Supreme Court Judgments

Guerin v. The Queen

Collection:	Supreme Court Judgments
Date:	1984-11-01
Report:	[1984] 2 SCR 335
Case number:	17507
Judges:	Laskin, Bora; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio; Wilson, Bertha
On appeal from:	Federal Court of Appeal
Subjects:	Aboriginal law
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SUPREME COURT OF CANADA
Guerin v. The Queen, [1984] 2 S.C.R. 335
Date : 1984-11-01

Delbert Guerin, Joseph Becker, Eddie Campbell, Mary Charles, Gertrude Guerin and Gail Sparrow suing on their own behalf and on behalf of all the other members of the Musqueam Indian Band *Appellants;*

and

Her Majesty The Queen *Respondent;*

and

The National Indian Brotherhood *Intervener.*

File No.: 17507.

1983: June 13, 14; 1984: November 1.

Present: Laskin C.J.: and Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Indians — Reserve lands — Surrender — Lease entered by Crown on Band's behalf — Lease bearing little resemblance to terms approved at surrender meeting — Whether or not breach of fiduciary duty, breach of trust, or breach of agency — Indian Act, R.S.C. 1952, c. 149, s. 18(1) — Trustee Act, R.S.B.C. 1960, c. 390, s. 98 (now R.S.B.C. 1979, c. 414).

An Indian Band surrendered valuable surplus reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown, however, were much less favourable than those approved by the Band at the surrender meeting. The surrender document did not refer to the lease or disclose the terms approved by the Band. The Indian Affairs Branch officials did not return to the Band for its approval of the revised terms. Indeed, they withheld pertinent information from both the Band and an appraiser assessing the adequacy of the proposed rent. The trial judge found the Crown in breach of trust in entering the lease and awarded damages as of the date of the trial on the basis

of the loss of income which might reasonably have been anticipated from other possible uses of the land. The Federal Court of Appeal set aside that judgment and dismissed a cross-appeal seeking more damages.

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Held: The appeal should be allowed.

Per Dickson, Beetz, Chouinard and Lamer JJ.: The Indians' interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763, by s. 18(I) of the *Indian Act,* or by any other executive order or legislative provision. The nature of the Indians' interest is best characterized by its inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered.

The nature of Indian title and the framework of the statutory scheme established for disposing of Indian land place upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. Successive federal statutes including the present *Indian Act* provide for the general inalienability of Indian reserve land, except upon surrender to the Crown. The purpose of the surrender requirement is to interpose the Crown between the Indians and prospective purchasers or lessees of their land so as to prevent the Indians from being exploited. Through the confirmation in s. 18(1) of the *Indian Act* of the Crown's historic responsibility to protect the interests of the Indians in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests lie. Where by statute, by agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

Section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with the surrendered land. In the present case, the document of surrender confirms this discretion in the clause conveying the land to the Crown. When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf. The Crown's agents promised the Band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms which was much less valuable. The Crown was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. After the Crown's agents had induced the Band to surrender its land on the

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understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore these terms. Equity will not countenance unconscionable behaviour in a fiduciary whose duty is that of utmost loyalty to his principal. In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed to the Band and it must make good the loss suffered in consequence. The *quantum* of damages falls to be determined by analogy with principles of trust law. The trial judge considered all the relevant evidence and his judgment disclosed no error of principle: his award should therefore be adopted.

The Band's action is not barred by either the *Statute of Limitations,* R.S.B.C. 1960, c. 370, or the equitable doctrine of laches.

Per Ritchie, McIntyre and Wilson JJ.: The Crown acted in breach of its fiduciary duty when it

"barrelled ahead" with a lease unacceptable to its *cestui que trust.* The Crown owed a fiduciary duty—not a mere political obligation—to the Band arising from its control over the use to which reserve lands could be put. The Crown's discretion in deciding these uses was limited to those which were " . . . for the benefit of the Band". This fiduciary duty, although recognized by s. 18(1), existed independently of the section. Although the limited nature of Indian title meant that the Crown was not a trustee of the lands themselves under s. 18(1) it did not preclude its owing a fiduciary duty to the Band with respect to their use. This fiduciary duty, upon surrender, crystallized into an express trust of the land for the purpose specified.

