Blueberry River Indian Band *v.* Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344

Joseph Apsassin, Chief of the Blueberry River Indian Band, and Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Indian Band and all present descendants of the Beaver Band of Indians *Appellants*

v.

Her Majesty The Queen in right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the *Veterans' Land Act* *Respondent*

and

The Musqueam Nation and Ermineskin Tribal Council, Chief Abel Bosum et al., Chief Terry Buffalo et al. and the Samson Indian Band and Nation, and the Assembly of First Nations *Interveners*

Indexed as: Blueberry River Indian Band *v.* Canada (Department of Indian Affairs and Northern Development)

File No.: 23516.

1995: June 13, 14; 1995: December 14.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Major JJ.

on appeal from the federal court of appeal

Indians -- Surrender -- Reserve -- Nature of duty owed by Crown prior to surrender -- Whether Crown under a fiduciary duty -- Indian Act, R.S.C. 1927, c. 98.

Indians -- Surrender -- Validity -- Indian chiefs not personally certifying surrender on oath -- Whether surrender invalid for failure to comply with s. 51 of Indian Act -- Whether s. 51 mandatory or directory -- Indian Act, R.S.C. 1927, c. 98, s. 51.

Indians -- Surrender -- Reserve -- Indian band surrendering reserve to Crown "to sell or lease" -- Indian band claiming that Crown breached its fiduciary duty -- Whether Crown should have leased land of former reserve rather than sell it -- Whether Crown sold land under value -- Whether Crown should have restored reserve to Band after surrender in view of Band's impoverished situation.

Indians -- Surrenders -- Mineral rights -- Reserve -- Indian band surrendering mineral rights on reserve to Crown in 1940 and surrendering reserve in 1945 -- Whether mineral rights included in 1945 surrender -- Indian Act, R.S.C. 1927, c. 98, ss. 2(e), (j), 51.

Indians -- Crown -- Fiduciary duty -- Mineral rights -- Indian band surrendering mineral rights on reserve to Crown "to lease" in 1940 and surrendering reserve "to sell or lease" in 1945 -- Department of Indian Affairs transferring land of former reserve to Department of Veteran Affairs in 1948 -- Department of Indian Affairs aware in 1949 that mineral rights had been erroneously transferred to

Department of Veteran Affairs and of potential value of these rights -- Whether Crown breached its fiduciary duty by transferring mineral rights in 1948 -- Whether Crown breached its fiduciary duty by failing to correct its error in 1949 when it learned of erroneous transfer -- Indian Act, R.S.C. 1927, c. 98, s. 64.

Limitation of actions -- Breach of fiduciary duty -- Running of time postponed -- Indian band surrendering mineral rights on reserve to Crown in 1940 and surrendering reserve in 1945 -- Department of Indian Affairs transferring land of former reserve to Department of Veteran Affairs in 1948 -- Mineral rights inadvertently acquired by Department of Veteran Affairs in transfer -- Land and mineral rights subsequently sold to veterans between 1948 and 1956 -- Band learning of mineral rights' transfer in 1977 and commencing action in 1978 claiming that Crown breached its fiduciary duty -- Whether action barred by limitation periods -- Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(4), 6(3), 8.

In 1916 the Beaver Band of Indians entered into a treaty with the Crown. In exchange for surrendering aboriginal title, the Band was given a parcel of land in British Columbia. The Band was nomadic, subsisting through trapping and hunting. The reserve was used as the site of its summer campground; in the winter, the Band trapped further north. In 1940, the Band surrendered the mineral rights on its reserve to the Crown, in trust "to lease" for its benefit. At the end of World War II, the federal government instituted a program under which agricultural land was made available to veterans for settlement. The Band was not using the reserve land for farming and, after considerable discussion, agreed in 1945 to surrender the reserve to the Crown "to sell or lease". The Department of Indian Affairs ("DIA") then transferred the reserve land to the Director of *The*

Veterans' Land Act ("DVLA") for $70,000 in March 1948. Part of that sum was later used by the DIA to purchase other lands for the Band closer to its trap lines. The DVLA also obtained the mineral rights "by inadvertence" because they had not been reserved from the 1948 transfer. In the same year gas was discovered near the former reserve and, in 1949, oil companies expressed interest in exploring the land for oil and gas. Between 1948 and 1956, the land of the former reserve was sold to veterans. In 1976, oil and gas were discovered and the revenue from this discovery went to the veterans or their assigns. In 1977, the Beaver Band was divided into the Blueberry River and the Doig River Indian Bands. That same year, a DIA officer found out how the Beaver Band had lost the mineral rights and informed the appellant Bands. The appellants commenced their action on September 18, 1978, claiming damages against the Crown for allowing it to make an improvident surrender of the reserve, and once surrendered, for disposing of it under value. They also claimed damages for permitting the transfer of the mineral rights to the DVLA and thence to the veterans. In the Federal Court, Trial Division, the trial judge dismissed the claims except for the sale of the surface rights to the DVLA, which he found to be under value. He held, however, that the appellants' action was barred by the 30-year limitation period under the British Columbia *Limitation Act*. The majority of the Federal Court of Appeal dismissed the appellants' appeal and the Crown's cross-appeal on the issue of sale under value. The appellants appeal to this Court, and the Crown cross-appeals.

Held: The appeal and cross-appeal should be allowed.

The appellants have not established that the Crown wrongly failed to prevent the surrender of the reserve in 1945. The measure of control which the

1927 *Indian Act* permitted a band to exercise over the surrender of its reserve negates a contention that, absent exploitation, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of a reserve. Under the Act, a band had the right to decide whether or not to surrender its reserve, and its decision was to be respected. The Crown's obligation was limited to preventing exploitative bargains. The Crown could thus refuse its consent if the band's decision was foolish or improvident. Here, subject to the matter of mineral rights, the Beaver Band's surrender of its reserve did not amount to exploitation. Further, the circumstances of this case did not give rise to a fiduciary duty on the Crown with respect to the 1945 surrender. While the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences in relation to the surrender of the reserve and the acquisition of new reserve lands, the Band did not abnegate or entrust its power of decision over the surrender of the reserve to the Crown. Finally, the failure to comply with s. 51(3) of the 1927 *Indian Act* does not invalidate the 1945 surrender. The word "shall" in s. 51(3) should not be considered mandatory. The true object of ss. 51(3) and 51(4) was to ensure that the surrender was validly assented to by the Band and the evidence amply established valid assent. The non-compliance with s. 51 was technical.

The 1945 surrender imposed a fiduciary duty on the Crown with respect to the subsequent sale or lease of the land, and the Crown did not breach that duty when it sold the land to the DVLA in 1948. First, the sale of the land was made in the best interests of the Beaver Band. Different options, including leasing, were considered. While in retrospect, with the decline of trapping and the discovery of oil and gas, the decision to sell, rather than to lease, may be argued to have been unfortunate, at the time it was defensible as a reasonable decision since that choice

had the advantage of meeting the Band's need and wish to purchase lands closer to its trap lines. Second, the Crown did not breach its fiduciary duty by selling the land for $70,000. The DIA received a higher appraisal but there were also appraisals giving lower value to the land. Since the Crown adduced evidence showing that the sale price lay within a range established by the appraisals, this raised a *prima facie* case that the sale price was reasonable. The onus then shifted to the appellants, who failed to demonstrate that the sale price was unreasonable. Third, the Crown did not breach its fiduciary duty after the surrender of the reserve by failing to restore the land to the Band. Although the Band lived in apparent poverty between 1945 and 1961, one cannot infer that the solution was to cancel the 1945 surrender or refuse to sell the reserve land. The Band's condition appears to have been unrelated to possession of the reserve.

Per La Forest, L'Heureux-Dubé, Sopinka and Gonthier JJ.: Under the 1945 surrender, both the surface and mineral rights in the reserve were surrendered to the Crown in trust "to sell or lease". This conclusion rests on reasoning unrelated to the scope of the 1927 *Indian Act* surrender regime and, in particular, to the issue of whether or not the 1940 surrender of mineral rights was actually governed by the 1927 Act, and therefore holds even if the mineral rights had attained the status of "Indian lands" through the 1940 dealings. The ultimate issue to be determined in this case is the impact of the 1945 surrender of the reserve on the 1940 surrender of the mineral rights in that reserve. The 1927 Act is entirely silent on the subjects of surrender variation, surrender revocation, and resurrender, yet no one would seriously suggest that this silence renders all surrenders, including the 1940 surrender, permanent and irrevocable.

The legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the Band's intention. The principles of common law property are not helpful in the context of this case. When determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings. Accordingly, unless some statutory bar exists (which is not the case here), the Band members' intention should be given legal effect. Here, the trial judge's findings indicate that the Band members neither expected nor intended to hold rights over the reserve once the 1945 surrender was completed. They understood that by agreeing to the 1945 surrender they would be transferring all their rights in the reserve to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. The Band's intention is also evidenced by the terms of the 1945 surrender. It is reasonable to conclude that the term "Reserve", as used in that surrender, was intended to have the same meaning as the term "reserve" in the 1927 *Indian Act*, which is defined in s. 2(*j*) as an unsurrendered tract of land including the "minerals . . . thereon or therein". The true nature of the 1945 surrender can best be characterized as a variation of a trust in Indian land. The 1945 surrender subsumed the 1940 surrender, and expanded upon it. Although a trust in Indian land cannot be equated with a common law trust, "trust-like" obligations and principles are relevant to the analysis of a surrender of Indian lands. Both surrenders in this case were framed as trusts, and the parties therefore intended to create a trust-like relationship. In light of the guiding principle that the decisions of aboriginal peoples should be honoured and respected, this surrender variation should be given effect since the Band's understanding of its terms was adequate, and since the

Crown's conduct did not taint the dealings in a manner which made it unsafe to rely on the Band's understanding and intention. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*.

By taking on the obligations of a trustee in relation to the reserve, the DIA was under a fiduciary duty to deal with the land in the best interests of the Band members. This duty extended to both the surface rights and the mineral rights. Although the 1945 surrender was "to sell or lease", there was no clear authorization from the Band which justified the DIA in departing from its long-standing policy of reserving mineral rights for the benefit of the aboriginal peoples when surface rights were sold. Given these circumstances, the DIA was under a fiduciary duty to continue the leasing arrangement which had been established in the 1940 surrender. It was a violation of this fiduciary duty to sell the mineral rights to the DVLA in 1948.

The evidence showed that by August 9, 1949, the DIA was aware that the mineral rights in the reserve were potentially of considerable value, and that these rights had been sold to the DVLA in 1948. The DIA breached its fiduciary duty to deal with the reserve in the best interests of the Band because, as of August 9, 1949, a reasonable person in the position of the DIA would have realized that a mistake had occurred, and would have exercised its power under s. 64 of the 1927 *Indian Act* to reacquire the mineral rights for the purpose of effecting a leasing arrangement for the benefit of the Band. Therefore, for the reasons given by McLachlin J., the appellants may recover any losses stemming from transfers by the DVLA after August 9, 1949 as such losses fall within the 30-year limitation

period imposed by the British Columbia *Limitation Act*, and are not barred by any other provision of that Act.

