governing the fiduciary duty alleged and the equitable remedies sought by the appellant bands.

The Existence of a Fiduciary Duty

The existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples. A fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.

However, even in the traditional trust context, not all obligations existing between the parties to a well-recognized fiduciary relationship are themselves fiduciary in nature. Equally, not all fiduciary relationships and not all fiduciary obligations are the same. They are shaped by the demands of the situation. These observations are of particular importance in a case where the fiduciary is also the government.

The Content of the Fiduciary Duty

The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest to be protected. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.

Prior to reserve creation, the Crown exercises a public law function under the *Indian Act*, which is subject to supervision by the courts exercising public law remedies. At that stage, a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries. Once a reserve is created the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation. The Crown must use diligence to protect a band's legal interest from exploitative bargaining with third parties or from exploitation by the Crown itself.

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting.

Here, the federal Crown's mandate was to create a new interest for the bands in lands not subject to treaty or aboriginal rights claims. The nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others, including the province, on their behalf, imposed a fiduciary duty on the Crown but there is no persuasive reason to conclude that the obligations of loyalty, good faith and disclosure of relevant information were not fulfilled. After the creation of the reserve, the Crown did preserve and protect each band's legal interest in its allocated reserve.

By the time the reserves creation process was completed in 1938, each of the appellant bands had formally abandoned the claim it now asserts to the other's reserve. They had manifested on several occasions their acknowledgement that the beneficial interest in Reserve 11 resided in the Campbell River Band and the beneficial interest in Reserve 12 resided in the Cape Mudge Band. The Band leadership in those years, whose conduct is now complained of, were autonomous actors, apparently fully informed, who intended in good faith to resolve a "difference of opinion" with a sister band. They were not dealing with non-Indian third parties. It is patronizing to suggest, on the basis of the evidentiary record, that they did not know what they were doing, or to reject their evaluation of a fair outcome.

Defences to Equitable Remedies

Enforcement of equitable duties by equitable remedies is subject to the usual equitable defences, including laches and acquiescence. Equitable remedies require equitable conduct by the claimant and are always subject to the discretion of the court.

Both branches of the doctrine of laches and acquiescence are applicable in this case: conduct equivalent to a waiver is found in the declarations, representations and failures to assert the alleged rights in circumstances that required assertion; and prosecution of the claim would, in each case, be unreasonable because each band relied on the *status quo* and improved its reserve under the understanding that the other band made no further claim. All of this was done with sufficient knowledge of the underlying facts relevant to a possible claim.

On the evidence, no fiduciary duty has been breached and no "equitable" remedy is available either to dispossess an incumbent band that is entitled to the beneficial interest, or to require the Crown to pay "equitable" compensation for its refusal to bring about such a wrongful dispossession.

Application of Limitation Periods

In any event, the appellant bands' claims are barred by the expiry of the applicable limitation periods. Section 39(1) of the *Federal Court Act* incorporates by reference the applicable British Columbia limitation legislation. The Campbell River Band's claim for possession of Reserve 12 was complete no later than in 1938 and was subject to a 20-year limitations period under s. 16 of the 1897 B.C. *Statute of Limitations*. The Cape Mudge Band's claim for possession of Reserve 11 arose when the Campbell River Band went into possession of that reserve prior to 1888 and was extinguished around the time the band signed the 1907 Resolution. Even if the running of the limitation periods was postponed due to a lack of pertinent information, all relevant facts were known to both bands when they made their declarations in 1936 and

1937. The limitation periods applicable to the claims for possession, therefore, expired no later than 1957.

As to breach of fiduciary duty, the 1897 *Statute of Limitations*, in force between 1897 and 1975, imposed no limitation on such claims. The transitional provisions of the 1975 *Limitations Act* therefore apply. By virtue of ss. 3(4) and 14(3) of the 1975 Act, the actions based on breach of fiduciary duty were barred as of July 1, 1977. In any case, the claims asserted in these proceedings were all caught by the 30-year "ultimate limitation period" in s. 8 of the 1975 Act.

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General of British Columbia, [1973] S.C.R. 313; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Frame v. Smith*, [1987] 2 S.C.R. 99; *R. v. Taylor* (1981), 34 O.R. (2d) 360, leave to appeal refused, [1981] 2 S.C.R. xi; *Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689; *Southeast Child & Family Services v. Canada (Attorney General)*, [1997] 9 W.W.R. 236; *B.C. Native Women's Society v. Canada*, [2000] 1 F.C. 304; *Paul v. Kingsclear Indian Band* (1997), 137 F.T.R. 275; *Mentuck v. Canada*, [1986] 3 F.C. 249; *Deer v. Mohawk Council of Kahnawake*, [1991] 2 F.C. 18; *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, aff'd (1999), 251 N.R. 220; *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143; *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997), 132 F.T.R. 106; *Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174; *Tuplin v. Canada (Indian and Northern Affairs)* (2001), 207 Nfld. & P.E.I.R. 292; *G. (A.P.) v. A. (K.H.)* (1994), 120 D.L.R. (4th) 511; *Lac La Ronge Indian Band v. Canada* (2001), 206 D.L.R. (4th) 638; *Cree Regional Authority v. Robinson*, [1991] 4 C.N.L.R. 84; *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), 145 F.T.R. 1; *Westbank First Nation v. British Columbia* (2000), 191 D.L.R. (4th) 180; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Neil*, [2002] 3 S.C.R. 631, 2002 SCC 70*; Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85; *Kruger v. The Queen*, [1986] 1 F.C. 3; *R. v. Lewis*, [1996] 1 S.C.R. 921; *Mitchell v. Peguis Indian*

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APPEALS from a judgment of the Federal Court of Appeal, [2000] 3 C.N.L.R. 303, 247 N.R. 350, 27 R.P.R. (3d) 157, [1999] F.C.J. No. 1529 (QL), affirming a decision of the Trial Division (1995), 99 F.T.R. 1, [1995] F.C.J. No. 1202 (QL). Appeals dismissed.

Michael P. Carroll, Q.C., Malcolm Maclean, Emmet J. Duncan and *Monika B. Gehlen*, for the appellants Roy Anthony Roberts et al.

John D. McAlpine, Q.C., and *Allan Donovan*, for the respondents/appellants Ralph Dick et al.

J. Raymond Pollard, *Mitchell R. Taylor* and *Georg Daniel Reuter*, for the respondent Her Majesty the Queen.

E. Ria Tzimas and *J. T. S. McCabe, Q.C.*, for the intervener the Attorney General for Ontario.

Patrick G. Foy, Q.C., and *Richard J. M. Fyfe*, for the intervener the Attorney General of British Columbia.

Peter R. Grant and *David Schulze*, for the interveners the Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band.

The judgment of the Court was delivered by

1 BINNIE J. — Two Indian bands on the east coast of Vancouver Island lay claim to each other's reserve land. The reserves, which have been in the possession of the incumbent band since about the end of the 19th century, are located two miles from each other. The inhabitants of both reserves are members of the Laich-kwil-tach First Nation which, in the mid-1800s, managed to displace the Comox First Nation from this area of British Columbia.

2 Each band claims that but for various breaches of fiduciary duty on the part of the federal Crown, its people would be in possession of *both* reserves. Members of the other band, on this view, should be in possession of neither.

3 There is no assertion of any entitlement in these lands under s. 35(1) of the *Constitution Act, 1982* ("existing aboriginal and treaty rights").

4 Although the bands seek formal declarations of trespass and possession and injunctive relief against each other, each acknowledges the hardship that such a result would cause the other, and each band therefore says it would be satisfied with financial compensation from the federal Crown. The Cape Mudge appellants say *their* compensation should be in the range of $12.2 to $14.8 million for Reserve No. 11 and the Campbell River appellants say *their* claim is about $4 million for Reserve No. 12. In short, if the appellant bands' claims are allowed, each band will stay where it is but

will receive substantial funds by way of "equitable compensation" plus costs on a solicitor-client scale.

5 We are therefore required to consider (i) the scope of the fiduciary duty of the Crown in the process of the *creation* of Indian reserve lands; (ii) whether the acts of government officials in this case breached any fiduciary duty; and (iii) what equitable remedies (including equitable compensation) are available to remedy such breaches, if any.

6 It is clear that neither of the bands is guilty of any wrongdoing towards the other. These are paper claims, based on dissecting the performance of the Department of Indian Affairs in its sometimes awkward attempts to establish reserves to accord with late 19th century patterns of Indian occupation on the west coast. The appellant bands rely on disputed inferences from contradictory records respecting which band was entitled to what, and when its entitlement arose. It is apparent that there were occasional gaps of understanding between what was happening on Vancouver Island and what appeared to be happening in the government records in Ottawa. That said, the trial judge, after 80 days of evidence and submissions, concluded that the Crown had acted fairly and honourably. The wishes of the Indians themselves had been sought out and respected.

7 As will be seen, by the time the reserves-creation process was completed by provincial Order-in-Council 1036 dated July 29, 1938, each of the appellant bands had formally abandoned the claim it now asserts to the other's reserve. Over the intervening 60 or more years, band members have relied on the *status quo* to make improvements to the reserves on which they reside. In these circumstances, in my view, no fiduciary duty

has been breached and no "equitable" relief is available either by way of injunction or equitable compensation. In any event, all such claims would have been barred by the expiry of the applicable limitation periods.