While the surrender document was silent as to the terms of the lease the Crown was well aware of these terms and could not hide behind the language of its own document.

Although there was a withholding of information by Indian Affairs personnel which amounted in the circumstances to equitable fraud, it did not, in the absence of dishonesty or moral turpitude, give rise to an action for deceit at common law or support a claim for punitive damages. It did, however, disentitle the Crown to relief

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for breach of trust under s. 98 of the *Trustee Act.*

The lost opportunity to develop the land for a lengthy period was to be compensated as at the date of trial notwithstanding the fact that market values may have increased since the date of the breach. In equity, the presumption is that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. The damage issue was properly approached on the basis of a lost opportunity for residential development and, absent an error of principle, this Court should not interfere with the *quantum* of damages. There was no reason to interfere with the decision to refuse pre-judgment interest and to award post-judgment interest at the statutory rate.

Per Estey J.: The essence of an agent's position is that he is only an intermediary between two other parties. Here, an agency prescribed by Parliament existed and the agent (the Crown) was bound in all its actions to serve only the interest of the native population whose rights alone are the subject of the protective measures of the statute. That the agent and principal were pre-scribed by statute neither detracted in law from the agent's legal capacity to act as agent nor diminished the rights of the principal to call upon the agent to account for the performance of the mandate. Indeed, the principal was even more secure in his rights than in situations absent a statutorily prescribed agency, for, although the statute restricts the choice of agent, it nowhere protects the agent from the consequence in law of a breach of the agency. The damages awarded by the trial judge were in no way affected by ascribing the resultant rights in the plaintiff to a breach of agency.

Calder v. Attorney General of British Columbia, [1973] S.C.R. 313, applied; *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. I) (N.S.W.) 399; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Johnson v. M'Intosh, 8* Wheaton 543 (1823), considered; *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619; *Tito v. Waddell (No.* 2), [1977] 3 All E.R. 129; *Civilian War Claimants Association, Ltd. v. The King,* [1932] A.C. 14; *Hereford Railway Co. v. The Queen* (1894), 24 S.C.R. 1, distinguished; *Smith v. The Queen,* [1983] 1 S.C.R. 554; *Robertson v. Minister of Pensions,* [1949] 1 K.B. 227; *Lever Finance Ltd. v. Westminster (City) London Borough Council,* [1971] 1 Q.B. *222; Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563;

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Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302; Toronto-Dominion Bank v. Uhren

(1960), 32 W.W.R. 61; Bartlett v. Barclays Bank Trust Co. (No. 2), [1980] 2 All E.R. 92; McNeil v. Fultz (1906), 38 S.C.R. 198; Penvidic Contracting Co. v. International Nickel Co. of Canada, [1976] 1 S.C.R. 267; Worcester v. State of Georgia, 6 Peters 515 (1832); Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C. 399; Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 A.C. 401; Attorney-General for Canada v. Giroux (1916), 53 S.C.R. 172; Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695; Western Inter—national Contractors Ltd. v. Sarcee Developments Ltd., [1979] 3 W.W.R. 631; Miller v. The King, [1950] S.C.R. 168; Laskin v. Bache & Co. Inc. (1971), 23 D.L.R. (3d) 385; Goldex Mines Ltd. v. Revill (1974), 7 O.R. 216; Pettkus v. Becker, [1980] 2 S.C.R. 834; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Central London Property Trust Ltd. v. High Trees House Ltd., [1947] K.B. 130; In Re West of England and South Wales District Branch, ex parte Dale & Co. (1879), 11 Ch. D. 772; Ontario Mining Co. v. Seybold, [1903] A.C. 73, affirming (1899), 31 O.R. 386; St. Ann's Island Shooting and Fishing Club Ltd. v. The King, [1950] S.C.R. 211; Surrey (Corporation of) v. Peace Arch Enterprises Ltd. (1970), 74 W.W.R. 380; The King v. McMaster, [1926] Ex. C.R. 68, referred to.