Per Cory, McLachlin and Major JJ.: The 1945 surrender of the reserve did not include the mineral rights. When the Band surrendered the reserve, it could transfer only those rights in the reserve which it still possessed. Since the Band had already surrendered the mineral rights to the Crown in 1940, the 1945 surrender involved only the surface rights of the reserve. This result is dictated not only by the most basic principles of property transfer, but by the 1927 *Indian Act* itself. The 1940 surrender was a valid surrender of a portion of the reserve which converted that portion into "Indian lands". As "Indian lands" held by the Crown in trust, they could not be surrendered again in 1945. By the definition in s. 2(*j*) of the Act, a reserve cannot include what has already been surrendered. The Crown therefore continued to hold the mineral rights in trust "to lease" for the welfare of the Band. The suggestion that mineral rights cannot be conveyed except in conjunction with surface rights is inconsistent with the general policy of the law permitting severance of the various property interests in a given parcel of land, the wording of the 1927 *Indian Act* and the regulations governing oil and gas enacted under it.

The general language of the 1945 surrender did not constitute a revocation of the 1940 surrender and a resurrender of the mineral rights. The mineral rights were not discussed in the negotiations leading to the 1945 surrender, nor referred to in the 1945 document of surrender. As well, the appropriate administrative formalities for a resurrender of the mineral rights complying with the provisions of the 1927 *Indian Act* were not followed. An intention by the Band

to transfer the mineral rights in 1945 cannot sweep aside the provisions of the Act or of the 1940 surrender and, even if it could, such an intention has not been established in this case. In the absence of evidence of intention, the 1940 surrender should not be overturned and the Band should be entitled to the protection of the 1927 *Indian Act* and the common law which prevent the Crown from unilaterally changing the terms under which it held the property as fiduciary without obtaining the informed consent of the Band.

While there was no breach of the Crown's fiduciary duty with respect to the sale of the surface rights of the reserve, the 1940 surrender also imposed a fiduciary duty on the Crown with respect to the mineral rights, and the DIA breached this duty and the terms of the 1940 surrender by conveying these rights to the DVLA in 1948. The 1940 surrender restricted the DIA to leasing the mineral rights for the benefit of the Band. In any event, even if one were to assume that the 1945 surrender revoked the previous surrender of mineral rights, the 1945 surrender still imposed an obligation on the Crown to lease or sell in the best interests of the Band. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. The duty on the Crown as fiduciary was that of a man of ordinary prudence in managing his own affairs.

The transfer of the mineral rights to the DVLA was made in March 1948 and the appellants' action filed in September 1978 is thus outside the 30-year

limitation period in s. 8 of the *Limitation Act* of British Columbia. However, while the fiduciary duty associated with the administration of the reserve as Indian lands may have terminated with the sale of the lands in 1948, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64 of the 1927 *Indian Act*. Under that section, the DIA had the power to revoke the erroneous transfer of the mineral rights to the DVLA up to the time they were sold by the DVLA. The Crown committed a second breach of fiduciary duty by failing to correct its error on August 9, 1949 when it learned of the erroneous transfer and of the potential value of the mineral rights. Since the present action was filed in September 1978, any losses stemming from sales after August 9, 1949 are still permissible under the 30-year general limitation period. Claims for breach of fiduciary duty regarding mineral rights which survive the 30-year limitation period are not barred by the 6-year limitation period provided by s. 3(4) of the *Limitation Act*. Although the action falls well beyond 6 years from the agreements for sale with the veterans, which took place between 1948 and 1956, by virtue of s. 6(3) of the *Limitation Act* the running of time was postponed until 1977 since it is only in that year that the appellants became aware of the true facts, placing their writ well within the applicable limitation period. The appellants are therefore entitled to damages against the Crown for breach of fiduciary duty with respect to such mineral rights as were conveyed by agreement for sale after August 9, 1949.

Cases Cited

By Gonthier J.

Referred to: *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

By McLachlin J.

Applied: *Guerin v. The Queen*, [1984] 2 S.C.R. 335; **referred to:** *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41; *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 A.C. 295; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *M. (K). v. M. (H)*, [1992] 3 S.C.R. 6.

Statutes and Regulations Cited

Act to amend the Indian Act, S.C. 1938, c. 31, s. 1.

Dominion Lands Act, R.S.C. 1927, c. 113.

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 38(1).

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Indian Act, R.S.C. 1927, c. 98, ss. 2(*e*), (*j*), 50, 51, 53, 54, 64, 93(3).

Land Act, R.S.B.C. 1924, c. 131, ss. 119, 120.

Limitation Act, R.S.B.C. 1979, c. 236, ss. 3(2), (4), 6(3), 8.

Order in Council P.C. 8939, November 19, 1941.

Regulations for the Disposal of Petroleum and Gas on the Indian Reserves in the Provinces of Alberta and Saskatchewan and the Northwest Territories, May 17, 1910, Order in Council P.C. 987.

Regulations for the Disposal of Petroleum and Natural Gas Rights on Indian Reserves, (1938) 72 Can. Gaz. 725, s. 1(*a*).

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Veterans' Land Act, 1942, S.C. 1942, c. 33, s. 5(2).

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APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [1993] 3 F.C. 28, 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20, dismissing an appeal and a cross-appeal from a judgment of the Trial Division, [1988] 3 F.C. 20 (abridged version), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73. Appeal and cross-appeal allowed.

Thomas R. Berger, Q.C., *Leslie J. Pinder*, *Arthur Pape* and *Gary A. Nelson*, for the appellants.

I. G. Whitehall, Q.C., *John R. Haig, Q.C.*, and *Mitchell R. Taylor*, for the respondent.

Marvin R. V. Storrow, Q.C., and *Maria Morellato*, for the interveners the Musqueam Nation and Ermineskin Tribal Council.

James O'Reilly, *Edward H. Molstad, Q.C.*, and *Chantal Chatelain*, for the interveners Chief Abel Bosum et al.

James O'Reilly, *Edward H. Molstad, Q.C.*, and *L. Douglas Rae*, for the interveners Chief Terry Buffalo et al.

Peter K. Doody and *John E. S. Briggs*, for the intervener the Assembly of First Nations.

The judgment of La Forest, L'Heureux-Dubé, Sopinka and Gonthier JJ. was delivered by

GONTHIER J. --

I. Introduction

1 I have had the benefit of reading the reasons of my colleague, McLachlin J. While I agree with her analyses of the surrender of the surface rights in Indian Reserve 172 ("I.R. 172"), and the application of the British Columbia *Limitation Act*, R.S.B.C. 1979, c. 236, and with her ultimate disposition of the case, I find that

I cannot agree with her conclusion that the 1945 surrender of I.R. 172 to the Crown did not include the mineral rights in the reserve. In my view, the 1945 agreement constituted a complete surrender to the Crown of the surface and mineral rights in the St. John Indian Reserve, in trust, "to sell or lease". The Beaver Band's intention at the time of the 1945 surrender, and the terms of the surrender instrument, bear this out. Moreover, while I agree with my colleague that in dealing with the mineral rights subsequent to the 1945 surrender, the Department of Indian Affairs ("DIA") committed a breach of fiduciary duty, my reasons are somewhat different. I set them out below.

II. The Effect of the 1945 Surrender of I.R. 172 on the 1940 Surrender of the Mineral Rights in I.R. 172

2 McLachlin J.'s position, in brief, is that since there had already been a surrender of the mineral rights in I.R. 172 for "lease" in 1940, these mineral rights could not have been included in the 1945 surrender. The basis of her position lies in the *Indian Act*, R.S.C. 1927, c. 98, scheme governing the transfer of reserve lands to the Crown. Once such lands are surrendered, they become "Indian lands" under the Act. Section 2(*e*) of the Act defines "Indian lands" as follows:

> "Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown;

It is therefore clear that "Indian lands" must constitute a "reserve or portion of a reserve". "Reserve" is defined in s. 2(*j*) of the Act:

> "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of

> Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

McLachlin J. argues that when the Band surrendered the mineral rights in I.R. 172 to the Crown in 1940, this severed the mineral rights from the "reserve". The mineral rights thus constituted "Indian lands" under s. 2(*e*) of the Act, because they were a "portion of a reserve" which had been "surrendered". Therefore, the 1945 agreement could not have included the Band's rights over the minerals, since the surrendered "reserve", as defined in s. 2(*j*) of the Act, was composed of only those portions of I.R. 172 which had not yet been surrendered. Furthermore, because the parties did not comply with certain administrative procedures associated with the resurrender of reserve lands (i.e., the execution of a formal revocation document prior to resurrender), McLachlin J. rejects the notion that the 1945 agreement constituted a revocation of the 1940 surrender of mineral rights for "lease", and a resurrender of those same rights "to sell or lease". She concludes that the 1940 surrender was unaffected by the 1945 agreement, and that s. 54 of the Act prevented the DIA from selling the mineral rights since it was required to continue to lease the mineral rights according to the 1940 terms.

3 The issue of whether the 1940 surrender of mineral rights was governed by the 1927 *Indian Act* surrender regime has been a source of considerable controversy. In the courts below, both Addy J. and Stone J.A. were of the view that the surrender by a band of the right to exploit indeterminate mineral deposits within reserve lands was outside the scope of the 1927 Act. This conclusion was based on their view that the statutory regime only applied to the surrender of surface rights and mineral rights together, and that mineral rights themselves could not be

a "reserve" with the status of "Indian lands". Isaac C.J., and my colleague McLachlin J., have both reached the opposite conclusion, finding that the 1927 Act applied also to a surrender of mineral rights only, since such rights constituted a "portion of a reserve", and therefore, would have the status of "Indian lands" following surrender.

4 In my view, the debate as to the juridical nature of the 1940 surrender is academic in the circumstances of this case, and the matter need not be determined here. Whether or not the 1940 surrender was actually governed by the 1927 Act, there has been no challenge to its legitimacy in this appeal. Nor should there be, since the Band gave its full and informed consent, the Crown fulfilled its fiduciary duty in relation to the surrender, and the parties complied with the statutory surrender procedures. My conclusion that the mineral rights in I.R. 172 were surrendered as part of the 1945 agreement rests on reasoning unrelated to the scope of the statutory surrender regime, and therefore holds even if the mineral rights had attained the status of "Indian lands" through the 1940 dealings. This is because the ultimate issue to be determined in this case is the impact of the 1945 surrender of I.R. 172 on the earlier 1940 surrender of the mineral rights in I.R. 172, regardless of the latter's effectiveness. The 1927 Act is entirely silent on the subjects of surrender variation, surrender revocation, and resurrender, yet no one would seriously suggest that this silence renders all surrenders, including the 1940 agreement, permanent and irrevocable. In fact, the DIA developed its own administrative procedures for the revocation of a surrender, in order to facilitate resurrender and fill the void left by the statute. It is this statutory void which must be addressed here, and I do not think that the analysis is advanced by a finding one way or the other as to whether "Indian lands" are in dispute.