8 I would therefore dismiss both appeals with costs.

Facts and Analysis

9 The Laich-kwil-tach First Nation, comprising four different bands, is itself part of a larger group of Indians who speak the Kwakwala language. They inhabit parts of the east coast of Vancouver Island, parts of the west coast of the mainland, and some of the offshore islands in between. Their livelihood and much of their culture was traditionally based on fishing the rich waters of what we now call the Straits of Georgia.

10 Unlike the historical disputes that reached back to time immemorial in such cases as *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the epicentre of these appeals lies in the late 19th and early 20th century paperwork of the Department of Indian Affairs and the records collected since then by the contending bands. The resulting bureaucratic paper trail is outlined comprehensively in the careful 275-page trial judgment of Teitelbaum J.: (1995), 99 F.T.R. 1. His findings of fact were not successfully challenged before the Federal Court of Appeal: (1999), 247 N.R. 350. I will deal only with those facts essential for an understanding of the legal issues that we are required to resolve.

11 The contending bands are the Cape Mudge Indian Band (traditionally known as the "Wewaikai") some of whom live on Reserve No. 12, and the Campbell River Indian Band (traditionally known as the "Wewaykum") some of whom live on Reserve No. 11. Each band also has reserves elsewhere. The reserves in dispute are quite small. Reserve 11, located at the mouth of the Campbell River, has about 350 acres and 120 inhabitants. Reserve No. 12, located inland on a tributary of the Campbell River, has less than 300 acres and fewer inhabitants. The multiplicity of relatively small reserves is characteristic of coastal British Columbia, where strategic access to plentiful fishing and other resources was thought to be more important than simple acreage.

12 It appears the first members of the Laich-kwil-tach First Nation to take up residence in the disputed area was Captain John Quacksister (or Kwaksistal) and his family, in or about 1875.

A. *Creation of Reserve Lands*

13 The legal requirements for the creation of a reserve within the meaning of the *Indian Act* were considered by this Court in *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816, 2002 SCC 54, released June 20, 2002. They include an act by the Crown to set apart Crown land for use of an Indian band combined with an intention to create a reserve on the part of persons having authority to bind the Crown and practical steps by the Crown and the Indian band to realize that intent (para. 67). In that case it was found that the Crown never intended to establish a reserve within the meaning of the Act. At para. 68, LeBel J. noted "that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into

consideration the *sui generis* nature of native land rights". The role of the Crown's fiduciary duty in reserve creation was not argued in that case. It is squarely raised in the appeals now before us.

B. *Reserve Creation in British Columbia*

14 When British Columbia joined Confederation in 1871, Article 13 of the *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10, provided:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies. [Emphasis added.]

15 Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property. Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid: *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C.). Equally, the province had no jurisdiction to establish

an Indian reserve within the meaning of the *Indian Act*, as to do so would invade exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians".

16 Implementation of Article 13 therefore required a number of stages preliminary to the federal reserve-creation process described in *Ross River*. First of all, federally appointed Indian Reserve Commissioners undertook to define and survey the proposed reserves. Then the federal government and the provincial government, armed with the surveys, negotiated the size, location and number of reserves. Administration and control of such lands had then to be transferred ("conveyed" is the word used in Article 13) from the new Province of British Columbia to the federal government. The federal government would have to "set apart" the lands for the use and benefit of a band: *The Indian Act, 1876*, S.C. 1876, c. 18, s. 3(6); *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1) "reserve".

17 For more than 60 years after the entry of British Columbia into Confederation, the reserve establishment issue remained an on-going source of friction between the federal and provincial governments. The trial judge found, for instance, that the British Columbia government initially considered the federal government's target of 80 acres *per capita* for reserve lands to be excessive. The provincial position was that a *per capita* allocation of 20 acres was sufficient, particularly where the principal source of livelihood of a band was fishing. There was even disagreement as to the mechanism to accomplish the "conveyance".

18 The issues were ultimately resolved by federal-provincial agreement and the transfer in 1938 of administration and control to the federal Crown of provincial land on which the reserves were to be established: G. V. La Forest, *Natural Resources and*

Public Property under the Canadian Constitution (1969), at p. 132. Until then, "[a]ll rested in the realm of bureaucratic recommendation and political intention with nothing conclusive accomplished in any effective legal sense": *Dunstan v. Hell's Gate Enterprises Ltd.*, [1986] 3 C.N.L.R. 47 (B.C.S.C.), *per* Cumming J., at p. 65.

19 I think there is no doubt on the evidence that when the federal Crown received the B.C. Order-in-Council 1036 dated July 29, 1938, it intended to set apart each of the contested reserves for the beneficial use and occupation of the present incumbent. The claim of each appellant band to *both* reserves is misconceived.

C. *The Indian Reserve Commission (1875-1912)*

20 In 1875, the federal government and the Province of British Columbia established the Indian Reserve Commission whose mandate was in part to

> . . . make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it. [Emphasis added.]
>
> (Order-in-Council P.C. 1088, November 10, 1875)

21 The mandate of the Indian Reserve Commission was thus to allocate reserves at the level of First Nation, as distinct from subgroupings at the band level. (Arguably, the Commission was required only to allocate reserves at the higher level of Kwakwala-speaking peoples, of which the Laich-kwil-tach grouping was a sub-component, but in practice the Laich-kwil-tach people were dealt with as a First Nation.) The reason for this high level allocation, as found by the trial judge at para. 25, was to

secure land quickly for the Indians "before white settlement alienated all the desired locations". Long and complex inquiries by the Commissioners into individual sub-First Nation allocations would have created unacceptable delay. The band level allocation was thus generally to be left to the local Indian agent, a federal official, who possessed the requisite detailed knowledge. The Campbell River Band argues that this view elevates the Indian Agent to the status of a "latter day Solomon with plenary authority to re-allocate reserves", but this is not so. The Indian Agents were the eyes and ears of the senior officials whose ultimate stamp of approval was essential.

22 In the 1870s, Commissioner Gilbert Sproat, who by then had become the sole member of the Indian Reserve Commission, surveyed a number of reserves in the area in question for the Laich-kwil-tach First Nation. His survey of a proposed reserve was not enough to create a reserve within the meaning of the *Indian Act* but, if approved by the provincial government, the effect was to withdraw the subject lands from other inconsistent uses, such as preemption by settlers. It thus created a measure of what might be termed administrative protection, but this fell well short of the various statutory protections under the federal *Indian Act*.

23 The reserves surveyed by Commissioner Sproat were not approved by the province in any event.

24 In 1886, Sproat's successor, P. O'Reilly, a former county court judge, recommended the allotment of 10 reserves to the "'Laich kwil tach' (Euclataw) Indians", but he did not deal with the lands now in dispute because "as the Indians were all absent, I deemed it advisable to delay making reserves until they are present to point out the

places they wish to have" (emphasis added). A policy of non-intervention in the *status quo* had been made explicit in O'Reilly's mandate from Ottawa:

> You should in making allotments of lands for Reserves make no attempt to cause any violent or sudden changes in the habits of the Indian band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in, you should on the contrary encourage them in any branch of industry which you find them so engaged. [Emphasis in original.]

D. *The Ashdown Green Survey*

25 Delay in the setting aside of reserves did in fact exacerbate the potential for conflict between Indians and the influx of settlers. In 1888, a dispute flared up at Campbell River between some homesteaders called Nunns and the resident Laich-kwil-tach Indians, each of whom claimed rights to some valuable timber in the vicinity of what is now Reserve No. 11. The most vocal figure in this dispute, at least on the Indian side, was Captain John Quacksister. He claimed that he had been granted ownership of all of the lands which Commissioner Sproat had provisionally set aside at Campbell River in 1879. He was likely not aware of the federal-provincial intricacies of land transfer. Captain John's band affiliation was the subject of dispute between the parties. The trial judge concluded, at para. 289:

> Men and women passed from one group to another and clearly a person could be a member of more than one subgroup. The attempt to categorize Captain John's tribal affiliation epitomized this difficulty and he was appropriately known as "Smoke All Around".

26 After Commissioner O'Reilly left for England on extended convalescent leave, the federal government authorized one of its surveyors, Mr. Ashdown Green, to

sort out the boundary between Captain John and the homesteaders. It is his 1888 survey that forms the root of the Cape Mudge Band's claim in this litigation.

E. *The Claim of the Cape Mudge Band (the "Wewaikai")*

27 After visiting the Campbell River area, Ashdown Green recommended the creation of two additional reserves: Reserve No. 11 (Campbell River) and Reserve No. 12 (Quinsam). However, given the terms of his appointment, and the nature of his mandate (which was to resolve the point of contention between Indians and non-Indians), his report purported to settle only the "extent and boundaries" of Reserves Nos. 11 and 12. In the body of his Report, Reserves Nos. 11 and 12 were not identified as allocated to a particular band, but rather to the "Laich-kwil-tach (Euclataw) Indians". Moreover, in a copy of Green's Report filed with the McKenna McBride Commission, he explains his understanding of the reserve-creation process:

> The Laich-kwil-tach (Euclataw) reserves were re-allotted by Mr. O'Reilly in 1886. No allotments were made to separate bands. The division into bands were made by the agents. [Emphasis in original.]