APPEAL from a judgment of the Federal Court of Appeal (1982), 143 D.L.R. (3d) 416, allowing an appeal and dismissing a cross-appeal from a judgment of Collier J. Appeal allowed.

M. R. V. Storrow, J. I. Reynolds, and L. F. Harvey, for the appellants.

W. I. C. Binnie, Q.C., M. R. Taylor, and M. Freeman, for the respondent.

B. A. Crane, Q.C., W. Badcock, and A. C. Pape, for the intervener.

The reasons of Ritchie, McIntyre and Wilson JJ. were delivered by

WILSON J.—The appellant, Delbert Guerin, is the Chief of the Musqueam Indian Band, the members of which are descended from the original inhabitants of Greater Vancouver. The other appellants are Band Councillors. In 1955 there were 235 members in the Band and they lived on a *[page 340]*
reserve located within the charter area of the City of Vancouver which contained approximately 416.53 acres of very valuable land.

The subject of the litigation is a lease of 162 acres of the reserve land entered into on January 22, 1958 on behalf of the Band by the Indian Affairs Branch of the federal government with the Shaughnessy Heights Golf Club as lessee. The trial judge [[1982] 2 F.C. 385] found that the Crown was in breach of trust in entering into this lease and awarded the Band $10 million in damages. The Crown appealed to the Federal Court of Appeal to have the trial judgment set aside and the Band cross-appealed seeking an increase in the award of damages. By a unanimous judgment [(1982), 143 D.L.R. (3d) 416] the Crown's appeal was allowed and the cross-appeal dismissed. The Band sought and was granted leave to appeal to this Court.

There are four main grounds on which the appellants submit that the trial judge's finding of liability should have been upheld in the Court of Appeal. I paraphrase them from the appellants' factum as follows:

> 1 Section 18(1) of the *Indian Act,* R.S.C. 1952, c. 149, imposes a trust or, at a minimum, fiduciary duties on the Crown with respect to reserve lands held by it for the use and benefit of Indian Bands. This trust or those fiduciary duties are not merely political in nature but are enforceable in the courts like any other trust or fiduciary duty.
>
> 2. The Federal Court of Appeal should not have allowed the Crown to put forward the concept of "political trust" as a defence to the Band's claim since, as the learned trial judge pointed

> out, it was not specifically pleaded as required by Rule 409 of the Federal Court Rules.
>
> 3. The leased lands were surrendered by the Band to the Crown in trust for lease to the Golf Club on very specific terms and those terms were not

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> obtained. The terms which were obtained were much less favourable to the Band and the Band would not have surrendered the land for lease on those terms.
>
> 4. The Crown, by misrepresenting the terms it could and would obtain on the lease, induced the Band to surrender its land and thereby committed the tort of deceit.

In any case of alleged breach of trust the facts are extremely important and none more so than in this case. We are fortunate, however, in having very careful and extensive findings by the learned trial judge and, although counsel on both sides roamed at large through the transcript for evidence in support of their various propositions, I have considered it desirable to confine myself very closely to the trial judge's findings.

1. The Facts

There can be little doubt that by the mid '50s the Indian Affairs Branch was well aware that the appellants' reserve was a very valuable one because of its location. Indeed, offers to lease or buy large tracts of the reserve had already been received. We know this from a report dated October 11, 1955 made by Mr. Anfield who was in charge of the Vancouver agency at the time to Mr. Arneil, the Indian Commissioner for British Columbia. Both these men are since deceased which is unfortunate since Mr. Anfield played a lead role in the impugned lease transaction. In a later report to Mr. Arneil, Mr. Anfield suggested that a detailed study should be made of the Band's requirements of its reserve lands so that the surplus, if any, could be identified and turned to good account for the Band's benefit. He suggested that not only should they obtain an appraisal of land values but that a land use planning survey should be prepared aimed at maximum development in order to provide long-term revenue for the Band. He continued:

> It seems to me that the real requirement here is the services of an expert estate planner with courage and vision and whose interest and concern would be as much

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> the future of the Musqueam Indians as the revenue use of the lands unrequited by these Indians. It is essential that any new village be a model community. The present or any Agency staff set up could not possibly manage a project like this, and some very realistic and immediate plans must be formulated to bring about the stated wish of these Musqueam people, the fullest possible use and development for their benefit, of what is undoubtedly the most potentially valuable 400 acres in metropolitan Vancouver today.