5 To explain the impact of the 1945 surrender of I.R. 172 "to sell or lease" on the 1940 surrender of the mineral rights in I.R. 172 for "lease", both the appellants and the Crown have advanced different common law property concepts in support of their competing positions. The Crown's position, which is essentially that of the trial judge, Addy J., is that the mineral rights were transferred in the 1945 surrender through the operation of the legal presumption that a general conveyance of land passes all interests except those specifically reserved in the deed of transfer. The appellants, whose position is adopted by my colleague McLachlin J., prefer the common law principle *nemo dat quod non habet* — a person cannot give what she does not possess. According to the reasons of McLachlin J., the Band could not surrender the mineral rights in I.R. 172 in 1945, since these rights had already been surrendered in 1940.

6 In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is *sui generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members' intention should be given legal effect.

7 An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the

understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.

8 While McLachlin J. dedicates a considerable portion of her reasons to an analysis of the Band's intention, the fact remains that under her approach, the Band's intention in 1945 is irrelevant. Even if McLachlin J. were to agree with my conclusion that the Band intended to surrender the mineral rights as part of the 1945 agreement, she would be forced to the conclusion that the mineral rights were not part of the 1945 surrender because of her findings in relation to the 1927 Act, the operation of *nemo dat quod non habet*, and the administrative procedures adopted by the DIA for surrender revocation. Although McLachlin J. and I might disagree on the Band's intention in this case, since I prefer to rely on the factual findings of the trial judge, I think that in principle an intention-based approach is preferable to my colleague's more technical reasoning.

9 In applying this approach in the circumstances of this case, one must have regard to the factual findings of the trial judge, Addy J. Three are particularly relevant in

determining the Band members' intention when they agreed to the surrender of I.R. 172 in 1945:

> 1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
>
> . . .
>
> 6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender;
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> 7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds; [Emphasis added.]
>
> ([1988] 3 F.C. 20, at pp. 66-67.)

The Band understood that by agreeing to the 1945 surrender, they would be transferring all their rights in I.R. 172 to the Crown in trust, and that the Crown would either sell or lease those rights for the benefit of the Band. The sale or lease of I.R. 172 by the Crown would provide the funds necessary for the Band to purchase alternate reserve sites better suited to their traditional hunting and gathering activities. The Band neither expected nor intended to hold rights over I.R. 172 once the 1945 surrender was completed. This was entirely appropriate, as my colleague McLachlin J. points out, because I.R. 172 was virtually useless to the Band at the time.

10 The Band's intention is evidenced by the terms of the 1945 surrender instrument, signed by Chief Succona, Joseph Apsassin and two councillors on behalf of the Band. This instrument states that the Band did "release, remise, surrender, quit

claim and yield up unto our Sovereign Lord the King, his Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises . . . composed of St. John Indian Reserve No. 172". Since this instrument effected the surrender of certain land forming a "reserve", it is reasonable to conclude that the term "Reserve", as used in the surrender instrument, was intended to have the same meaning as the term "reserve" in the *Indian Act*. As I noted above, s. 2(*j*) of the Act defines "reserve" as an unsurrendered tract of land including the "minerals . . . thereon or therein". Therefore, the 1945 surrender included the tract of land forming I.R. 172, the minerals in that tract of land, and the right to exploit those minerals. On this basis, I must respectfully disagree with McLachlin J.'s assertion that the surrender document was silent concerning the mineral rights.

11 Given the Band's intention *vis-à-vis* the 1945 surrender, and the terms of that surrender, Stone J.A., in the court below, concluded:

> It would seem to me that the overall effect of the 1945 transaction was essentially the same as might have been achieved by first cancelling the 1940 surrender with consent of the Indians followed by the acceptance of that cancellation by the Governor in Council. According to the Trial Judge's finding the Indians agreed to the release of their rights in I.R. 172; their consent was reflected in the language of the formal surrender instrument and the surrender was afterwards accepted by the Governor in Council.
>
> ([1993] 3 F.C. 28, at pp. 122-23.)

He therefore construed the 1945 surrender as a revocation of the 1940 agreement, and a transfer of I.R. 172, including the mineral rights, to the Crown "to sell or lease".

12 Although the "revocation-resurrender" description offered by Stone J.A. is one plausible construction of the 1945 agreement, I think that the true nature of the 1945 dealings can best be characterized as a variation of a trust in Indian land. In 1940, the Band transferred the mineral rights in I.R. 172 to the Crown in trust, requiring the Crown to lease those rights for the benefit of the Band. The 1945 agreement was also framed as a trust, in which the Band surrendered all of its rights over I.R. 172 to the Crown "to sell or lease". The 1945 agreement subsumed the 1940 agreement, and expanded upon it in two ways: first, while the 1940 surrender concerned mineral rights only, the 1945 surrender covered all rights in I.R. 172, including both mineral rights and surface rights; and second, while the 1940 surrender constituted a trust for "lease", the 1945 surrender gave the Crown, as trustee, the discretion "to sell or lease". This two-pronged variation of the 1940 trust agreement afforded the Crown considerably greater power to act as a fiduciary on behalf of the Band. Of course, under the terms of the trust, and because of the Crown's fiduciary role in the dealings, the DIA was required to exercise its enlarged powers in the best interests of the Band.

13 I should add that my reasons should not be interpreted to equate a trust in Indian land with a common law trust. I am well aware that this issue was not resolved in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, and I do not wish to pronounce upon it in this case. However, this Court did recognize in *Guerin* that "trust-like" obligations and principles would be relevant to the analysis of a surrender of Indian lands. In this case, both the 1940 and 1945 surrenders were framed as trusts, and the parties therefore intended to create a trust-like relationship. Thus, for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land.

14 I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention. However, neither of these situations arises here. As the trial judge found, the consequences of the 1945 surrender were fully explained to the Indians by the local agent of the DIA during the negotiations. There was also substantial compliance with the technical surrender requirements embodied in s. 51 of the 1927 *Indian Act*, and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members to the 1945 agreement. Moreover, by the terms of the surrender instrument, the DIA was required to act in the best interests of the Band in dealing with the mineral rights. In fact, the DIA was under a fiduciary duty to put the Band's interests first. I therefore see nothing during the negotiations prior to the 1945 surrender, or in the terms of the surrender instrument, which would make it inappropriate to give effect to the Band's intention to surrender all their rights in I.R. 172 to the Crown in trust "to sell or lease". In fact, the guiding principle that the decisions of aboriginal peoples should be honoured and respected leads me to the opposite conclusion.

15 I therefore conclude that under the 1945 agreement, both the surface rights and the mineral rights in I.R. 172 were surrendered to the Crown in trust "to sell or lease".

III. Breach of Fiduciary Duty by the DIA Subsequent to the 1945 Surrender

16 The terms of the 1945 surrender transferred I.R. 172 to the Crown "in trust to sell or lease the same to such person or persons, and upon such terms as the

Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people". By taking on the obligations of a trustee in relation to I.R. 172, the DIA was under a fiduciary duty to deal with the land in the best interests of the members of the Beaver Band. This duty extended to both the surface rights and the mineral rights.

17 In my view, it is critical to the outcome of this case that the 1945 agreement was a surrender in trust, to sell or lease. The terms of the trust agreement provided the DIA with the discretion to sell or lease, and since the DIA was under a fiduciary duty *vis-à-vis* the Band, it was required to exercise this discretion in the Band's best interests. Of equal importance is the fact that the 1945 surrender gave the DIA a virtual *carte blanche* to determine the terms upon which I.R. 172 would be sold or leased. The only limitation was that these terms had to be "conducive" to the "welfare" of the Band. Because of the scope of the discretion granted to the DIA, it would have been open to the DIA to sell the surface rights in I.R. 172 to the Director, *The Veterans' Land Act* ("DVLA"), while continuing to lease the mineral rights for the benefit of the Band, as per the 1940 surrender agreement.

18 Why this option was not chosen is a mystery. As my colleague McLachlin J. observes, the DIA had a long-standing policy, pre-dating the 1945 surrender, to reserve out mineral rights for the benefit of the aboriginal peoples when surrendered Indian lands were sold off. This policy was adopted precisely because reserving mineral rights was thought to be "conducive to the welfare" of aboriginal peoples in all cases. The existence and rationale of this policy (the wisdom of which, though obvious, is evidenced by the facts of this case) justifies the conclusion that the DIA was under a fiduciary duty to reserve, for the benefit of

the Beaver Band, the mineral rights in I.R. 172 when it sold the surface rights to the DVLA in March 1948. In other words, the DIA should have continued to lease the mineral rights for the benefit of the Band as it had been doing since 1940. Its failure to do so can only be explained as "inadvertence".

19 The DIA's failure to continue the leasing arrangement could be excused if the Department had received a clear mandate from the Band to sell the mineral rights. As I stated above, the Band's intention leads me to the conclusion that both the surface and mineral rights in I.R. 172 were included in the 1945 surrender. However, the 1945 surrender was "to sell or lease". At no time during the negotiations leading to the 1945 agreement was the sale of the mineral rights discussed specifically. The authorization given encompassed leasing as well as selling. There was therefore no clear authorization from the Band which justified the DIA in departing from its long-standing policy of reserving mineral rights for the benefit of the aboriginals when surface rights were sold. This underscores the critical distinction between the Band's intention to include the mineral rights in the 1945 surrender, and an intention of the Band that the mineral rights must be sold and not leased by the Crown. Given these circumstances, the DIA was under a fiduciary duty to continue the leasing arrangement which had been established in the 1940 surrender. It was a violation of the fiduciary duty to sell the mineral rights to the DVLA in 1948.

IV. Limitation of Actions

20 I agree with McLachlin J. that the breach of fiduciary duty committed by the DIA is not limited to the date when the mineral rights in I.R. 172 were sold to the

DVLA. The DIA was under a duty to act in the best interests of the Beaver Band in all of its dealings with the mineral rights in I.R. 172, and as I noted above, this gave rise to a specific duty to lease those mineral rights for the benefit of the Band according to the terms of the 1945 agreement. So long as the DIA had the power, whether under the terms of the surrender instrument, or under the *Indian Act*, to reserve the mineral rights through a leasing arrangement, the DIA was under a fiduciary duty to exercise this power. Thus, like McLachlin J., I think that s. 64 of the Act is very significant, since it gave the DIA the power to revoke an erroneous sale or lease of Indian lands. Because the mineral rights in I.R. 172 were sold inadvertently, s. 64 provided the DIA with the power to reacquire the reserve lands, and thus afforded the DIA a "second chance" to effect a lease of the mineral rights.

21 In her reasons, McLachlin J. amply demonstrates that between July 15, 1949 and August 9, 1949, the DIA became aware of two facts: (1) the mineral rights in I.R. 172 were potentially of considerable value; and (2) the mineral rights had been sold to the DVLA in 1948. It should also be recalled that the DIA had a long-standing policy of reserving mineral rights for the benefit of aboriginal peoples when selling Indian lands. Given these circumstances, it is rather astonishing that no action was taken by the DIA to determine how the mineral rights could have been sold to the DVLA. Little effort would have been required to detect the error which had occurred.