The trial judge concluded that Ashdown Green did not have, and did not think he had, authority "to allocate reserves to any one subgroup or band" (para. 57). His task was to separate Indian reserve land from land to be taken up by non-Indian settlers.

28 Even if Ashdown Green had stood in O'Reilly's shoes, all reserves recommended by the Reserve Commissioner were subject to the approval of the Provincial Chief Commissioner of Lands and Works and the Dominion Superintendent pursuant to Order-in-Council No. 1334. The trial judge concluded that whether or not

Ashdown Green could be construed as recommending the allocation of Reserve No. 11 and Reserve No. 12 to the Cape Mudge Band, no such higher approval was given. As recently affirmed in *Ross River*, *supra*, the relevant "intention" is the "intention to create a reserve on the part of persons having the authority to bind the Crown" (para. 69).

29 The Cape Mudge Band contends that, notwithstanding the findings of the trial judge, Ashdown Green *did* have authority to allocate reserves within the Laich-kwil-tach First Nation and *did* award both Reserve No. 11 and Reserve No. 12 to them. Their factual argument turns on disputed inferences from a notation on a map of the two reserves attached to Ashdown Green's 1888 Report that was entitled "Laich-kwil-tach (Eu-cla-taw) Indians. We-way-a-kay Band", and by subsequent repetition of this allocation for a short period in the Schedules of Indian Reserves published by the Department of Indian Affairs.

30 The Department officially began publishing these Schedules in 1892. They included a summary of the location and size of the various reserves in British Columbia. The Schedules were not legally mandated and were primarily internal administrative documents. Often they contained errors. The 1892 Schedule (i.e., the first to be published) listed the Reserves Nos. 10, 11 and 12 surveyed by Ashdown Green as belonging to the "Laich-Kwil-Tach Indians" without any indication of how these reserves were to be distributed amongst the four bands composing the Laich-kwil-tach First Nation. By 1902, Reserves Nos. 11 and 12 were shown on the Schedule as allocated to the "Wewayakay" (Cape Mudge) Band.

31 The trial judge found that the Cape Mudge Band had not in fact resided in the area now designated Reserve No. 11. Its members had used the rich fishing grounds

in the vicinity in common with other Laich-kwil-tach peoples, but had landed their catch elsewhere along the shoreline.

32 When a particular reserve was provisionally allocated at the band level, the practice was for a departmental official to write out a band's name in full for the first entry, and for every successive reference (in an unfortunate economy of effort) the official would simply put quotation or "ditto" marks. Thus by 1902, the Schedule (unlike the 1892 Schedule) showed an allocation to the Cape Mudge Band ("Wewayakay") of both Reserve No. 11 *and* Reserve No. 12 as follows:

Reserve No.	**Reserve Name**	**Tribe or Band**
1	Salmon River	Laichkwiltach, Kahkahmatsis band
. . . [*listing of reserves 2 to 6 omitted*]		
7	Village Bay	We-way-akay band
8	Open Bay	" "
9	Drew Harbour	" "
10	Cape Mudge	" "
11	Campbell River	" "
12	Quinsam	" "

(Source: Joint Record, vol. 8, p. 1325)

A note in the margin of the 1902 Schedule stated, "[a]llotted by Mr. Ashdown Green . . . May 7, 1888. Surveyed, 1888. Final confirmation, May 18, 1889". As stated, the trial judge found this information to be erroneous. The only approval given by the Indian Superintendent was approval of the reserves for the Laich-kwil-tach First Nation and not for any of its subgroups. The approval was in any event provisional, as the Indian

Superintendent must be taken to have been aware that British Columbia had still not agreed on what provincial Crown lands would be made available for that purpose.

33 The trial judge's findings of fact were clearly supported by the evidence and collectively are fatal to the Cape Mudge Band claim to both reserves. Appearance of the band name on an Indian Affairs document used for administrative purposes does not create in law a reserve in their favour, particularly where the document is based on erroneous information. The Cape Mudge Band did have, as members of the Laich-kwil-tach First Nation, a claim for the appropriate consideration of their requirements. As to Reserve No. 11 in particular, however, their own Chief and Principal Men authoritatively disclaimed any beneficial interest on numerous occasions prior to the lawsuit.

34 As early as March 24, 1896, Indian Agent Pidcock reported:

> At a meeting in the house of the chief yesterday, the Indians of the We-Wai-Ai-Kai [Cape Mudge] band who reside on the Reserve at Cape Mudge, said they had always considered the Reserve at Campbell River to belong to Chief Kwaksista [Quacksister], and they did not claim any of it.

This disclaimer was repeated more authoritatively by formal resolution of the Chief and Principal Men in March 1907. No claim was made to Reserve No. 11 by the Cape Mudge Band either in 1914 when making submissions to the McKenna McBride Commission, or again in response to an Indian Affairs departmental inquiry in 1936. Having on those occasions acknowledged the beneficial interest in Reserve No. 11 to be in the Campbell River Band, equitable relief is not available to the Cape Mudge Band to achieve what would now be a most inequitable dispossession of its sister band. Nor, for the reasons to follow, is "equitable" compensation available against the Crown in

substitution for the inequitable dispossession which, quite understandably, the Cape Mudge Band does not really desire.

F. *The Claim of the Campbell River Band ("Wewaykum")*

35 The imputed allocation in the 1902 Schedule of both Reserves Nos. 11 and 12 to the Cape Mudge Band ("Wewayakay") created practical difficulties, as the Cape Mudge Band was not in occupation of Reserve No. 11, and never had been, whereas members of the Campbell River Band had been there for several years.

36 In 1905, a dispute between the two bands over fishing rights in the Campbell River led to a dispute over possession of Reserve No. 11. At about the same time, the International Timber Company expressed an interest in using the area in conjunction with their logging operations. It thus became necessary to sort out who was (provisionally) entitled to what. The Indian Agent William Halliday reported to Ottawa that "I deemed it necessary to get an expression of opinion from the Indians regarding ownership of this reserve [i.e., Reserve No. 11]".

37 It is important to note that Halliday did not consider it his mandate to impose a solution. It was "to get an expression of opinion from the Indians". The result was the *1907 Resolution* in March of that year wherein the Cape Mudge Band "ceded" to the Campbell River Band any claim to Reserve No. 11, subject to retaining fishing rights in the area. The Resolution is set out in the trial judgment, at para. 91, as follows:

> Resolved that whereas there is a difference of opinion as to the ownership of the reserve known as the Campbell River Reserve [No. 11], this reserve being claimed by both the Wewaiaikai [Cape Mudge] and Wewaiaikum [Campbell River] Bands, and as the reserve is gazetted in the office of the

> Indian Department as belonging to the Wewaiaikai [Cape Mudge] Band, as the reserve is at present occupied by the Wewaiaikum [Campbell River] Band, as it would entail hardship on the members of the Weiwaiaikum [Campbell River] Band to be obliged to move, and as the first Indians to live on this reserve were of the Wewaiaikum [Campbell River] Band, and as the object of the Wewaiaikai [Cape Mudge] Band in asking for this land for a reserve was to have the use of the river for fishing purposes, therefore, the members of the Wewaiaikai [Cape Mudge] Band in council here assembled, do cede all right to the Campbell River Reserve [No. 11] to the Wewaiaikum [Campbell River] Band forever, with the proviso that at any and all times the Wewaiaikai [Cape Mudge] Band shall have the undisputed right to catch any and all fish in the waters of Campbell River, this right to be in common with the Wewaiaikum [Campbell River] Band.
>
> Resolved further that the Indian Agent who is presiding at this meeting is hereby authorized to take what steps are necessary to have this resolution made official and properly carried out.

38 The trial judge was satisfied that the Cape Mudge Indians, either directly or with the assistance of an interpreter, "were capable of communicating in English by March 1907" (para. 430).

39 For my purposes, the key points made in the Resolution adopted by the Cape Mudge Band can be summarized as follows:

> 1. The Cape Mudge Band acknowledges that Reserve No. 11 is recorded in the departmental Schedule as allocated to it. (There was other corroborating evidence of disclosure by the Crown of the facts known to it as at 1907.)
>
> 2. There was however a "difference of opinion" between the bands which needed to be resolved (i.e., the issue here was not one of surrender or alienation but to resolve the "difference of opinion").

3. The members of the Cape Mudge Band recognize that Reserve No. 11 is occupied by the Campbell River Band, who were the first to reside there. (This is consistent with Indian Agent Pidcock's 1896 letter and arguably confirms that in Cape Mudge's then view, Captain John Quacksister was a member of the Campbell River Band.)

4. Members of the Cape Mudge Band acknowledge that it would "entail hardship on the members" of the Campbell River Band "to be obliged to move". (This too is important because it acknowledges that the Campbell River Band had "started to make use of the lands" as contemplated in *Ross River* as an element of reserve creation (para. 67).)

5. The interest of the Cape Mudge Band in Reserve No. 11 "was to have the use of the river for fishing purposes" (i.e., not the reserve for residential purposes).