Mr. Anfield went on to speak in terms of "another potential 'British Properties' " and suggested that all parties interested in the land should be advised that the land not required by the Band for its own use, when defined and surrendered, would be publicly advertised.

About this time the Shaughnessy Heights Golf Club was looking for a new site. Its lease from the Canadian Pacific Railway was due to expire in 1960 and the club had been told that it would not be renewed. The club turned its attention therefore to the Musqueam Reserve. At the same time an active interest in the reserve was being displayed by a representative of a prominent Vancouver

real estate firm on behalf of a developer client interested in a long-term lease. Although his contact had been directly with the Indian Affairs Branch in Ottawa, Messrs. Arneil and Anfield were both aware of it. Indeed, when he suggested to them that he meet with the Chief and Councillors of the Band to try to work out some arrangement, he was told by Mr. Anfield not to do so but to deal only through Indian Affairs personnel. That he followed this advice is made clear from the evidence of the Band members who testified. They were told of no interest in their land other than that expressed by the golf club.

The learned trial judge dealt specifically with the issue of the credibility of the members of the Band because he was very conscious of the fact that neither Mr. Arneil nor Mr. Anfield was alive to testify. He found the Band members to be "honest, truthful witnesses" and accepted their testimony.

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The Band agreed that its surplus land should be leased and authorized a land appraisal to be made and paid for out of Band funds. In fact the appraisal was done by Mr. Howell of the Veterans Land Act Administration. Although he was a qualified appraiser, he was not a land use expert. He divided the reserve for valuation purposes into four areas, the first of which included the 162 acres leased to the golf club. This area comprised 220 acres classified by Mr. Howell as "First Class Residential area" and valued at $5,500 per acre making a total of $1,209,120. The other three areas which were all low lying he valued at $625 per acre. The Band was not given a copy of his report and indeed Mr. Arneil and Mr. Anfield had difficulty getting copies. They were very anxious to get the report because they were considering a lease of 150 acres to the golf club at "a figure of say $20,000 to $25,000 a year". The documentary evidence at trial showed that meetings and discussions had taken place between Mr. Anfield and the president of the golf club in 1956 and in the early part of 1957. It is of interest to note that Mr. Anfield had told the president of the golf club about the appraisal which was being carried out and had subsequently reviewed Mr. Howell's report with them. The golf club was, of course, advised that any proposal made by it would have to be laid before the Band for its approval.

On April 7, 1957 the Band Council met, Mr. Anfield presiding. The trial judge found that the golf club proposal was put to the Chief and Councillors only in the most general terms. They were told the lease would be of approximately 160 acres, that it would be for an initial term of fifteen years with options to the club for additional fifteen year periods and that it would be "on terms to be agreed upon". In fact the rent that had been proposed by the club was $25,000 a year for the first fifteen years with the rent for each successive fifteen-year period being settled by mutual agreement or failing that by arbitration. However, under the proposal the rent for the renewal periods

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was subject to a ceiling increase of 15 per cent of the initial rent of $25,000.

The learned trial judge found that when Mr. Bethune, the Superintendent of Reserves and Trusts in

Ottawa, was advised of the $25,000 rental figure he questioned its adequacy and suggested to Mr. Arneil that he consult with Mr. Howell, the appraiser, as to what a proper return on the 160 acres would be. Unfortunately, Mr. Howell was not given all the facts. He was not told of the 15 per cent ceiling on rent increases. He was not told that the golf club would have the right to remove all improvements on termination of the lease although he was told that the club proposed to spend up to a million dollars in buildings and improvements on the leased land. Mr. Howell therefore recommended acceptance of the golf club's offer stating: "These improvements will revert to the Band at the end of the lease" and "the Department will be in a much sounder position to negotiate an increase in rental in fifteen years' time when the club will have invested a considerable amount of capital in the property, which they will have to protect." Mr. Howell testified at trial that he would not have recommended acceptance of the golf club's offer had he known that the improvements would not revert to the Band and that the rental on renewal periods was subject to a 15 per cent ceiling increase.