22 As a fiduciary, the DIA was required to act with reasonable diligence. In my view, a reasonable person in the DIA's position would have realized by August 9, 1949 that an error had occurred, and would have exercised the s. 64 power to correct the

error, reacquire the mineral rights, and effect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA's fiduciary duty to deal with I.R. 172 according to the best interests of the Band.

23 Thus, I conclude that the appellants may recover any losses stemming from transfers by the DVLA after August 9, 1949 as such losses fall within the 30-year limitation period imposed by the British Columbia *Limitation Act*, and are not barred by any other provision of that Act as explained in the reasons of McLachlin J.

V. Conclusion

24 For the reasons given above, I would allow the appeal in the manner stated by McLachlin J. and remit the action to the Federal Court, Trial Division, for assessment of damages accordingly. I would also allow the cross-appeal for the reasons given by her. In the circumstances, I would award costs to the appellants throughout, and would make no order as to costs on the cross-appeal.

The reasons of Cory, McLachlin and Major JJ. were delivered by

MCLACHLIN J. --

I. Introduction

25 In 1916 the Beaver Indian Band (the "Band") entered into a treaty with the Crown. In exchange for surrendering aboriginal title, the Band was given a parcel of land

near Fort St. John, in Northeastern British Columbia (also referred to as "I.R. 172"). The Band was nomadic, subsisting through trapping and hunting. Its Fort St. John reserve was used as the site of its summer campground. In the winter, the Band trapped further north.

26 In 1940, the Band surrendered the mineral rights on its Fort St. John reserve to the Crown, in trust to lease for its benefit. In the same year, the Crown issued permits to prospect on the land for the sum of $1,800 and divided the money among the Band members.

27 At the end of World War II, the federal government instituted a program under which agricultural land was made available to veterans for settlement. The possibility of making the Fort St. John reserve available under this scheme came under discussion. The reserve contained good agricultural land, and the Indians, who made their living by trapping and hunting rather than agriculture, were not using it for farming. After considerable discussion, the Band agreed to surrender its reserve to the Crown, pursuant to the provisions of the *Indian Act*, R.S.C. 1927, c. 98, so that it could ultimately be distributed under *The Veterans' Land Act, 1942*, S.C. 1942, c. 33. After negotiations between the Department of Indian Affairs ("DIA"), and the Director, *The Veterans' Land Act* ("DVLA"), a price of $70,000 was agreed upon and paid to the DIA by the DVLA. The DIA used some of this money in 1950 to purchase other lands further north and nearer to the Band's trap lines, which became the Band's new reserves.

28 Between 1948 and 1956, the land which had formerly been the Band's Fort St. John reserve was sold to veterans by way of agreements for sale. In 1948 gas was

discovered about 40 miles southeast of the reserve. In 1949 oil companies expressed interest in exploring the land for oil and gas. The question arose of who held the mineral rights to the property, the Band or the veterans? Correspondence ensued between the DIA and the DVLA on the subject. It was concluded that the DVLA held the mineral rights, having obtained them because they had not been reserved from the transfer of the reserve to the DVLA in 1948. In the 1960s it was concluded that the failure to reserve the mineral rights was by "inadvertence". In 1952 the veterans entered into a pooling arrangement with respect to the mineral rights. In 1976, oil and gas were discovered. The revenue from this discovery (an amount not determined in the current proceedings, but estimated by the trial judge to be roughly $300 million) went to the veterans or their assigns.

29 In 1977, the Band was divided into the Blueberry River Band and the Doig River Band (the "Bands"). In the same year, a concerned officer of the DIA was moved to inquire into how the Band had lost the mineral rights. He brought the matter to the attention of the Bands and took them to see a lawyer. On September 18, 1978 the writ commencing these proceedings was filed. The Bands claimed damages against the Crown for allowing the Band to make an improvident surrender of the reserve, and once surrendered, for disposing of it under value. They also claimed damages for permitting the transfer of the mineral rights to the DVLA and thence to the veterans.

30 Addy J. at trial dismissed all the Bands' claims except for the sale of the surface rights to the DVLA, which he found to be under value: [1988] 3 F.C. 20 (abridged version), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73. The majority of the Federal Court of Appeal, Isaac C.J. dissenting, dismissed the appeal and the Crown's cross-

appeal: [1993] 3 F.C. 28, 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20. The Bands appeal to this Court, and the Crown cross-appeals on the issue of sale under value.

31 The appeal raises many issues relating to the duties on the Crown, the alleged breaches of those duties and whether the claims are statute-barred. I propose to consider them under the following headings: (1) Pre-surrender duties and breaches; (2) Post-surrender duties and breaches regarding surface rights; (3) Post-surrender duties and breaches regarding mineral rights; and (4) Limitations issues.

II. Analysis

(1) *Pre-surrender Duties and Breaches*

32 The Bands argue that the Crown was under a fiduciary obligation prior to the 1945 surrender of the land to ensure that the Band did not enter into the surrender improvidently. This raises the issue of the nature of the duty owed by the Crown when a band wishes to surrender its reserve. The Bands admit that in 1945 they wished to surrender the Fort St. John reserve in order to obtain other lands closer to its trap lines, and the remaining cash lump sum. They contend that the Crown should not have allowed them to make this surrender since, viewed in the long term, surrender was not in their best interest.

(a) Whether the *Indian Act* Imposed a Duty on the Crown to Prevent the Surrender of the Reserve

33 The first issue is whether the *Indian Act* imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this question is found in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, where the majority of this Court, *per* Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains.

34 The Bands contend that the *Indian Act* imposed a duty on the Crown to refuse to allow the Band to surrender its lands in light of its interest in the land and the paternalistic scheme of the *Indian Act*. When a reserve is granted to a band, as was done here in 1916, title does not pass to the band. Rather the Crown holds the fee simple title. The Crown thus possesses power with respect to those lands and must, it is argued, exercise that power as a fiduciary on behalf of the band. This is reinforced by the paternalistic tone of the *Indian Act*, which it is argued imposes a duty upon the Crown to protect the Indians from themselves and prevent them from making foolish decisions with respect to their land. This is why, it is submitted, title remains in the Crown. The Crown, on the other hand, paints the Band as an independent agent with respect to the surrender of its lands.

35 My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

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.

36 Subject to the issue of the value of the reserve and the matter of mineral rights, which I deal with later, the evidence does not support the view that the surrender of the Fort St. John reserve was foolish, improvident or amounted to exploitation. In fact, viewed from the perspective of the Band at the time, it made good sense. The measure of control which the Act permitted the Band to exercise over the surrender of the reserve negates the contention that absent exploitation, the Act imposed a fiduciary obligation on the Crown with respect to the surrender of the reserve.

(b) Whether the Circumstances of the Case Gave Rise to a Fiduciary Duty on the Crown with Respect to the Surrender

37 If the *Indian Act* did not impose a duty on the Crown to block the surrender of the reserve, the further question arises of whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*.

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

39 The evidence supports the view that the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. It does not support the contention that the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown, as attested by the following findings of Addy J. (at pp. 66-67 F.C.):

> 1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
>
> 2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;
>
> 3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;

> 4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
>
> 5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;
>
> 6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender;
>
> 7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds;
>
> 8. That the said alternate sites had already been chosen by them, after mature consideration.

40 I conclude that the evidence does not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band.

(c) Whether the Surrender Was Invalid for Failure to Comply with Section 51 of the *Indian Act*

41 Section 51(1) of the 1927 *Indian Act* indicates that no surrender shall be valid unless the surrender is assented to by the majority of male members of the band at a meeting summoned for the purpose. Subsections (3) and (4) then provide:

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

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

These subsections were not complied with in obtaining the 1945 surrender from the Band. The non-compliance was technical. The chiefs should have personally certified the surrender on oath. Instead, they told the commissioner that they wished to surrender, which the commissioner certified on oath.

42 This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175):

> When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only . . . .

Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.

43 The true object of ss. 51(3) and 51(4) of the *Indian Act* was to ensure that the surrender was validly assented to by the Band. The evidence, including the voter's list, in the possession of the DIA amply established valid assent. Moreover, to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with s. 51 of the *Indian Act* therefore does not defeat the surrender.

(d) Conclusions on Pre-surrender Duty and Breach

44 I conclude that the Bands have not established that the Crown wrongly failed to prevent the surrender of the Fort St. John reserve in 1945.

(2) *Post-surrender Duties and Breaches Regarding Surface Rights*

45 The 1945 surrender conveyed the Band's lands to the Crown "in trust to sell or lease the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people" (emphasis added). The Crown concedes that this surrender imposed a fiduciary duty on the Crown with respect to the subsequent sale or lease of the lands: *Guerin, supra*. The only issue is whether the Crown breached that duty when in 1948 it sold the lands to the DVLA for $70,000.

46 The duty imposed upon the Crown by the terms of surrender (converted to a statutory duty by s. 54 of the Act) was broad. It extended not only to the monetary aspects of the transaction, but to whether the arrangement would be conducive to the welfare of the Indians in the broader sense. The Bands argue that the Crown breached this duty by: (a) failing to consider leasing rather than selling the land; (b) selling the land under value; and (c) not restoring the reserve to the Band after surrender in view of its impoverished situation. I will consider each allegation in turn.

(a) Failure to Consider Leasing Rather than Sale of the Surface Rights

47 The trial judge held that the Crown considered the best interests of the Band in disposing of the land and that, viewed from the perspective of the time, the sale of the land to the Department of Veterans Affairs was in fact in the best interests of the Band. He held that the Band was interested in obtaining reserves nearer to its hunting and trapping grounds. If the surface rights had been leased rather than sold, the Band might not have had enough money up front to purchase replacement lands.

48 Against this, the Bands point to policy statements of the DIA in the early 1940's which suggest that the DIA would have preferred to lease unused Indian interests rather than sell them, so that the land would be available for use by the Indians and their descendants in the future. The Bands claim that the DIA failed to follow its own policy. The Bands also rely on the fact that the Director of Indian Affairs, Dr. McGill, wrote to the Deputy Minister in August 1944, strongly advising against the

sale of the lands and suggesting that the annoyance of seeing good agricultural land unused could be assuaged by leasing it to suitable tenants, if available.

49 The evidence is clear that the government's general policy was against selling Indian lands. The evidence is also clear that a debate took place over whether the Fort St. John reserve, which the Crown now held upon trust for the Indians, should be sold. In the end, the initial inclination of the DIA not to sell the reserve was outweighed by two factors: the desire of the Band to get money for the purchase of substitute lands nearer their trap lines; coupled with political pressure for release of the lands for agricultural purposes. Dr. McGill pointed out that although the Band did not use the reserve for agriculture, it might be compelled to use it in the future due to dwindling fur supplies. The Deputy Minister responded that he agreed that any suggestion to dispose of Indian lands "should be most carefully considered before any final decision is reached", and wrote to the Canadian Legion (interested in acquiring the land for veterans) suggesting an alternative plan in which only a portion of the reserve would be sold. A non-surrender lease, pursuant to s. 93(3) of the 1927 *Indian Act*, was also considered by the Superintendent of Reserves and Trusts in 1945. Throughout this time, the DIA took the view that it should bring no pressure to bear on the Band to promote the sale.