6. The Cape Mudge Band "in council here assembled, do cede all right to the Campbell River Reserve [No. 11] to the Wewaiaikum [Campbell River] Band forever". (This seems to be in the nature of a quit claim deed rather than a "surrender" or purported conveyance of any interest.)

7. Reserving to the Cape Mudge Band "the undisputed right to catch any and all fish in the waters of Campbell River, this right to be in common with" the Campbell River Band;

8. The Indian Agent Halliday was "hereby authorized to take what steps are necessary to have this resolution made official and properly carried out".

The trial judge concluded that Halliday must have assumed that no reciprocal Resolution was required from the Campbell River Band disclaiming any interest in Reserve No. 12 because the Schedule at Indian Affairs already listed that reserve as allocated to the Cape Mudge Band and there was at that time no dispute about it.

40 Counsel for Cape Mudge argues that the *1907 Resolution* is invalid for non-compliance with the surrender provisions of the *Indian Act* but (i) I do not think resolution of a "difference of opinion" between sister bands of the same First Nation to which the land had been allocated in the first instance should be characterized as a surrender, (ii) the land designated as Reserve No. 11 was not an Indian Reserve within the meaning of the *Indian Act* in 1907; it was still provincial Crown property, and (iii) in any event the operation of the surrender provisions of the *Indian Act* had been suspended (to the extent they were capable of application) by Proclamation of the Privy Council made December 15, 1876 (*The Canada Gazette*, December 30, 1876, vol. X, No. 27).

41 The effect of the *1907 Resolution* was ineptly recorded by Indian Affairs in Ottawa in a handwritten addition to the 1902 Schedule as follows:

Reserve No.	**Reserve Name**	**Tribe or Band**
1	Salmon River	Laichkwiltach, Kahkahmatsis band

. . . [*listing of reserves 2 to 6 omitted*]

7	Village Bay	We-way-akay band
8	Open Bay	" "
9	Drew Harbour	" "
10	Cape Mudge	" "
11	Campbell River	*We-way-akum band*
12	Quinsam	" "

(Source: Joint Record, vol. 9, p. 1453)

42 As is apparent, through a further unfortunate economy of effort, the handwritten note of "We-way-akum band" opposite Reserve No. 11 was not accompanied by any amendment to the Schedule to clarify the status of Reserve No. 12, whose ditto marks remained unchanged. The trial judge characterized this as the "ditto mark error". He found, amply supported by the evidence, that the handwritten correction was intended to refer only to Reserve No. 11, and that there was no intention (or basis) to make any change to Reserve No. 12, which was not part of the *1907 Resolution.* The "difference of opinion", on the evidence, was confined at that time to Reserve No. 11. On a correct interpretation, therefore, the ditto marks opposite Reserve No. 12 *continued* to refer to the "Wewayakay" (Cape Mudge) Band, despite the confusion introduced by the subsequent handwritten notation against Reserve No. 11.

43 In light of the trial judge's findings that the "ditto mark error" was the result of a simple slip, and that there was no demonstrated reason for the *1907 Resolution* to have precipitated the re-allocation not only of Reserve No. 11 but of Reserve No. 12 as well, which contradicted the intention of the parties, it is difficult not to see the Campbell River Band's position as an overly technical attempt to rely on what it conceives to be

"the letter of the law". This, I think, is unfortunate. Our Court has on several occasions emphasized that in dealing with the Indian interest in reserves, "we must ensure that form not trump substance" (*St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 16) or allow the true intention of the parties to be frustrated by "technical" rules embodied in the common law (*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at para. 6).

44 In my view, the Campbell River Band's claim to a "legislated entitlement" is misconceived, but in any event it is seeking *equitable* relief against the Crown, and equity has always looked to substance not form, as will be discussed below.

45 It is difficult to see how such a "ditto mark error" could ever form the basis of *equitable* relief.

G. *The McKenna McBride Commission, 1912*

46 The continuing disagreements between the federal and provincial governments about the size and number of reserves in British Columbia led to the establishment in 1912 of the McKenna McBride Commission. Its mandate included the power to vary "the acreage of Indian Reserves", either to reduce the size of a parcel provincially set aside as a reserve where "the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality", or to add acreage where "an insufficient quantity of land has been set aside for the use of the Indians of that locality", or to "set aside land for any Band of Indians for whom land has not already been reserved".

47 The McKenna McBride Commission visited the proposed reserves in the Campbell River area. In their analysis of the evidence gathered there, the Commissioners acknowledged that Reserve No. 11 was properly allocated in the federal Schedule to the Campbell River Band, but noted the error with respect to Reserve No. 12:

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

48 In their respective appearances before the McKenna McBride Commission in 1914, the Campbell River Band made no claim to Reserve No. 12 and the Cape Mudge Band made no claim to Reserve No. 11.

49 The McKenna McBride Commission concluded its business, making no changes to the federal 1913 Schedules, despite noting various allocation errors. Commissioner MacDowall is recorded as having commented with respect to the reserve situations:

> We have to take these reserves as they appear in the government list and we are dealing with the land and not with the distribution of the Tribe at all — That is a matter for the Department to settle.

The McKenna McBride Commission neither added acreage nor subtracted acreage from Reserve No. 11 or Reserve No. 12. This, in the trial judge's view at para. 106, confirmed that the "Commission's role was not to deal with beneficial ownership of reserves, but

simply with size. Ownership was a matter to be dealt with by the [federal] Department of Indian Affairs". "In fact", he added, "years after the McKenna McBride Commission hearings, a number of errors with respect to the individual allocation of reserves to bands or subgroups were brought to the attention of various department officials by Halliday as well as by Indian Commissioner [W.E.] Ditchburn." The McKenna McBride Commission did factor the acreage of Reserve No. 12 into the Campbell River Band's entitlement, a point which the Campbell River Band now says shows the allocation of both reserves to it to be deliberate and wholly justified. However, as mentioned, strategic location in relation to the fishery, not acreage, seemed to be of prime importance to the bands.

H. *The Ditchburn Clark Commission*

50 Unfortunately, the McKenna McBride Report also failed to obtain provincial approval. The federal and provincial governments then enacted mirror legislation establishing the Ditchburn Clark Commission to attempt to bring closure for a federal-provincial wrangle that at that stage had dragged on for almost 50 years: see *Indian Affairs Settlement Act*, S.B.C. 1919, c. 32, and *British Columbia Indian Lands Settlement Act*, S.C. 1920, c. 51. Its report did not appear until 1923. With respect to Reserves Nos. 11 and 12, it basically restated the position already proposed in the McKenna McBride Report.

51 In 1924, the British Columbia government as well as the federal government finally adopted the McKenna McBride recommendations, as modified by the Ditchburn Clark Report. The federal Order-in-Council P.C. 1265, made July 19, 1924, provided that such adoption was in "full and final adjustment and settlement of all differences in

[this matter] between the Governments of the Dominion and the Province, in fulfilment of the said Agreement of the 24th day of September, 1912 [establishing the McKenna McBride Commission], and also of Section 13 of the Terms of Union . . .". Provincial Order-in-Council No. 911 made July 26, 1923, was to the same effect. This eventually led to the issuing of provincial Order-in-Council No. 1036 on July 29, 1938, which transferred administration and control of the subject lands to the Crown in right of Canada. While the Department of Indian Affairs treated the "reserves" in British Columbia as being in existence prior to these formal enactments, there was a good deal of confusion in the early years regarding the precise nature of the federal interest under s. 91(24) of the *Constitution Act, 1867*. It was not until the Judicial Committee of the Privy Council decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, that it was made clear that under s. 91(24) all "the Dominion had [was] a right to exercise legislative and administrative jurisdiction — while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province . . ." (see *Ontario Mining Co. v. Seybold* (1899), 31 O.R. 386 (H.C.), at p. 395, aff'd (1900), 32 O.R. 301 (Div. Ct.), aff'd (1901), 32 S.C.R. 1, aff'd [1903] A.C. 73 (P.C.)). More importantly, given the critical role of "intention" in the creation of reserves (*Ross River*, *supra*, at para. 67), it was clear that at the highest levels of both governments the *intention* was to proceed by way of mutual agreement. An intention to create a reserve in 1907 on land that might be withdrawn from the federal-provincial package at any time prior to such agreement being concluded cannot reasonably be attributed to the federal Crown.

52 The position of the Campbell River Band is that the series of orders-in-council appending the faulty Schedules placed a legislative seal of approval ("legislative entitlement") on the "ditto mark error", and that the courts are now bound to give it full

effect by dispossessing the Cape Mudge Band from Reserve No. 12 (not its preferred solution) or obtaining "equitable compensation" from the Crown in lieu thereof.

53 Orders-in-council are certainly presumptive proof of the Crown's intention to create a reserve as therein stated but they are not conclusive: *Ross River*, at para. 50. The trial judge found that the federal Crown, in whose jurisdiction the final act of reserve creation resided, *intended* that Reserve No. 12 be allocated to the Cape Mudge Band. As stated, substance not form prevails.

54 Counsel for the Campbell River Band is correct, of course, that a conventional reading of the ditto marks would give both reserves to his client. If this were the usual real estate battle between multinational corporations, which had negotiated extensively each word and punctuation mark in the documentation, the ditto mark argument might be considered a solid point, except that here his client is seeking *equitable* relief, and even as between multinational corporations such an outcome might be regarded as wholly inequitable in light of the factual findings of the trial judge.