Mr. Howell's letter was forwarded to Ottawa with the request that surrender documents be prepared for submission to the Band and this was done. It is interesting to note, however, that in the letter forwarding the surrender documents Mr. Bethune indicated to Mr. Arneil that he would like to see the 15 per cent ceiling on rent removed and rent for subsequent periods established either by mutual agreement or by arbitration.

A Band Council meeting was held on July 25, 1957 again with Mr. Anfield in the chair. There was further discussion of the proposed lease to the golf club and two Councillors expressed the view that the renewal period should be at ten year

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intervals rather than fifteen. It was at this meeting that the resolution was passed to hold a general meeting of Band members to consider and vote on the surrender of the 162 acres to the Crown for purposes of the lease. The meeting of the Band was held on October 6, 1957 but prior to that there was another meeting of Councillors on September 27, 1957. Mr. Harrison and Mr. Jackson of the Shaughnessy Golf Club attended this meeting and Mr. Anfield, who had in the interval been promoted to Assistant Indian Commissioner for British Columbia, was there along with a Mr. Grant who was described as "Officer in charge—Vancouver Agency". In the presence of the golf club representatives Chief Sparrow took issue with the $25,000 per annum rental figure and stipulated for something in the neighbourhood of $44,000 to $44,500 per annum. The golf club representatives balked at this and they were asked to step outside while the Band Council and the Indian Affairs personnel had a private discussion.

Mr. Anfield expressed the view that the $44,000 figure was unreasonable and suggested $29,000 to which the Councillors agreed on the understanding that the first lease period would be for ten years and subsequent rental negotiations would take place every five years. Mr. Grant testified that Mr. Anfield advised the Council to go ahead with the lease at the $29,000 figure and in ten years demand a healthy increase from the golf club. Mr. Grant also testified that the Council objected to

any ceiling on future rental and Mr. Anfield said that he would convey their concern to the Department of Indian Affairs. On that basis the Council, according to Mr. Grant, reluctantly accepted the $29,000 figure.

At the meeting of the Band on October 6, 1957 ("the surrender meeting") Chief Sparrow was present along with the Councillors and members. Mr. Anfield presided as usual. The learned trial judge made specific findings as to what occurred at the meeting and I reproduce them from his reasons:

> (a) Before the Band members voted, those present assumed or understood the golf club lease would be,
>
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>
> aside from the first term, for 10-year periods, not 15 years.
>
> (b) Before the Band members voted, those present assumed or understood there would be no 15% limitation on rental increases.
>
> (c) The meeting was not told the golf club proposed it should have the right, at any time during the lease and for a period of up to 6 months after termination, to remove any buildings or structures, and any course improvements and facilities.
>
> (d) The meeting was not told that future rent on renewal periods was to be determined as if the land were still in an uncleared and unimproved condition and used as a golf club.
>
> (e) The meeting was not told that the golf club would have the right at the end of each 15-year period to terminate the lease on six-month's prior notice.

Neither (d) nor (e) were in the original golf club proposal and first appeared in the draft lease following the surrender meeting. They were not brought before the Band Council or the Band at any time for comment or approval. The Band voted almost unanimously in favour of the surrender.

By the surrender document the Chief and Councillors of the Band acting on behalf of the Band surrendered 162 acres to the Crown:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever 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.
>
> AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.
>
> AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.

It will be noted that there is no reference in the surrender to the proposed lease to the golf club. The position of the Crown at trial was that once

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the surrender documents were signed the Crown could lease to anyone on whatever terms it saw fit.

After the surrender there was considerable correspondence between Mr. Anfield and personnel in the Indian Affairs Branch in Ottawa particularly over the more controversial provisions of the lease

but none of this correspondence was communicated to the Band Council nor were they given a copy of the draft lease which would have drawn these controversial provisions to their attention. The trial judge states at p. 409:

> Put baldly, the band members, regardless of the whole history of dealings and the limited information imparted at the surrender meeting, were not consulted.
> But it was their land. It was their potential investment and revenue. It was their future.