50 Armed with these instructions, the local agent, Grew, visited the Band. He reported back that the Band was willing to surrender the land for sale or lease provided that they would be supplied with other lands, nearer their trap lines. He also suggested that it was unlikely that the Band would ever make use of the reserve for farming, as they were trappers. The Director of Indian affairs (then a Mr. Hoey) wrote back that in addition to political pressure to open the lands for

"ordinary settlement", the cash received as a result of the sale would be "for many years of more practical value to the Indians" than the land of the reserve. Once Dr. McGill left office, the general policy of maintaining the Fort St. John reserve for the Band appears to have succumbed to political demands for farm land. This, coupled with the apparent desire of the Band to exchange their more southern reserve for other lands nearer their trap lines, resulted in the sale of the land to the DVLA.

51 In the face of this evidence, it cannot be said that Addy J. erred in concluding that the sale of the land to the DVLA was not in breach of the Crown's fiduciary duty. A number of options -- lease, partial sale and outright sale -- were considered. The interests and wishes of the Band were given utmost consideration throughout. The choice that was made -- to sell the land -- possessed the advantage of allowing the Band to get other lands nearer its trap lines. At the time, that was a defensible choice. Indeed, it can be argued that the sale of the surface rights was the only alternative that met the Band's apparent need to obtain land nearer its trap lines. In retrospect, with the decline of trapping and the discovery of oil and gas, the decision may be argued to have been unfortunate. But at the time, it may be defended as a reasonable solution to the problems the Band faced.

(b) Sale at Undervalue

52 The DIA received an appraisal of the land which placed its value at approximately $93,160. The DVLA's appraisals suggested a lower value. Ultimately, the DIA sold the land to the DVLA *en bloc* for $70,000. The trial judge accepted the Bands' contention that the Crown breached its fiduciary duty by selling the land under

value, since it sold at less than value suggested by its appraisers. He stated (at p. 76 F.C.):

> The defendant had a duty to convince the Court that it could not reasonably have been expected to obtain a better price. There was no evidence as to what other offers were sought and what efforts were made to obtain a better price elsewhere. Since the onus of establishing that a full and fair price was in fact obtained in March 1948 has not been discharged by the defendant, I find that the latter was guilty of a breach of its fiduciary duty towards the plaintiffs in that regard.

The Crown appeals this finding, arguing first that the onus was on the Bands to show that the sale was under value, and second, that the price of $70,000 was unreasonable.

53 The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J. C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157-59; and *A. H. Oosterhoff: Text, Commentary and Cases on Trusts* (4th ed. 1992). The Crown, facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.

54 More problematic is the trial judge's conclusion that the Crown failed to discharge the onus of showing the price of $70,000 to be reasonable. While the DIA received a higher appraisal, there were also appraisals giving lower value to the land. In fact, there appears to have been no alternate market for the land at the time, which might be expected to make accurate appraisal difficult. The evidence

reveals the price was arrived at after a course of negotiations conducted at arm's length between the DIA and the DVLA.

55 This evidence does not appear to support the trial judge's conclusion that the Crown was in breach of its fiduciary obligation to sell the land at a fair value. In finding a breach despite this evidence, the trial judge misconstrued the effect of the onus on the Crown. The Crown adduced evidence showing that the sale price lay within a range established by the appraisals. This raised a *prima facie* case that the sale price was reasonable. The onus then shifted to the Bands to show it was unreasonable. The Bands did not adduce such evidence. On this state of the record, a presumption of breach of the Crown's fiduciary duty to exact a fair price cannot be based on a failure to discharge the onus upon it. I note that the trial judge made no finding as to the true value of the property, nor any finding that it was significantly greater than $70,000, deferring this to the stage of assessment of damages.

56 I conclude that the trial judge erred in concluding that the Crown breached its fiduciary duty to the Band by selling the land for $70,000.

(c) Failure to Restore the Surface Rights to the Band after the 1945 Surrender

57 The Bands argue that they should have been given their reserve back because of their apparent impoverishment between 1945 and 1961. The Crown, in the Bands' submission, should have realized that the surrender had been a mistake. Instead of confirming the mistake by selling the land to the DVLA, it should have cancelled the surrender and transferred the land back to the Band.

58 There can be no doubt that the Band lived in abject poverty and ill-health between 1945 and 1961. The problem the Bands' argument faces is that their condition appears to have been unrelated to possession of the Fort St. John reserve. In fact, the Band did not make significant use of the reserve from 1916 to 1945, one of the primary reasons behind the move to surrender it and purchase more suitable property. Nor did the Band make much use of the land from 1945 to 1950 when alternative lands were purchased, despite the fact that it was entitled to use the land during this period. Finally, the purchase of new lands in 1950 did not, by the Bands' own admission, alleviate the situation.

59 Accepting that the Band was living in poverty, one cannot infer that the solution was to cancel the 1945 surrender or refuse to sell the Fort St. John reserve land. The Crown cannot be said to have breached the fiduciary duty it owed the Band after surrender of the Fort St. John reserve by failing to restore the land to the Indians.

(d) Conclusions on Post-surrender Duty and Breach with Respect to Surface Rights

60 I conclude that the Bands have not established breach of fiduciary duty with respect to the sale of the surface rights.

(3) *Post-surrender Duties and Breaches Regarding Mineral Rights*

61 The Band surrendered "Petroleum and Natural Gas and the mining rights in connection therewith" in the Fort St. John reserve to the Crown in 1940, "in trust to lease the same to such person or persons, and upon such terms as the

Government of Canada may deem most conducive to our welfare and that of our people". Section 54 of the 1927 *Indian Act* required the Crown to hold these lands for the purpose specified in the surrender -- for lease for the benefit of the Band. The right to explore for minerals was leased in 1940 for $1,800. In 1948, by means which to this day remain the subject of debate, the mineral rights were transferred to the DVLA and hence to the veterans who took up the Fort St. John land. When oil and gas were discovered on the lands in 1976, it was not the Indians, but the veterans and their assigns, who obtained the revenues that flowed from the mineral rights.

62 To this résumé must be added two additional uncontested facts. First, at the time the mineral rights passed to the DVLA, and hence to the veterans, the Indians were unsophisticated and may not have fully understood the concept of different interests in land and how they might be lost. Second, they were never advised of the transfer of the mineral rights to the DVLA. They discovered it only in 1977, when an employee of the DIA brought to their attention that oil and gas had been discovered on their former lands and queried how the mineral rights had come to be transferred from the Band to the veterans.

63 The trial judge held that the mineral rights were not severable from the surface rights and consequently passed to the DVLA with the general surrender of the reserve in 1945. He failed to consider whether the earlier surrender of the mineral rights raised special considerations and imposed special obligations on the Crown. He further held that the Crown acted properly with respect to the mineral rights because they were not considered valuable at the time. In my view, he erred on both counts.

(a) The Effect of the 1940 Surrender of Mineral Rights

64 The duties of the Crown with respect to the surrender of the mineral rights after the 1940 surrender are clear. The mineral rights were conveyed to the Crown in trust to lease for the welfare of the Band. The Crown owed the Band a fiduciary duty with respect to the minerals after the 1940 surrender as a matter of general law: *Guerin, supra*. Quite apart from this, the terms of the surrender and the Act, s. 54, make it clear that the Crown took the mineral rights as a fiduciary for the Band on terms which limited the Crown to leasing them for the Band's benefit.

(b) The Effect of the 1945 Surrender on the Mineral Rights

65 The trial judge found that the mineral rights were surrendered to the DIA by virtue of the general surrender of land in 1945, due to the failure to exclude mineral rights. The matter of the subsequent transfer of the mineral rights to the DVLA appears never to have been considered in any of the discussions between the DIA and the DVLA, and the Band was never advised that its mineral rights would be transferred. The mineral rights were transferred, on the trial judge's view, not because anyone intended them to be transferred, but by reason of the presumption of law that a general conveyance of land passes all interest except those specifically reserved in the deed of transfer.

66 In my view, this analysis is in error. Prior to 1940, the Band held a right in both the surface rights and the mineral rights of the reserve. The Band surrendered the mineral rights in the reserve to the Crown in 1940. The effect of this was to remove the mineral rights from the reserve. When the Band surrendered its

interest in the Fort St. John reserve to the Crown in 1945, it could transfer only those rights in the reserve which it still possessed: *nemo dat quod non habet* -- a person cannot give what he does not possess. The 1945 surrender could not therefore have included surrender of the Band's reserve rights over the minerals. Rather, it involved only the surrender of those rights which still belonged to the Band to surrender, namely the surface rights. The minerals remained in the Crown and the Crown remained bound by the terms of the 1940 surrender, even after the 1945 surrender of the Indian's remaining interest in the lands.

67 This result is dictated not only by the most basic principles of property transfer, but by the *Indian Act* itself. Section 2 of the 1927 Act differentiates between a "reserve" and "Indian lands":

> (*e*) "Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown;
>
> . . .
>
> (*j*) "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein; [Emphasis added.]

Only a "reserve" or "a portion of a reserve" can be surrendered: ss. 50, 51, 53 and 54. Once a reserve or a "portion of a reserve" is surrendered, it becomes "Indian lands": s. 2(*e*); and *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211. This was the status of the mineral rights after the 1940 surrender. As "Indian lands" held by the Crown in trust, they could not be surrendered again in 1945.

68 A number of arguments are raised against the proposition that the mineral rights, having already been surrendered in 1940, were not affected by the 1945 surrender. I will consider each in turn. The first argument is that offered by the trial judge. The trial judge took the view that mineral rights cannot be surrendered except in conjunction with a surrender of surface rights. The trial judge based this conclusion on the definition of reserve in the 1927 *Indian Act*:

> "reserve" means any tract or tracts of land ... and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein;

The trial judge concluded that since a reserve means a tract of land including, *inter alia*, minerals, a portion of a reserve must mean a portion of a tract of land including minerals. If this interpretation is adopted, mineral rights can never be surrendered under the 1927 *Indian Act* without the surface rights and conversely, the surface rights can never be surrendered without the mineral rights. With the greatest of respect, this interpretation is unwarranted on the wording of the definition. While a reserve is defined as a tract of land it is also defined as including, *inter alia*, minerals. Therefore, the reserve as a whole includes the minerals. In plain English, a portion is part of the whole: *Chambers English Dictionary* (7th ed. 1988), and *Concise Oxford Dictionary* (8th ed. 1990). The minerals and the rights pertaining thereto are included as part of the whole reserve and therefore constitute a portion of the reserve.

69 The trial judge concluded that the 1940 surrender was not a surrender of a "portion" of the reserve, but only of an indivisible right "in a part of the whole reserve". In this way, the words of the Act prohibiting resurrender of a portion of

a reserve previously surrendered were avoided. The trial judge distinguished *St. Ann's Island*, *supra*, by pointing out that in that case, it was an island which was considered a portion of the reserve.