I. *Correction of the "Ditto Mark Error"*

55 The apparent conflict between the official records and the *status quo* occupation by the appellant bands was bound to lead to a measure of agitation.

56 In 1928, Indian Commissioner Ditchburn wrote to the Secretary of the Department of Indian Affairs that

> As Quinsam Reserve No. 12 has always been claimed by the We-way-akay (Cape Mudge) Band and the claim has not been disputed by the

> Wewayakum (Campbell River) Band, I would recommend that it be officially decided as belonging to the We-way-akay Indians and notations made in the Schedule accordingly.

57 Both bands retained legal counsel in 1932 to investigate. In 1934, Indian Agent Todd, Halliday's replacement, was asked to contact the bands to ascertain accuracy of the sub-tribal allocations in the federal Schedule. The trial judge found as a fact that during the ensuing discussions, both appellant bands "were informed of the Department's position with respect to Reserves No[s]. 11 and 12, including the circumstances and full text of the 1907 ceding resolution" (para. 131).

58 After the relevant facts had been ascertained and discussed, both bands confirmed the correctness of the *status quo*.

59 On November 23, 1936, a declaration was signed by the chief and principal men of the Wewaikai Band stating: "We the Chiefs and Principal Men of the Cape Mudge Band, do hereby state under oath that the Reserves shown below are the only reserves belonging to this band and this list is complete" (emphasis added). Among these reserves were Reserve No. 10 (Cape Mudge) and Reserve No. 12 (Quinsam). The Campbell River Reserve No. 11 was not mentioned in their list.

60 A parallel declaration was sworn by members of the Campbell River Band in 1937 indicating that "We the Chiefs and Principal Men of the Campbell River Band, do hereby state under oath that the reserves shown below are the only reserves belonging to this band and that this list is complete" (emphasis added). The list referred to in their declaration, while it mentions "Reserve No. 11", makes no claim to Reserve No. 12.

61 That is, both bands made declarations that corresponded to their actual incumbency. The various attacks now made on these declarations and the Indian agents by the respective sets of appellants were rejected by the trial judge. No reason has been shown to interfere with the trial judge's finding in that regard.

62 In 1943, Indian Affairs published a corrected Schedule of Reserves. Corresponding to the sworn declarations, Reserve No. 11 was listed for the Campbell River Band and Reserve No. 12 was listed for the Cape Mudge Band. However, it seems that no formal amendment has been made to the various orders-in-council that had appended the previous faulty Schedules.

J. *Recent Developments*

63 The dispute resurfaced in the 1970s. The Campbell River Band, through legal counsel, contacted the Minister of Indian Affairs regarding Reserve No. 12. In response, and after inquiry, Indian Affairs reported: "In view of the evidence available in our records, we have to state that the Quinsam Indian Reserve No. 12 is set apart for the use and benefit of the Cape Mudge [Wewaikai] Band of Indians". The Department attached copies of the *1907 Resolution* and the 1936 and 1937 declarations.

64 In 1985, the Campbell River Band initiated action against the Crown and the Cape Mudge Band. It did so, as stated in para. 30 of its factum, because of the perceived impact of the decision of this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, where a precedent was set of financial compensation to an Indian band for breach of fiduciary duty in the disposition of part of its reserve. The Cape Mudge Band counterclaimed for

exclusive entitlement to both reserves and, in 1989, added a claim against the Crown. In October 1989, the actions were consolidated.

K. *Identification of the Beneficial Interests*

65 As Commissioner O'Reilly stated in 1886, the job of the Indian Commissioners was to ascertain reserves on the basis of the "places they [the Indians] wish to have".

66 Whatever was or was not done by Ashdown Green in 1888, the facts remain that (i) under the *1907 Resolution*, (ii) in their evidence to the McKenna McBride Commission and (iii) in their November 23, 1936 declaration, the Chief and Principal Men of the Cape Mudge Band, who were closer in time to the events in question than the present membership, acknowledged that the beneficial interest in Reserve No. 11 rested with the Campbell River Band.

67 Equally, regardless of the "ditto mark error" in the 1913 Indian Affairs Schedule as subsequently reproduced in various orders-in-council (until corrected in 1943), the Campbell River Band is confronted with the facts that before the McKenna McBride Commission and in their January 24, 1937 declaration, their then "Chief and Principal Men" asserted no beneficial interest in Reserve No. 12.

L. *Rectification of Order-in-Council 1036*

68 The trial judge characterized the "ditto mark error" as a clerical error, and purported to "rectify" the faulty Schedule to Order-in-Council 1036. The Federal Court of Appeal, *per* McDonald J.A., endorsed this approach (para. 150).

69 Judicial correction of perceived errors in legislative enactments, in the rare instances where they can be justified, is performed on the basis that the corrected enactment expresses the intent of the enacting body. The clerical error is generally apparent on the face of the enactment itself. Examples are found in the municipal by-law cases, e.g., in *Morishita v. Richmond (Township)* (1990), 67 D.L.R. (4th) 609 (B.C.C.A.); *R. v. Liggetts-Findlay Drug Stores Ltd.*, [1919] 3 W.W.R. 1025 (Alta. S.C.A.D.); and is occasionally found in the correction of statutes, *Cameron v. The King*, [1927] 2 D.L.R. 382 (B.C.C.A.); *Morris v. Structural Steel Co.* (1917), 35 D.L.R. 739 (B.C.C.A.); *Rennie's Car Sales & R. G. Hicks v. Union Acceptance Corp.*, [1955] 4 D.L.R. 822 (Alta. S.C.A.D.). See also R. Sullivan, *Statutory Interpretation* (1997), at pp. 164-66; *Maxwell on the Interpretation of Statutes* (4th ed. 1905), at p. 344.

70 I have difficulty in attributing to the provincial government of British Columbia in 1938 a "corrected" intent to allocate Reserve No. 12 to the Cape Mudge Band. Allocation of reserves was not a provincial responsibility. The mistake was made at the federal level in the Department of Indian Affairs. It was noted but not corrected by the McKenna McBride Commission. The Schedules in their uncorrected form were attached by the provincial government to its Order-in-Council 1036. We really do not know what intent, if any, the provincial government had. The permissible constitutional scope of the provincial "intent" in relation to "lands reserved for Indians" was limited to the size, number and location of reserves to be transferred by it to the administration and control of the Crown in right of Canada. In these circumstances it seems to me

unsafe to "correct" the original Schedules to provincial Orders-in-Council Nos. 911 and 1036. As to federal Order-in-Council P.C. 1265 made July 19, 1924, if read correctly according to the eccentric record-keeping practices of the Department of Indian Affairs at the time (i.e., substance over form), no rectification was necessary.

71 The solution to these appeals, in my opinion, does not lie in the law of rectification but in the law governing the fiduciary duty alleged and the equitable remedies sought by the appellant bands, as will now be discussed.

M. *The Sui Generis Fiduciary Duty*

72 If, as we affirm, neither band emerged from the reserve-creation process with *both* reserves, the issue arises whether this outcome establishes in the case of either appellant band a breach of fiduciary duty on the part of the federal Crown.

73 Prior to its watershed decision in *Guerin*, *supra*, this Court had generally characterized the relationship between the Crown and Indian peoples as a "political trust" or "trust in the higher sense". In *St. Catherines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, decided just prior to Ashdown Green's trip to Campbell River, Taschereau J. of this Court described the Crown's obligation towards aboriginal people as a "sacred political obligation, in the execution of which the state must be free from judicial control" (p. 649 (emphasis added)). Over 60 years later, in *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, Rand J. stated at p. 219:

> The language of the statute [*Indian Act*] embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. [Emphasis added.]

74 The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people. A quasi-proprietary interest (e.g., reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty" (*Guerin*, at p. 385). Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples.

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75 In *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, the Court had recognized for the first time in the modern era that the Indian interest in their ancestral lands constituted a *legal* interest that predated European settlement. Recognition of aboriginal rights could not, therefore, be treated merely as an act of grace and favour on the part of the Crown. These propositions, while brought to the fore in Canadian law relatively recently, are not new. Marshall C.J. of the United States ruled as early as 1823 that the legal rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), at pp. 573-74; *Guerin*, *supra*, at pp. 377-78; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at paras. 141-46.

76 Thus in *Guerin* itself, where the Crown failed to carry out its mandate to negotiate on particular terms a lease of 162 acres of an existing Indian reserve to the Shaugnessy Heights Golf Club in suburban Vancouver, Dickson J. (as he then was) was

able to distinguish the "political trust" cases as inapplicable in a passage that should be set out in its entirety (at pp. 378-79):

> . . . Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in Council*, *supra*; *Tito v. Waddell (No. 2)*, *supra*, and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision. [Emphasis added.]

Later in his reasons, Dickson J. further pointed out that fiduciary duty was imposed on the Crown *despite* rather than *because* of its government functions, at p. 385:

> As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

Wilson J., in a concurring opinion, made similar comments, at p. 352:

> It seems to me that the "political trust" line of authorities is clearly distinguishable from the present case because Indian title has an existence apart altogether from s. 18(1) of the *Indian Act*. It would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band.