The learned trial judge accepted that the Chief, the Councillors and the Band members were wholly excluded from any further discussions or negotiations among the Indian Affairs personnel, the golf club officers and their respective solicitors with respect to the terms of the lease. The trial judge found an explanation, although not a justification, for this in the possibility that Indian Affairs personnel at the time took a rather paternalistic attitude towards the Indian people whom they regarded as wards of the Crown.

I turn now to the essential terms of the lease as entered into in January 22, 1958 as described by the learned trial judge at p. 412:

1. The term is for 75 years, unless sooner terminated.

2. The rent for the first 15 years is $29,000 per annum.

3. For the 4 succeeding 15-year periods, annual rent is to be determined by mutual agreement, or failing such agreement, by arbitration

> ... such rent to be equal to the fair rent for the demised premises as if the same were still in an uncleared and unimproved condition as at the date of each respective determination and considering the restricted use to which the Lessee may put the demised premises under the terms of this lease ...

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4. The maximum increase in rent for the second 15-year period (January 1, 1973 to January 1, 1988) is limited to 15% of $29,000, that is $4,350 per annum.

5. The golf club can terminate the lease at the end of any 15-year period by giving 6 months' prior notice.

6. The golf club can, at any time during the lease and up to 6 months after termination, remove any buildings or other structures, and any course improvements and facilities.

Mr. Grant stated in evidence that the terms of the lease ultimately entered into bore little resemblance to what was discussed and approved at the surrender meeting and the learned trial judge agreed. He found that had the Band been aware of the terms in fact contained in the lease they would never have surrendered their land.

So much for the facts as found by the learned trial judge. What recourse in law, if any, does the Band have in such circumstances?

2. Section 18 of the *Indian Act*

The appellants contend that the Federal Court of Appeal erred in failing to find that s. 18 of the *Indian Act* imposed on the Crown a fiduciary obligation enforceable in the courts. The section reads as follows:

> 18. (1) Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use

> and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Mr. Justice Le Dain, after concluding on the authorities that there was nothing in principle to prevent the Crown from having the status of a trustee in equity, found that s. 18 nevertheless did not have that effect. It merely imposed on the Crown a governmental obligation of an administrative nature. It was a public law obligation rather than a private law obligation. Section 18 could not therefore afford a basis for an action for breach of trust.

While I am in agreement that s. 18 does not *per* se create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes

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the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder v. Attorney General of British Columbia, [1973] S.C.R.* 313. In that case the Court did not find it necessary to define the precise nature of Indian title because the issue was whether or not it had been extinguished. However, in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. *46,* Lord Watson, speaking for the Privy Council, had stated at p. *54* that "the tenure of the Indians ... [is] a personal and usufructuary right". That description of the Indian's interest in reserve lands was approved by this Court most recently in *Smith v. The Queen,* [1983] *1 S.C.R.* 554. It should be noted that no constitutional issue such as arose in the *St. Catherine's* and *Smith* cases arises in this case since title to Indian reserve land in British Columbia was transferred to the Crown in right of Canada in 1938: see British Columbia Orders in Council *208* and 1036 passed pursuant to Article 13 of the Terms of Union of 1870.

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

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does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction.

The respondent submits, however, that any obligation imposed on the Crown by s. 18(1) of the *Indian Act is* political only and unenforceable in courts of equity. Section 18, he says, gives rise to a "trust in the higher sense" as discussed in *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619 (H.L.), and *Tito v. Waddell (No.* 2), [1977] 3 All E.R. 129 (Ch.) Mr. Justice Le Dain, delivering the judgment of the Federal Court of Appeal, adopted this approach. He expressed the view, at p. 467, that these cases indicate that "in a public law context neither the use of the words 'in trust' nor the fact that the property is to be held or dealt with in some manner for the benefit of others is conclusive of an intention to create a true trust". He found that the discretion conferred on the Crown by s. 18(1) evidenced an intention to exclude the equitable jurisdiction of the courts.