70 This reasoning raises a number of problems. The *Indian Act* makes no mention of a right in a "part" of a whole reserve, nor any provision for its surrender. The trial judge's reasoning leaves us with this question: how could the surrender of 1940 have been effected under the *Indian Act* if the mineral rights were not a "portion" of a reserve? Moreover, the narrow and technical interpretation of the phrase "portion of a reserve" adopted by the trial judge violates the wording of the *Indian Act*, and is not supported by the incorporeal nature of Indian title. It runs contrary to the general policy of the law, which permits severance of the various property interests in a given parcel of land, and to the provisions and the legislative intention of the *Indian Act* and regulations dealing with severance of interests in general, and of oil and gas in particular. From a practical perspective, it deprives the Indian people of the ability to deal with mineral interests in their reserves separate from the surface rights while retaining the significant protections of the *Indian Act.*

71 Dealing first with the general policy of the law, the proposition that mineral rights cannot be severed from surface rights on reserve lands is novel. No authority is cited for it. The general rule is that mineral title can be severed from the realty and form the basis for a separate chain of title: *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, at p. 395, *per* Kellock J.

72 This might not be determinative if the nature of the Band's interests in land required a departure from the usual rule. But that is not the case. The trial judge's apparent assumption that the mineral interest in the reserve cannot be severed from the corporeal interest loses its force when it is realized that the only and entire interest of a band in a reserve is incorporeal. Even the right of the Band in the surface area of the reserve was not a corporeal property interest but rather a personal right guaranteed in perpetuity; for this reason it could not form the *res* of a trust according to the majority in *Guerin*. Indian title in reserves is *sui generis* in that it does not include the fee simple title but consists rather in a right of perpetual usufruct. This renders suspect the trial judge's conclusion that a "portion of a reserve" must include a physical piece of the realty.

73 The wording of the *Indian Act* and the regulations governing oil and gas which have been enacted under it, confirm that mineral rights in Indian reserves have consistently been viewed as capable of being transferred without transferring surface rights. Pursuant to the Act, Parliament early on introduced a separate regime governing mineral interests in Indian lands. In 1910 it passed the first regulations: *Regulations for the Disposal of Petroleum and Gas on the Indian Reserves in the Provinces of Alberta and Saskatchewan and the Northwest Territories*, May 17, 1910, Order in Council P.C. 987. This was followed in 1938 by a comprehensive scheme to regulate the leasing of Indian oil and gas interests pursuant to an amendment to the *Indian Act* authorizing the Governor in Council to make regulations in this respect, see: *An Act to amend the Indian Act*, S.C. 1938, c. 31, s. 1; and Regulations for the Disposal of Petroleum and *Natural Gas Rights on Indian Reserves*, (1938) 72 Can. Gaz. 725.

74 More specifically, s. 50 of the Act and the regulations in place in 1938 confirm that in 1940, when the surrender of mineral rights at issue was made, it was possible to surrender mineral rights without surrendering surface title. Section 50 of the Act provides that no reserve "or portion of a reserve" can be sold or leased unless first surrendered to the Crown. Section 1(*a*) of the 1938 regulations confirms that oil and natural gas rights were viewed as "portion of a reserve" which might be surrendered, with or without surface rights. Section 1(*a*) requires that a statutory surrender be made before the regulations can be applied to Indian oil and gas interests and before oil and gas interests can be leased by the Crown:

> 1. (*a*) The petroleum and natural gas rights on any Indian Reserve in Canada may be leased to applicants at a rental of fifty cents an acre for the first year, and for each subsequent year a rental at the rate of one dollar an acre, payable yearly in advance, provided that such petroleum and natural gas rights have been released or surrendered to His Majesty in trust, in accordance with the provisions of Subsection One of Section 50 of the Indian Act . . . . [Emphasis added.]

75 It is undisputed that the Band's 1940 surrender of its mineral rights precisely met the formal requirements of the surrender provisions of the 1927 *Indian Act*. The surrender was assented to by a majority as required by s. 51(1). This was certified on oath as required by s. 51(3), and the surrender was accepted by the Governor in Council as required by s. 51(4). The Order in Council P.C. 8939, November 19, 1941, which accepts the 1940 surrender of the mineral rights specifically references the statutory nature of the surrender and directs that the mineral rights be leased in accordance with the regulations:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Mines and Resources, is pleased to accept the attached surrender, dated July 9, 1940, of the petroleum and natural gas and the mining rights in connection therewith on all that parcel or tract of land and premises situate, lying and being in the St. Johns Indian Reserve No. 172 in the Province of British Columbia . .

> . which has been duly executed in accordance with the provisions of the Indian Act and Regulations, by the members of the St. Johns Band of Indians in the said Province, in order that the said petroleum and natural gas and the mining rights in connection therewith may be leased for their benefit, and it is hereby accepted as provided in Section 51(4) of the Indian Act, Chapter 98, Revised Statutes of Canada 1927.
>
> His Excellency in Council, on the same recommendation, and pursuant to the provisions of Section 54 of the said Indian Act is further pleased, hereby, to direct that the said petroleum and natural gas and the mining rights in connection therewith be leased as agreed upon, subject to the terms and conditions of the Regulations for the disposal of Petroleum and Natural Gas rights on Indian Reserves and subject further to the conditions of the said surrender and the provisions of Part One of the said Indian Act. [Emphasis added.]

76 The scheme of the Act and regulations, in 1938 as now, is clear. Indians may surrender mineral rights which in turn must be dealt with by the Crown according to the terms of the surrender. The statute and the regulations protect the Indians by requiring that the formalities of surrender be complied with before the mineral rights can be leased or otherwise dealt with. The result is beneficial to Indians, who are able to retain the surface rights so important to their sense of place and belonging, while profiting from the lease and sale of their mineral rights. Today, as in 1940, the vast majority of the oil and gas interests managed by the Crown on behalf of the Indians underlie reserves whose surface rights have not been surrendered to Crown. The suggestion that mineral title cannot be conveyed except in conjunction with surface rights undermines this statutory regime.

77 The second argument brought against the conclusion that the 1945 surrender did not include the Band's mineral rights is that the right to "resurrender" the mineral rights previously surrendered for a new purpose must be presumed. Otherwise, the 1940 surrender would preclude the Band from ever changing the terms of the trust, for example, to permit sale of the mineral rights instead of lease. My colleague

Gonthier J. relies on this argument. He states that the 1927 Act is entirely silent on the subject of resurrender. With respect, this is incorrect. The Act does not permit resurrender. The Act only permits surrender of a "reserve" or "portion of a reserve" which has not been surrendered to the Crown. It does not allow for resurrender of "Indian lands" which has already been surrendered.

78 This does not mean, however, that an Indian band is forever bound by the terms of the initial surrender and is incapable of varying the terms of a surrender. Joe Leask, a Crown witness and Director of Reserves and Trusts for Indian affairs, testified that the settled practice under the Act was that once land was surrendered, it could not be resurrendered unless the initial surrender was first revoked. When a change was sought in the terms of a surrender, the process used in the DIA required the Crown to revoke the original surrender and restore the previously surrendered "Indian lands" to the band, by way of an order in council. At this point the "Indian lands" once again became a "reserve" or "portion of a reserve", which could be surrendered on new terms pursuant to the Act. This administrative procedure allowed surrenders to be varied while retaining the provisions and protections of the *Indian Act.*

79 A third argument against the view that the 1940 surrender of mineral rights precluded their resurrender in 1945 asserts that the general language of the 1945 surrender constituted a revocation of the 1940 surrender and a resurrender of the mineral rights. Again, the argument is tenuous. To achieve a revocation of the 1940 surrender, according to the Crown witness Leask, a formal revocation document would have had to be executed by the Crown and approved by the Governor in Council, followed by a resurrender complying with the provisions of

the Act. And even if these formalities could somehow be dispensed with, the Crown is faced by the fact that the mineral rights were not discussed in 1945, nor referred to in the 1945 document of surrender. To accept the Crown's argument would be to infer revocation of the 1940 surrender not from the words of the 1945 document, but from the absence of exclusionary words.

80 Before leaving my conclusion that the 1940 surrender of mineral rights precluded the resurrender of the mineral rights in 1945, I must deal with the comments of Gonthier J. with respect to it. Gonthier J. suggests that this argument is academic. In his view, the result in this case should not depend on "technical" interpretations of the *Indian Act* and rules of property transfer, but only on the intention of the Band in 1945. If the Band intended to transfer the mineral rights in 1945, then the mineral rights should be deemed to be transferred, in his view.

81 With respect, I cannot agree. My reasons are two. First, neither the 1940 transfer and the obligations the Crown incurred under it, nor the provisions of the *Indian Act* can be swept aside by some vague intention five years later. Second, the alleged intention, in my view, is not established.

82 If intention were all that mattered, there would be no purpose to the detailed provisions of the *Indian Act* and regulations under it regarding surrender, nor any substance to the fiduciary duty which the Crown assumed with respect to the Band's mineral rights when it accepted their surrender in 1940. It is not disputed that the property of Indians, like the property of any other person, must be dealt with according to law. The stark facts are that the Band conveyed the mineral rights in I.R. 172 to the Crown in 1940, on the trust that the Crown would lease

those mineral rights for their benefit. With respect, I find it neither academic nor technical to suggest, that the 1940 surrender removed the mineral rights from I.R. 172, with the result that they could not pass when what remained of the Band's rights in I.R. 172 was surrendered in 1945.

83 The basic purpose of the surrender provisions of the *Indian Act* is to ensure that the intention of Indian bands with respect to their interest in their reserves be honoured. One must wonder why, if the Band intended to alter the terms of the 1940 conditional surrender to make an absolute surrender, it did not avail itself of the provisions of the *Indian Act* for the proper legal expression of that intention? One may also ask why, if it was the intention of the Band to surrender the mineral rights for purposes of sale in 1945, mineral rights were never discussed in the negotiations leading to the 1945 surrender?

84 Even assuming that an intention to transfer the mineral rights in 1945 could somehow sweep aside these problems, finding such an intention in 1945 is difficult. My colleague Gonthier J. asserts that the trial judge found as a fact that the Band intended to give up all rights in I.R. 172 forever in 1945. With respect, the trial judge's findings fall short of this.

85 The trial judge did not make an explicit finding of fact as to whether the Band gave full, free and informed consent to the surrender of the mineral rights in 1945. He began his discussion of this issue at p. 54 F.C. as follows:

> Assuming for the moment that full, free and informed consent was given by the plaintiffs to the 1945 surrender, one would normally conclude on the mere reading of those two documents and failing evidence to the contrary, that it was intended by both parties on

> executing the 1945 surrender, that all of the property rights of the plaintiffs, including any property or other rights in minerals which they might possibly have were being surrendered for the purposes mentioned in that document, that is, for sale or lease by the Crown for the benefit of the Indians. [Emphasis added.]

The trial judge then continued to discuss the wording of the 1945 document and concluded that the wording of that document (by its failure to exclude the mineral rights) evidenced an intention of the Band to resurrender those rights on different terms. He somehow reached this conclusion in spite of his recognition at p. 64 F.C. that "[t]he legal effect could only be to grant or surrender whatever rights the plaintiffs had in I.R. 172." Clearly if the effect of the 1940 surrender was to sever mineral rights from the reserve then the legal effect of the 1945 surrender could not include those rights. He never returned to consider the validity of his initial assumption that full, free and informed consent was given by the Band.