77 It is true that Dickson J. also noted, at p. 379, that for purposes of identifying a fiduciary duty:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases . . . .

However, he was speaking of disposition of the Indian band interest in an *existing* Indian reserve in a transaction that predated the *Constitution Act, 1982*. Here we are speaking of a government program to *create* reserves in what was not part of the "traditional tribal lands".

78 The *Guerin* concept of a *sui generis* fiduciary duty was expanded in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, to include protection of the aboriginal people's pre-existing and still existing aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*. In that regard, it was said at p. 1108:

> The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). 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 trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]

See also: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 185.

79 The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in *Sparrow*, at p. 1108, as a "general guiding principle for s. 35(1)", is of broader importance. All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
>
> (B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

See also *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 17; W. R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective", [1986] 3 C.N.L.R. 19, at p. 31.

80 This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in *Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1, to the "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians"), but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal

populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in *Guerin*, *supra*, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." See also: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J., at pp. 599-600; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, *per* La Forest J., at p. 406; *Frame v. Smith*, [1987] 2 S.C.R. 99, *per* Wilson J., dissenting, at pp. 135-36. Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown": *R. v. Taylor* (1981), 34 O.R. (2d) 360 (C.A.), *per* MacKinnon A.C.J.O., at p. 367, leave to appeal refused, [1981] 2 S.C.R. xi; *Van der Peet*, *supra*, *per* Lamer C.J., at para. 24; *Marshall*, *supra*, at paras. 49-51.

81 But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.

82 Since *Guerin*, Canadian courts have experienced a flood of "fiduciary duty" claims by Indian bands across a whole spectrum of possible complaints, for example:

(i) to structure elections (*Batchewana Indian Band (Non-resident members) v. Batchewana Indian Band*, [1997] 1 F.C. 689 (C.A.), at para. 60; subsequently dealt with in this Court on other grounds);

(ii) to require the provision of social services (*Southeast Child & Family Services v. Canada (Attorney General)*, [1997] 9 W.W.R. 236 (Man. Q.B.));

(iii) to rewrite negotiated provisions (*B.C. Native Women's Society v. Canada*, [2000] 1 F.C. 304 (T.D.));

(iv) to cover moving expenses (*Paul v. Kingsclear Indian Band* (1997), 137 F.T.R. 275; *Mentuck v. Canada*, [1986] 3 F.C. 249 (T.D.); *Deer v. Mohawk Council of Kahnawake*, [1991] 2 F.C. 18 (T.D.));

(v) to suppress public access to information about band affairs (*Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, aff'd (1999), 251 N.R. 220 (F.C.A.); *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143 (T.D.); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997), 132 F.T.R. 106);

(vi) to require legal aid funding (*Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174 (T.D.));

(vii) to compel registration of individuals under the *Indian Act* (rejected in *Tuplin v. Canada* (*Indian and Northern Affairs*) (2001), 207 Nfld. & P.E.I.R. 292 (P.E.I.S.C.T.D.));

(viii) to invalidate a consent signed by an Indian mother to the adoption of her child (rejected in *G. (A.P.) v. A. (K.H.)* (1994), 120 D.L.R. (4th) 511 (Alta. Q.B.)).

83 I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

84 I note, for example, what was said by Rothstein J.A. in *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)*, *supra*, at para. 6:

> The second argument is that the Government of Canada has a fiduciary duty to the appellants not to disclose the information in question because some of it relates to Indian land. We are not dealing here with the surrender of reserve land, as was the case in *Guerin v. Canada*. Nor are we dealing with Aboriginal rights under s. 35 of the *Constitution Act, 1982*. This case is about whether certain information submitted to the government by the appellants should be disclosed under the *Access to Information Act*. [Emphasis added.]

See also *Lac La Ronge Indian Band v. Canada* (2001), 206 D.L.R. (4th) 638 (Sask. C.A.); *Cree Regional Authority v. Robinson*, [1991] 4 C.N.L.R. 84 (F.C.T.D.); *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), 145 F.T.R. 1; *Westbank First Nation v. British Columbia* (2000), 191 D.L.R. (4th) 180 (B.C.S.C).

85 I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below.

N. *Application of Fiduciary Principles to Indian Lands*

86 For the reasons which follow, it is my view that the appellant bands' submissions in these appeals with respect to the existence and breach of a fiduciary duty cannot succeed:

1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.

2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* — which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic

obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

4. In this case, as the appellant bands have rightly been held to lack any beneficial interest in the other band's reserve, equitable remedies are not available either to dispossess an incumbent band that is entitled to the beneficial interest, or to require the Crown to pay "equitable" compensation for its refusal to bring about such a dispossession.

5. Enforcement of equitable duties by equitable remedies is subject to the usual equitable defences, including laches and acquiescence.

87 I propose to discuss each of these propositions in turn.

1. <u>The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.</u>

88 In *Ross River*, *supra*, the Court affirmed that "[a]lthough this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power [of reserve creation] remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution*

Act, 1982" (LeBel J., at para. 62). Further, "it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band. It would certainly be in the interests of fairness for the Crown to take into consideration in any future negotiations the fact that the Ross River Band has occupied these lands for almost half a century" (para. 77).

89 In the present case the reserve-creation process dragged on from about 1878 to 1928, a period of 50 years. From at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had. It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion.

90 The issue, for present purposes, is to define the content of the fiduciary duty "with respect to the lands occupied by the Band" (*Ross River*, *supra*, at para. 77) at the reserve-creation stage insofar as is necessary for the disposition of these appeals.

91 The situation here, unlike *Guerin*, does not involve the Crown interposing itself between an Indian band and non-Indians with respect to an existing Indian interest in lands. Nor does it involve the Crown as "faithless fiduciary" failing to carry out a mandate conferred by a band with respect to disposition of a band asset. The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the *disposition* of an

existing Indian interest in the subject lands, but the *creation* of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.

92 This is not to suggest that a fiduciary duty has no role to play in these circumstances. It is to say, however, that caution must be exercised. As stated, even in the traditional trust context not all obligations existing between the parties to a well-recognized fiduciary relationship are themselves fiduciary in nature: *Lac Minerals*, *supra*, *per* Sopinka J., at pp. 597 *et seq*. Moreover, as pointed out by La Forest J. in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, not all fiduciary relationships and not all fiduciary obligations are the same: "[T]hese are shaped by the demands of the situation" (p. 149). Thus, for example, the singular demands of the administration of justice drive and "shape" the content of the fiduciary relationship between solicitor and client: *R. v. Neil*, [2002] 3 S.C.R. 631, 2002 SCC 70. These observations are of particular importance in a case where the fiduciary is also the government, as the Court in *Guerin* fully recognized (p. 385). (In the case of rival bands asserting overlapping claims to s. 35 aboriginal title over the same land, for example, the Crown is caught truly and unavoidably in the middle, but that is not the case here.)

93 The starting point in this analysis, therefore, is the Indian bands' interest in specific lands that were subject to the reserve-creation process for their benefit, and in relation to which the Crown constituted itself the exclusive intermediary with the province. The task is to ascertain the content of the fiduciary duty in relation to those specific circumstances.

2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* — which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its

mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

94 Insofar as the appellant bands contend for a broad application of a fiduciary duty at the stage of reserve creation in non-s. 35(1) lands (as distinguished from their other arguments concerning existing reserves and reserve disposition), it is necessary to determine what the imposition of a fiduciary duty adds at that stage to the remedies already available at public law. The answer, I think, is twofold. In a substantive sense the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary. In *Blueberry River* McLachlin J. (as she then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs'". See also D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 32-33; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. Secondly, and perhaps more importantly, the imposition of a fiduciary duty opens access to an array of equitable remedies, about which more will be said below.

95 In this case the intervention of the Crown was positive, in that the federal government sought to create reserves for the appellant bands out of provincial Crown lands to which these particular bands had no aboriginal or treaty right. As explained, the people of the Laich-kwil-tach First Nation arrived in the Campbell River area at about the same time as the early Europeans (1840-1853). Government intervention from 1871 onwards was designed to protect members of the appellant bands from displacement by the other newcomers.

96 When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, "[t]he Crown's position as fiduciary is necessarily unique" (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J. said in *Guerin*, *supra*, at p. 385:

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

97 Here, as in *Ross River*, the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries. As the dispute evolved into conflicting demands between the appellant bands themselves, the Crown continued to exercise public law duties in its attempt to ascertain "the places they

wish to have" (as stated at para. 24), and, as a fiduciary, it was the Crown's duty to be even-handed towards and among the various beneficiaries. An assessment of the Crown's discharge of its fiduciary obligations at the reserve-creation stage must have regard to the context of the times. The trial judge concluded that each of these obligations was fulfilled, and we have been given no persuasive reason to hold otherwise.

3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

98 The content of the fiduciary duty changes somewhat after reserve creation, at which the time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands. In *Guerin*, Dickson J. said the fiduciary "interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown" (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85. See also *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.).