86 It follows that the finding of the trial judge that the Band intended to give up all rights in I.R. 172 forever is a legal finding based on his reading of the wording of the 1945 surrender rather than a finding of fact based on the evidence presented at trial. In fact the only witness whose oral testimony with respect to the 1945 surrender was accepted by the trial judge testified: "No mention of mineral rights were made at the meeting" (p. 201 F.T.R.). Likewise, the notes of the Indian agent in Fort St. John, Galibois, indicate that no mention was made of mineral rights. At page 184 F.T.R., the trial judge states that "from and including the surrender in 1945 . . . mineral rights were never mentioned or considered either one way or the other". What the evidence does establish is that the Band was promised replacement reserves at the 1945 surrender meeting. It also establishes that the replacement reserves purchased for the Band did not include mineral rights.

87 While the reasons of my colleague Gonthier J. claim to reflect the intention of the Band, the only evidence on the record of an intention to vary the terms under which the Crown held the mineral rights is that they were not mentioned either at the meeting at which assent was given to the 1945 surrender nor in the 1945 surrender document. With respect, this constitutes a weak evidentiary basis on which to establish an intention which would have the effect of revoking or varying an explicit surrender on different terms to which full and informed consent was given. In fact, later in his reasons, my colleague accepts that in 1945 the Crown did not receive a clear mandate from the Band to sell the mineral rights.

88 In my opinion, we should not overturn a deliberately executed and statutorily authorized surrender on the basis of no evidence. In determining something as nebulous as intention over 40 years later one must look to all available sources. Here the written source is silent where one would have expected clear wording to revoke the previous surrender and the oral testimony establishes that the issue was never even discussed. This cannot be evidence of intention and the Band should be entitled to the protection of the *Indian Act* and the common law which prevent the Crown from unilaterally changing the terms under which it held the property as fiduciary without obtaining the informed consent of the Band. In the words of Gonthier J., the DIA never received a clear mandate from the Band to sell the mineral rights. How then, one may ask, can one conclude that the Band intended that the mineral rights be surrendered for purposes of sale?

89 My colleague, Gonthier J. asserts that the 1945 surrender specifically included the mineral rights. He reaches this conclusion by importing the definition of "reserve" from the 1927 *Indian Act* into the 1945 surrender agreement. He notes that the

statutory definition in s. 2(*j*) includes "minerals" and therefore that minerals were included in the 1945 surrender. With respect, this assertion conveniently overlooks the requirement in s. 2(*j*) that a reserve includes only that which "has not been surrendered to the Crown". Given the legitimacy of the 1940 surrender with respect to the mineral rights, which my colleague accepts, it would be more accurate to say that applying the statutory definition of "reserve" to the 1945 surrender would specifically exclude minerals from that surrender.

90 It should be remembered that this is not a case where an Indian band is arguing that the Crown's failure to follow the proper administrative procedures has thwarted its true intentions. Rather, this is a case where the Crown, as fiduciary, has acted in a manner not authorized by the original surrender under which it became the fiduciary of the property. If the Crown wished to gain a broader discretion with respect to the property that it held in a "trust-like" manner there were certain steps it was required to follow. These steps included informing the Band specifically of the Crown's intention to alter the terms on which it held the mineral rights and following its own administrative procedures by revoking the 1940 surrender by order in council to allow for a new surrender in accordance with the *Indian Act*. Neither of these steps were taken here.

91 Gonthier J. suggests that the 1945 dealings may best be "characterized as a variation of a trust in Indian land" (para. 12), a concept of trust which we are told is not to be equated with a common law trust. Whatever the legal characteristics of the proposed "trust in Indian land", it is difficult to see how it advances the case. The difficulties of applying trust principles directly to the *sui generis* Indian interest in their reserves point to the fact that it is better to stay within the

protective confines of the *Indian Act.* The 1927 *Indian Act* contains provisions which regulate in some detail the manner in which Indians may surrender their reserves or interests in their reserves to the Crown. The formal surrender requirements contained in the *Indian Act* serve to protect the Indians' interest by requiring that free and informed consent is given by a band to the precise manner in which the Crown handles property which it holds on behalf of the Band. The Act also recognizes the Indians as autonomous actors capable of making decisions concerning their interest in reserve property and ensures that the true intent of an Indian Band is respected by the Crown. No matter how appealing it may appear, this Court should be wary of discarding carefully drafted protections created under validly enacted legislation in favour of an *ad hoc* approach based on novel analogies to other areas of the law.

92 I conclude that the 1940 surrender of the mineral rights was a valid surrender of a portion of the reserve which converted that portion into "Indian lands". By the definition of the Act, a reserve cannot include what has already been surrendered. It follows that the 1945 surrender of the reserve could not include the mineral rights as a matter of law and according to the wording and the statutory scheme of the *Indian Act*. I conclude that the 1945 surrender had no effect on the mineral rights. The Crown continued to hold them in trust for the Band on terms that they be leased for the welfare of the Band.

(c) Did the Transfer of the Mineral Rights in 1948 Constitute a Breach of Fiduciary Duty?

93 Until 1948 the DIA held the surface rights and the mineral rights in trust for the Indians, pursuant to the surrenders of 1945 and 1940 respectively. In 1948, after

concluding negotiations for the reserve, it assigned the land to the DVLA. The assignment did not reserve out mineral rights despite the fact that the Crown had no right to sell them under the terms of the 1940 surrender and s. 54 of the Act, and despite the fact that they had not been mentioned in the negotiations leading to the sale and appear to have played no role in determining the price paid. Since the transfer to the DVLA did not reserve out the mineral rights, and since the DIA had always held legal title to both the mineral rights and the surface rights, the transfer must be taken to have legally passed the mineral rights as well as the surface rights: *Attorney-General of British Columbia v. Attorney-General of Canada* (1889), 14 A.C. 295 (P.C.). So the DVLA, without ever having sought them, found itself in possession of the mineral rights. The DVLA in turn passed the mineral rights on to the veterans as they met the terms of their agreements for sale, in the form of original Crown grants, pursuant to s. 5(2) of *The Veterans' Land Act, 1942* (later R.S.C. 1952, c. 280, s. 5(3)).

94 Years later, wonderment persisted as to why the mineral rights had been passed to the DVLA. The wonderment was understandable given the well-known policy of the DIA to reserve out mineral rights and the fact that the only interest of the DVLA was to obtain land for agricultural purposes, not to enrich veterans through procuring mineral rights for them. The best explanation of how the mineral rights came to be transferred to the DVLA appears to lie in simple inadvertence. Thus, in 1961 District Solicitor A. F. McWilliams wrote to the Director of Veteran's Affairs as follows:

> It has been known here The Director, The Veterans' Land Act is the owner of the mineral rights underlying the Fort St. John Indian Reserve. <u>It has always been a mystery to the writer how he acquired these mineral rights, and our file on the Fort St. John Indian Reserve</u>

> does not disclose how this came about. We would be interested to know, therefore, under what arrangement did The Director, The Veterans' Land Act acquire the mineral rights under the Fort St. John Indian Reserve. [Emphasis added.]

The reply from H. R. Holmes, the Superintendent of the Securities and Property Division of the Department of Veterans' Affairs reads as follows:

> 1. I think the simple answer to your query of June 14th is that the reason we acquired the mineral rights when we acquired the surface rights is because the Letters Patent which issued did not reserve the mines and minerals.
>
> 2. The chief and principal men of the St. John Beaver Band of Indians executed a Surrender dated the 22nd of September, 1945, and the Governor in Council by Order in Council P.C. 6506 dated the 16th day of October, 1945, accepted the Surrender and authorized the Minister of Mines and Resources [under which Ministry the DIA existed at the time] to sell or lease the said lands subject to the conditions of the Surrender and the provisions of the Indian Act. During purchase negotiations with Indian Affairs, there was no reference, to the best of my knowledge and belief, to the question of mineral rights. As I have already said, the mines and minerals, either deliberately or inadvertently, were not reserved with the result that we acquired them. I think possibly the failure to reserve the sub-surface rights was inadvertent. [Emphasis added.]

95 There exist two grounds for arguing that transfer of the minerals to the DVLA in 1948 constituted a breach of fiduciary duty by the Crown. The first argument is that the transfer breached the 1940 surrender of the minerals, which restricted the DIA to leasing them for the benefit of the Band. A fiduciary is at very least bound to adhere to the terms of the instrument which bestows his powers and creates the trust.

96 In any event, even if one were to accept for the sake of the argument that the 1945 surrender revoked the 1940 surrender of mineral rights, the 1945 surrender still imposed an obligation on the Crown to lease or sell in the best interests of the

Band. This would leave for consideration the argument that the Crown breached its fiduciary obligations by transferring the mineral rights to the DVLA in 1948, because transfer rather than reservation for future leasing was contrary to the best interests of the Indians.

97 The trial judge rejected this argument on the ground that it was not foreseeable in 1948 that the mineral rights could have any value (at p. 49 F.C.):

> I find that, taking into account the fiduciary relationship then existing between Her Majesty the Queen and the plaintiffs, none of her officers, servants or agents, exercising due care, consideration and attention in the discharge of those fiduciary duties, could reasonably be expected to have anticipated at any time during 1948 or previously that there would be any real value attached to potential mineral rights under I.R. 172 or that there would be any reasonably foreseeable advantage in retaining them.

98 The finding of the trial judge that the Crown could not have known in 1948 that the mineral rights might possess value flies in the face of the evidence on record. Accordingly, this is one of those rare cases where departure from a trial judge's finding may be warranted.

99 The Crown's own prior experience sufficed to establish that the mineral rights had actual and potential value. After taking the surrender in 1940, it issued a permit for prospecting for oil and gas on the property. The 1940 permit alone was worth $1,800, a not insignificant sum given that the annual interest of 5 percent on the $70,000 purchase price for the surface rights yielded about $3,500.

100 Moreover, the Crown had much earlier realized the potential value of mineral rights and routinely excluded them from its grants. As early as 1919, in *The*

Soldier Settlement Act, 1919, S.C. 1919, c. 71, the federal Crown had reserved out mines and minerals from land grants to returning veterans. The *Dominion Lands Act*, R.S.C. 1927, c. 113, covering all federal land on the Prairies and in the Peace River District did the same. Provinces adopted the same policy. For example, the B.C. *Land Act*, R.S.B.C. 1924, c. 131, ss. 119 and 120, reserved mineral rights to the B.C. Crown on all grants of provincial lands. As a result, the new reserves obtained for the Band in 1950 did not include mineral rights.

101 If more were required, events close in time to 1948 reveal that these particular mineral rights might have considerable value, if only from the point of view of revenues from exploration rights. In 1949 interest in further exploration on the land for oil and gas gave rise to negotiations which resulted in a pooling agreement by the veterans in 1952. The Department of Mines and Minerals noted in its 1949 recommendation that gas had been discovered (in 1948) 40 miles south of the reserve and that detailed geological exploration of the reserve was in order. In view of the fact that the 1952 lease was in the same terms as the 1940 lease, the trial judge's suggestion that the 1952 lease constituted the first evidence that the mineral rights could be potentially valuable is difficult to understand. Equally inexplicable is the trial judge's emphasis on the fact that oil was not discovered on the land until 1976 and then only by chance. Those observations do not negate the clear evidence that the potential value of the mineral rights was apparent at a much earlier date. In so far as he confused potential with actual value, the trial judge erred.

102 Secondly, the trial judge's inference from low value of the absence of a duty to reserve the mineral from the 1948 transfer is suspect. If indeed the mineral rights

had minimal sale value in 1948, it does not follow that a prudent person would give them away. It is more logical to argue that since nothing could be obtained for them at the time, and since it would cost nothing to keep them, they should be kept against the chance, however remote, that they might acquire some value in the future. The wisdom of the latter course is demonstrated by the Crown's policy with respect to its own mineral rights; it reserved them to itself, regardless of actual value. It lies ill in the mouth of the Crown to argue that it should have done less with the property entrusted to it as fiduciary to lease for the welfare of the Band.

103 The trial judge's emphasis on the apparent low value of the mineral rights suggests an underlying concern with the injustice of conferring an unexpected windfall on the Indians at the Crown's expense. This concern is misplaced. It amounts to bringing foreseeability into the fiduciary analysis through the back door. This constitutes an error of law. The beneficiary of a fiduciary duty is entitled to have his or her property restored or value in its place, even if the value of the property turns out to be much greater than could have been foreseen at the time of the breach: *Hodgkinson v. Simms*, *supra*, at p. 440, *per* La Forest J.

104 The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess

value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

(d) Conclusions on Post-surrender Duty and Breach with Respect to Mineral Rights

105 I conclude that the 1940 surrender of the mineral rights imposed a fiduciary duty to the Band with respect to the mineral rights under the terms of the 1940 surrender, and that the DIA breached this duty by conveying the mineral rights to the DVLA.

(4) *Limitations Issues*

106 The Crown argues that if it breached its fiduciary duty to the Band, by conveying the reserve to the DVLA, the action on the breach is statute-barred. The Bands dispute this contention.

107 Section 38(1) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, which applies to this litigation (now R.S.C., 1985, c. F-7, s. 39(1)), adopts the limitations legislation in place in the province where the cause of action arose. The relevant legislation in British Columbia is the *Limitation Act*, R.S.B.C. 1979, c. 236 (previously S.B.C. 1975, c. 37). Section 8 of that Act places a general ultimate 30-year limitation on any action: no action may be brought after the expiration of 30 years from the date on which the right to do so arose. In addition, s. 3(2) fixes a 10-year limitation on actions for breach of trust, and s. 3(4) places a 6-year limitation on actions which are not listed in the Act. There is no specific limitation in the Act on claims for breach of fiduciary duty. The 6- and 10-year limitations,

but not the general 30-year ultimate limitation, may be postponed in certain circumstances. It is important to determine whether these limitations will affect recovery by the plaintiffs.

(a) The Sale of Surface Rights

108 I earlier concluded that no breach of duty with respect to the sale of the surface rights has been proven. If it had been, it would be statute-barred, because the sale to the DVLA took place in March 1948, 30 years and 6 months prior to the filing of this claim in September 1978.

(b) The Mineral Rights Claims

109 I earlier concluded that the Crown breached its fiduciary duty to the Band by inadvertently transferring the mineral rights to the DVLA, which in turn transferred them to the veterans who ultimately took up the reserve land. The Crown argues that since the inadvertent transfer was made in March 1948, the action for this breach is barred by the 30-year limitation period.

110 Against this, the Bands argue that the 1948 transfer to the DVLA was not a transfer at all, but merely an administrative allocation within the bosom of the unified Crown. Thus, the Crown's fiduciary duty continued, although it was transferred for administrative purposes to the DVLA after 1948. Consequently, the cause of action did not arise until the land was alienated from the DVLA to the veterans.

111 I cannot accept this argument. Although the transfer was from one Crown entity to another, it remained a transfer and an alienation of title. First, the transfer converted the Band's interest from a property interest into a sum of money, suggesting alienation. Second, the continuing fiduciary duty proposed for the DVLA is problematic from a practical point of view. Any duty would have applied, at least in theory, both to the mineral rights and the surface rights. Each sale to a veteran would have required the DVLA to consider not only those matters he was entitled to consider under his Act, but sometimes conflicting matters under the *Indian Act*. This would have made the sale in 1948 pointless from the DVLA's point of view and have rendered it impossible to administer. Moreover, it is not clear that the DVLA had any knowledge of the fiduciary obligations which bound the DIA. In fact, the DVLA and the DIA acted at arms length throughout, as was appropriate given the different interests they represented and the different mandates of their statutes. In summary, the crystallization of the property interest into a monetary sum and the practical considerations negating a duty in the DVLA toward the Band negate the suggestion that the 1948 transfer changed nothing and that the real alienation came later.

112 An alternative argument, not considered below, is that the Crown had a statutory ability under s. 64 of the 1927 *Indian Act* to revoke any sale or lease issued in error or mistake, and that it was under a duty to exercise this power to correct the erroneous transfer of the mineral rights to the DVLA. Section 64 empowered the DIA to revoke erroneous sales or leases from the DIA to third parties:

> **64.** If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been

> made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made. [Emphasis added.]

113 The Crown argues that s. 64 does not apply because the mineral rights were not transferred in error. The evidence does not support this contention. As discussed earlier, the transfer has never been described as intentional and has generally been attributed to inadvertence. This constitutes "error or mistake" within s. 64.

114 It follows that the DIA had the power to revoke the inadvertent, erroneous grant of the mineral rights to the DVLA up to the time they were transferred to veterans. The remaining questions are whether the DIA was under a duty to use this power to revoke the transfer, and how this affects the timing of a breach of fiduciary duty.

115 In my view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians. The fiduciary duty associated with the administration of Indian lands may have terminated with the sale of the lands in 1948. However, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64. That section gave the DIA the power to revoke erroneous grants of land, even as against *bona fide* purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party

possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: *Frame v. Smith, supra, per* Wilson J.; and *Hodgkinson v. Simms, supra*. Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band's minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.

116 The DIA's duty was the usual duty of a fiduciary to act with reasonable diligence with respect to the Indians' interest. Reasonable diligence required that the DIA move to correct the erroneous transfer when it came into possession of facts suggesting error and the potential value of the minerals that it had erroneously transferred.

117 As of July 15, 1949, the DIA was incontrovertibly in possession of information that I.R. 172 had mineral value potential as determined by the Crown's own officials. On July 12, 1949, acting on the assumption that the DIA still owned the mineral rights, Mr. Allan, the Superintendent of Reserves and Trusts, who had been approached by an oil company, requested advice from the Department of Mines and Resources as to whether exploration on I.R. 172 was appropriate. The answer sent on July 15, 1949 is worth quoting:

> Natural gas has recently been discovered about 40 miles to the southeast of the St. John Indian Reserve.
>
> In view of this fact and as there has been no detailed geological exploration of this area and more geological information is desirable it is recommended that the Reserve be made available for permit under the Regulations.

According to the letter from Allan to Galibois on August 3, 1949 the exploration revenues would be $1,800. That letter requests Galibois to get the necessary surrender from the Band (still assuming mineral rights held by the Band). On August 9, 1949 Galibois informed Allan by letter that I.R. 172 had been sold (with the minerals) to the DVLA. In the months that followed, the DIA responded to the DVLA's concerns as to the validity of its title to the mineral rights by confirming that the mineral rights had indeed been passed to the DVLA in 1948. The DIA took no action to have the transfers set aside, as it could have under s. 64 of the *Indian Act*.

118 I conclude that the Crown, having first breached its fiduciary duty to the Indians by transferring the minerals to the DVLA, committed a second breach by failing to correct the error on August 9, 1949 when it learned of the error's existence and the potential value of the mineral rights.

119 This action was filed on September 18, 1978. Any losses stemming from transfers after August 9, 1949, are therefore still permissible under the s. 8 general limitation. As of this date, 6.75 sections of the 31 transferred to the DVLA remained in the hands of the DVLA. Had the DIA discharged its duty to the Indians, the mineral title would have been returned to them. Instead, mineral title was passed on to the veterans, and in the case of 2.5 sections, directly conveyed to oil companies to the credit of the Consolidated Revenue Fund.

120 The remaining issue is whether those claims regarding mineral rights which survive the 30-year limitation period are barred by other limitation periods. The parties treated this action as falling under s. 3(4) of the B.C. *Limitation Act* which

prescribes a 6-year limitation for "[a]ny other action not specifically provided for". I am content to do the same.

121 Clearly the action, commenced in 1978, falls well beyond 6 years from the agreements for sale with the veterans, which took place between 1948 and 1956. However, that is not the end of the matter. Section 6(3) of the *Limitation Act* provides:

> **6.** . . .
>
> (3) The running of time with respect to the limitation periods fixed by this Act for an action
>
> . . .
>
> (e) in which material facts relating to the cause of action have been wilfully concealed;
>
> . . .
>
> is postponed and time does not commence to run against a plaintiff until . . . those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
>
> (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

This section and its equivalents elsewhere embrace a broad definition of discoverability: see *M. (K). v. M. (H.)*, [1992] 3 S.C.R. 6. The facts in the case at bar fall within it. Until approached by a member of the DIA in 1977, the Bands were ignorant of critical facts in the exclusive possession of the Crown: the fact

that the mineral rights were transferred to the DVLA for no consideration; the fact that the DVLA had no right to that transfer; and the fact that the Crown had in its possession knowledge of its error and the potential value of the mineral rights while it was still within its power to rectify the error. The Bands became aware of the true facts only in 1977, placing their writ well within the applicable limitation period of 6 years.

122 Other arguments, neither presented nor considered below, were presented by the Bands and interveners in support of relaxing or not applying the limitation periods prescribed by the *Limitation Act* of British Columbia. I find them unpersuasive in the context of this case and consider them no further.

III. Conclusion

123 I would allow the appeal and set aside the judgments below. The Bands are entitled to damages against the Crown for breach of fiduciary duty with respect to such mineral rights as were conveyed by agreement for sale or by deed after[*] August 9, 1949. I would also allow the cross-appeal, for the reasons given above. I would award costs to the appellants on the appeal. Since the cross-appeal was as to reasons only and did not affect the result, I would make no order of costs on the cross-appeal.

Appeal allowed with costs and cross-appeal allowed.

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[*] See Erratum [1996] 1 S.C.R. iv

Solicitor for the respondent: George Thomson, Ottawa.

Solicitors for the interveners the Musqueam Nation and Ermineskin Tribal Council: Blake, Cassels & Graydon, Vancouver.

Solicitors for the interveners Chief Abel Bosum et al. and Chief Terry Buffalo et al.: O'Reilly & Associés, Montreal.

Solicitors for the intervener the Assembly of First Nations: Scott & Aylen, Ottawa.