99 At the time of reserve *disposition* the content of the fiduciary duty may change (e.g. to include the implementation of the wishes of the band members). In *Blueberry River*, McLachlin J. observed at para. 35:

> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident — a decision that

> constituted exploitation — the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

To the same effect see *R. v. Lewis*, [1996] 1 S.C.R. 921, *per* Iacobucci J., at para. 52, and, in another context, *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, *per* La Forest J., at pp. 129-30.

100 It is in the sense of "exploitative bargain", I think, that the approach of Wilson J. in *Guerin* should be understood. Speaking for herself, Ritchie and McIntyre JJ., Wilson J. stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction" (p. 350). The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). This is consistent with *Blueberry River* and *Lewis*. Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself. (Of course, there will also be cases dealing with the ordinary accountability by the Crown, as fiduciary, for its administrative control over the reserve and band assets.)

101 The Cape Mudge appellants contend that the Crown breached its fiduciary duty with respect to its two reserves (while attacking the trial judge's rejection of this factual premise) by permitting (or even encouraging) the *1907 Resolution*. They have been deprived of their legal interest in Reserve No. 11, they say, by an "exploitative bargain". They gave away 350 acres for nothing.

102 While the reserves were not constituted, as a matter of law, until 1938, I would be prepared to assume that, for purposes of this argument, the fiduciary duty was in effect in 1907. The Cape Mudge Band argument is nevertheless unconvincing. I do not accept what, with respect, is its shaky factual premise, i.e., that the band "gave away" Reserve No. 11 as opposed to entering a quit claim in favour of a sister band with a superior interest. More importantly, this argument rests on a misconception of the Crown's fiduciary duty. The Cape Mudge forbears, whose conduct is now complained of, were autonomous actors, apparently fully informed, who intended in good faith to resolve a "difference of opinion" with a sister band. They were not dealing with non-Indian third parties (*Guerin*, at p. 382). It is patronizing to suggest, on the basis of the evidentiary record, that they did not know what they were doing, or to reject their evaluation of a fair outcome. Taken in context, and looking at the substance rather than the form of what was intended, the *1907 Resolution* was not in the least exploitative.

103 While courts applying principles of equity rightly insist on flexibility to deal with the unforeseeable and infinite variety of circumstances and interests that may arise, and which will fall to be decided under equitable rules, it must be said that the bold attempt of the appellant bands to extend their claim to fiduciary relief on the present facts is overly ambitious.

104 On the other hand, the trial judge and the Federal Court of Appeal adopted, with respect, too restricted a view of the content of the fiduciary duty owed by the Crown to the Indian bands with respect to their existing quasi-proprietary interest in their respective reserves. In their view, the Crown discharged its fiduciary duty with respect to existing reserves by balancing "the interests of both the Cape Mudge Indians and the Campbell River Indians and to resolve their conflict regarding the use and occupation

of the [Laich-kwil-tach] reserves . . . [without favouring] the interests of one band over the interest of the other" (para. 493 F.T.R. and para. 121 N.R.). With respect, the role of honest referee does not exhaust the Crown's fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty. The Crown was obliged to preserve and protect each band's legal interest in the reserve which, on a true interpretation of events, had been allocated to it. In my view it did so.

4. In this case, as the appellant bands have rightly been held to lack any beneficial interest in the other band's reserve, equitable remedies are not available either to dispossess an incumbent band that is entitled to the beneficial interest, or to require the Crown to pay "equitable" compensation for its refusal to bring about such a dispossession.

105 The various technical arguments arrayed by the bands are, in any event, singularly inappropriate in a case where they seek equitable remedies. As noted, each band has, over the past 65 or more years, reasonably relied on the repeated declarations and disclaimers of its sister band, and on the continuance of the *status quo*, to reside on and improve its reserve.

106 Reserves Nos. 11 and 12 were formally created when the federal Crown obtained administration and control of the subject lands in 1938. At that time, as outlined above, the appellant bands had manifested on several occasions their acknowledgement that the beneficial interest in Reserve No. 11 resided in the Campbell River Band and the beneficial interest in Reserve No. 12 resided in the Cape Mudge Band. The equitable remedies sought by the appellant bands necessarily address the disposition of the *beneficial* or equitable interest. The trial judge found as a fact (although not using these precise terms) that the equitable interests are reflected in the *status quo*. A mandatory injunction is not available to dispossess the rightful incumbent.

Nor is there any requirement on the Crown to pay *equitable* compensation to a claimant band to substitute for an equitable or beneficial interest that does not belong to it.

5. Enforcement of equitable duties by equitable remedies is subject to the usual equitable defences, including laches and acquiescence.

107 One of the features of equitable remedies is that they not only operate "on the conscience" of the wrongdoer, but require equitable conduct on the part of the claimant. They are not available as of right. Equitable remedies are always subject to the discretion of the court: *Frame v. Smith*, *supra*, at p. 144; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 589; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, at para. 66.

108 Equity has developed a number of defences that are available to a defendant facing an equitable claim such as a claim for breach of fiduciary duty. One of them, the doctrine of laches and acquiescence, is particularly applicable here. This equitable doctrine applies even if a claim is not barred by statute. The British Columbia *Limitation Act*, R.S.B.C. 1979, c. 236 (previously the *Limitations Act*, S.B.C. 1975, c. 37), which is incorporated into federal law by s. 39(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7, explicitly so acknowledged in s. 2:

> **2.** Nothing in this Act interferes with
>
> (a) a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by this Act;
>
> (b) a rule of equity that refuses relief, on the ground of laches, to a person claiming equitable relief in aid of a legal right, whose right to bring the action is not barred by this Act; or

. . .

A similar provision is found in the earlier British Columbia *Statute of Limitations*, R.S.B.C. 1897, c. 123 (in force in B.C. between 1897 and 1975):

> **39.** Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.

109 The doctrine of laches and acquiescence was considered by this Court in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. In that case, the appellant sued her father for damages arising from episodes of incest that occurred a number of years before, in her youth. She alleged breach of fiduciary duty. After rejecting the respondent's argument that the action was statute barred, La Forest J. discussed the legal principles applicable to the doctrine of laches and acquiescence. He referred (at pp. 76-77) to a leading English authority as follows:

> . . . the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.
>
> (*Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40)

La Forest J. concluded, at pp. 77-78:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

See also *Harris v. Lindeborg*, [1931] S.C.R. 235; *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300; and *Blundon v. Storm*, [1972] S.C.R. 135.

110 The doctrine of laches is applicable to bar the claims of an Indian band in appropriate circumstances: *L'Hirondelle v. The King* (1916), 16 Ex. C.R. 193; *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at p. 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (C.A.), aff'd [1991] 2 S.C.R. 570); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). There are also dicta in two decisions of this Court considering, without rejecting, arguments that laches may bar claims to aboriginal title: *Smith v. The Queen*, [1983] 1 S.C.R. 554, at p. 570; *Guerin*, *supra*, at p. 390.

111 It seems to me both branches of the doctrine of laches and acquiescence apply here, namely: (i) where "the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver", and (ii) such conduct "results in circumstances that make the prosecution of the action unreasonable" (*M. (K.) v. M. (H.)*, *supra*, at pp. 76 and 78). Conduct equivalent to a waiver is found in the declaration, representations and failure to assert "rights" in circumstances that required assertion, as previously set out. Unreasonable prosecution arises because, relying on the *status quo*, each band improved the reserve to which it understood its sister band made no further claim. All of this was done with sufficient knowledge "of the underlying facts relevant to a possible legal claim" (*M. (K.) v. M. (H.)*, at p. 79).

112 I conclude therefore that the claims of the appellant bands were rightly rejected on their merits by the trial judge.

O. *In Any Event, the Claims of the Appellant Bands are Statute Barred*

113 Having rejected the appellants' claims to each other's lands on their merits, I need not, strictly speaking, address the limitations issue. However, as this ground was extensively canvassed in the courts below and in argument before this Court, it should be dealt with.

114 This case originated in the Federal Court. It is therefore subject to the limitation provisions contained in the *Federal Court Act* and, in particular, s. 39(1):

> **39.** (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province.

Section 39(1) effectively incorporates by reference the applicable British Columbia limitation legislation, but the relevant provisions apply as federal law not as provincial law: *Blueberry River*, *supra*, at para. 107. I will deal first with some preliminary objections.

1. Constitutionality of the Prescription Period

115 The appellant bands raise the threshold objection that provincial law cannot "extinguish" the Indian interest, which is a matter of exclusive federal legislative

competence: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 673. Section 9 of the B.C. *Limitations Act* provides for extinguishment of the cause of action, but, as stated, it applies as federal law.

116 Parliament is entitled to adopt, in the exercise of its exclusive legislative power, the legislation of another jurisdictional body, as it may from time to time exist: *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137. This is precisely what Parliament did when it enacted what is now s. 39(1) of the *Federal Court Act*.

2. Conflict With *Federal Real Property Act*

117 The appellant Campbell River Band contends that ss. 13 and 14 of the *Federal Real Property Act*, S.C. 1991, c. 50, prohibit the transfer of reserve land by prescription or by virtue of provincial legislation. They provide:

> **13.** Except as expressly authorized by or under an Act of Parliament, no person acquires any federal real property by virtue of a provincial Act.
>
> **14.** No person acquires any federal real property by prescription.

118 Here, however, the prescription resides in s. 39(1) of the *Federal Court Act*, which is not provincial legislation. Moreover, s. 2 defines "federal real property" as "real property belonging to Her Majesty". The reserve land was and remains vested in the Crown. The underlying title is not in dispute.

3. Conflict with the Scheme of the *Indian Act*

119 In its factum, the appellant Campbell River Band further argues that application of the prescription period would be contrary to the scheme of the *Indian Act*. It contends that the *Indian Act* stipulates a valid surrender process as the *exclusive* method of divesting an Indian band of its reserve. Therefore, s. 39(1) of the *Federal Court Act*, which is introduced by the words "Except as expressly provided by any other Act", cannot apply so as to divest an Indian band of its right to possession of its reserve by the passage of time.

120 This argument misconstrues s. 39(1). The words "Except as expressly provided by any other Act" refer, *in pari materia*, to another limitation or prescription period. The *Indian Act* does not establish any comprehensive scheme for the litigation and adjudication of disputes regarding reserves. The adjudication of such disputes is within the jurisdiction of the courts and in this case is governed by the Act constituting the Federal Court. There is thus no *relevant* statutory provision to the contrary.

4. Alleged Harshness of the Prescription Ban

121 The Cape Mudge Band argues that the limitation periods otherwise applicable in this case should not be allowed to operate as "instruments of injustice" (factum, at para. 104). However, the policies behind a statute of limitations (or "statute of repose") are well known: *Novak v. Bond*, [1999] 1 S.C.R. 808, at paras. 8 and 64; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 34. Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today. As the

Law Reform Commission of British Columbia wrote in support of an "ultimate" 30-year limitation period in 1990:

> If there are limitation periods, conduct which attracts legal consequences is more likely to be judged in light of the standards existing at the time of the conduct than if there are no restrictions on the plaintiff's ability to litigate. This rationale for the limitation of actions is of increasing importance, given the rate at which attitudes and norms currently change. New areas of liability arise continually in response to evolving sensitivities.
>
> (*Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), at pp. 17-18)

122 The need for repose is evident in this case. Each band had settled and legitimate expectations with respect to the reserve it now inhabits. Each band still recognizes the need for repose of its sister band (thus seeking compensation from the Crown rather than dispossession of its sister band). Each band claims repose for itself, thus pleading the limitation period in its own defence against the other band.

123 This is not to say that historical grievances should be ignored, or that injustice necessarily loses its sting with the passage of the years. Here, however, the bands had independent legal advice at least by the 1930s, and were aware at that time of the material facts, if not all the details, on which the present claims are based. While the feeling may not have been unanimous, each band membership elected not to disturb its neighbours. The conduct of each band between 1907 and 1936 suggests that not only was the other band's open and notorious occupation of its reserve acknowledged, but such occupation was considered, as between the bands, to be fair and equitable.

124 The Campbell River Band at para. 30 and again at para. 133 of its factum links initiation of these proceedings to a new awareness precipitated by the release of the

Guerin decision in 1984 of the possibility of financial compensation against the Crown. Awareness of the availability of a claim in equity for financial compensation against the Crown does not, however, turn what the band regarded as an equitable situation into an inequitable situation.

5. Applicable Limitation Period

125 The causes of action at issue in the present appeal arose prior to July 1, 1975, the date on which the new B.C. *Limitations Act* came into force. If the appellants' causes of action were already extinguished by July 1, 1975 (*Limitation Act* (1979), s. 14(1)), it is *prima facie* the 1897 version of the B.C. *Statute of Limitations* which was in force in British Columbia between 1897 and 1975, that applies. If not so extinguished, the provisions of the new version of this *Limitations Act* apply.

126 The B.C. *Statute of Limitations* prior to the 1975 amendments applied to bar actions in the Federal Court by virtue of s. 38(1) of the *Federal Court Act*, S.C. 1970-71-72, c. 1 (reproduced in R.S.C. 1970 (2nd Supp.), c. 10), which took effect on June 1, 1971, and prior to that s. 31 of the *Exchequer Court Act*, R.S.C. 1952, c. 98. See *Zakrzewski v. The King*, [1944] 4 D.L.R. 281 (Ex. Ct.), and *Parmenter v. The Queen*, [1956-60] Ex. C.R. 66.

127 The Campbell River Band's claim to possession of Reserve No. 12 is based on what it conceives to be its "legislated entitlement" under Order-in-Council 1036 dated July 29, 1938. Its cause of action was complete no later than that date. Under s. 16 of the then applicable *Statute of Limitations*, the claim to possession was extinguished unless commenced within 20 years. In fact, the Campbell River's action for possession

was not commenced until 1985, almost 27 years after its cause of action for possession was extinguished.

128 Cape Mudge's claim for possession arose when members of the Campbell River Band went into possession of Reserve No. 11 even prior to Ashdown Green's 1888 survey. The possession claim was thus extinguished around the time the band signed its *1907 Resolution* 20 or so years later.

129 Even if the running of the limitation period with respect to possession was initially postponed because of the lack of pertinent information, the trial judge found the relevant facts to have been disclosed by the Crown to both bands in the discussions that led to the making of the 1936 and 1937 declarations. The limitation period for possession thus expired no later than the end of 1957.

130 I note parenthetically that if this case was truly about possession and "trespass", the dispute would be an inter-band dispute and the equitable compensation in lieu of possession should be sought from the other band, not the Crown. That, however, is not the position taken by either band.

131 With respect to the claims against the Crown based on breach of fiduciary duty, the 1897 Act imposed no limitation, and the case therefore falls to be decided under the transitional provisions of the 1975 Act. While the new Act is also silent with respect to an action for breach of fiduciary duty, or an action for declaration as to the title to property by a person that is not in possession of it, s. 3(4) of the B.C. *Limitations Act* provides a general six-year limitation period:

> **3.** . . .
>
> (4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

Section 14(3) of the 1975 *Limitations Act* therefore applied to bar actions for breach of fiduciary duty at the expiry of the grace period on July 1, 1977: *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (C.A.); *Mathias v. Canada* (2001), 207 F.T.R. 1, 2001 FCT 480, at paras. 724-30; *Kruger*, *supra*. The appellants' causes of action in these respects were therefore statute barred when they filed their respective statements of claim.

132 In any event, the claims asserted in these proceedings are all caught by the "ultimate limitation period" in s. 8 of the 1975 *Limitations Act* which says that "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". The applicability of this limitation was affirmed in *Blueberry River*, at para. 107. The 30-year "ultimate" limit is subject to very limited exceptions, none of which apply here.

133 Finally, it is appropriate to note in support of the limitations policy an observation made by the trial judge, at para. 520:

> . . . for much of the century, members of both bands had first hand knowledge of the important events which are the subject of these actions. Unfortunately, within the last 30 years, those band members as well as the Indian Agents, have died and many of their documents have been lost or destroyed.

6. <u>The Assertion of Continuing Breach</u>

134 The appellants contend that every day they are kept out of possession of the other band's reserve is a fresh breach, and a fresh cause of action. As a result, their respective claims are not yet statute barred (and could never be). For instance, the Campbell River Band claims in its factum, at par. 111, that

> [t]he fact that Campbell River has been legally entitled to Quinsam since 1938, at the latest, gives it a presently enforceable right. Two additional consequences flow from this: (1) the Crown's fiduciary duty to safeguard Campbell River's right to its reserve against alienation has also subsisted since the legislation was passed; and (2) Cape Mudge has committed a continuous trespass since it first took possession of Quinsam. Both of these wrongs were committed anew each day and caused fresh damages each day.

The Cape Mudge Band's factum, at para. 98, makes analogous arguments.

135 Acceptance of such a position would, of course, defeat the legislative purpose of limitation periods. For a fiduciary, in particular, there would be no repose. In my view such a conclusion is not compatible with the intent of the legislation. Section 3(4), as stated, refers to "[a]ny other action not specifically provided for" and requires that the action be brought within six years "after the date on which the right to do so arose". It was open to both bands to commence action no later than 1943 when the Department of Indian Affairs finally amended the relevant Schedule of Reserves. There was no repetition of an allegedly injurious act after that date. The damage (if any) had been done. There is nothing in the circumstances of this case to relieve the appellants of the general obligation imposed on all litigants either to sue in a timely way or to forever hold their peace.

136 Similarly, the "ultimate limitation" in s. 8(1) runs "from the date on which the right to [initiate proceedings] arose". All of the necessary ingredients of the causes

of action pleaded in these proceedings could have been asserted more than 30 years prior to the date on which the actions were eventually commenced. The trial judge found that no new or fresh cause of action had arisen at any time within the 30-year period. None of the legislated exceptions being applicable, the 30-year "ultimate limit" applies by reason of its incorporation by reference into federal law.

137 This conclusion accords with the result on this point reached in *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 (C.A.), *per* Isaac C.J., at para. 63; *Costigan v. Ruzicka* (1984), 13 D.L.R. (4th) 368 (Alta. C.A.), at pp. 373-74; *Lower Kootenay Indian Band v. Canada* (1991), 42 F.T.R. 241; *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 F.C. 48 (T.D.), at paras. 295-99.

Disposition

138 I would therefore dismiss the appeals with costs.

Appeals dismissed with costs.

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