With respect, while I agree with the learned justice that s. 18 does not go so far as to create a trust of reserve lands for the reasons I have given, it does not in my opinion exclude the equitable jurisdiction of the courts. The discretion conferred on the Governor in Council is not an unfettered one to decide the use to which reserve lands may be put. It is to decide whether any use to which they are proposed to be put is "for the use and benefit of the band". This discretionary power must be exercised on proper principles and not in an arbitrary fashion. It is not, in my opinion, open to the Governor in Council to determine that a use of the land which defeats Indian title and affords the Band nothing in return is a "purpose" which could be "for the use and benefit of the band". To
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so interpret the concluding part of s. 18 is to deprive the opening part of any substance.
Moreover, I do not think we are dealing with a purely public law context here. Mr. Justice Le Dain agrees that a Band has a beneficial interest in its reserve. I believe it is clear from s. 18 that that interest is to be respected and this is enough to make the so-called "political trust" cases inapplicable.

In *Kinloch, supra* in which Lord Selborne L.C. first advanced the idea of the political trust, the issue was whether a Royal Warrant that "granted" booty of war to the respondent Secretary of State for India "in trust" for the officers and men of certain forces created a trust enforceable in the courts. It was held that it did not, the effect of the Warrant being to constitute the Secretary of State an agent of the Crown for the distribution of the booty rather than a trustee. In *Civilian War Claimants Association, Ltd. v. The King,* [1932] A.C. 14, the plaintiffs, as the assignees of civilian claimants who had suffered loss at the hands of the Germans during World War I, alleged, *inter alia,* that money received by the Crown as war reparations from Germany pursuant to treaty was being held for the claimants on trust. Their claim was rejected by the House of Lords. In *Hereford Railway Co. v. The Queen* (1894), 24 S.C.R. 1, money alleged by the plaintiff railway to have been granted by the legislature as a subsidy was held not to be subject to a trust enforceable in the courts. In all these cases the funds at issue were the property of the Crown (or, at least, as in *Kinloch, supra,* in the possession of the Crown) and none of those laying claim to them as beneficiaries could show a right to share in the funds independent of the treaty, statute or other instrument alleged to give rise

to an enforceable trust.

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In *Tito v. Waddell (No. 2), supra,* the plaintiff Banaban Islanders asserted that certain royalties payable to the local government Commissioner as a result of mining operations on their land gave rise to trusts in their favour. In rejecting their claims on the basis of a number of different considerations, Megarry V.C. found at pp. 225-26 that there was not a sufficient relationship between the land on which the mining operations took place and the royalties to give rise to a fair inference that a true trust of the royalties was intended. The royalties were exclusively Crown property and the fact that the Banaban Islanders owned the land did not give them an interest in the royalties. I believe it is implicit in Megarry V.C.'s reasons that if the Banaban Islanders could have shown an interest in the royalties themselves, a stronger case would have arisen in favour of a trust.

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

Continuing with the analysis of s. 18, it seems to me quite clear from the wording of the section that the Governor in Council's authority to determine in good faith whether any purpose to which reserve lands are proposed to be put is for the use and benefit of the Band is "subject to the terms of any treaty or surrender". I take this to mean that if a Band surrenders its beneficial interest in reserve lands for a specific purpose, then the Governor in Council's authority under the section to decide whether or not the purpose is for the use and benefit of the Band is pre-empted. The Band has itself agreed to the purpose and the Crown may rely upon that agreement. It will be necessary to consider this in greater detail in connection with the surrender which in fact took place in this case.

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3. The Failure to Plead the Defence of "Political Trust"

The second ground of appeal put forward by the appellants concerns the fact that the defence of "political trust" which was accepted by the Federal Court of Appeal and formed the basis of its decision was not specifically pleaded as required by Rule 409 of the Federal Court Rules.

I need say very little about this ground since I think the case falls to be decided on the substantive rather than the procedural issues. However, I agree with the appellants' submission that the Crown's tactics in this regard left a lot to be desired. It is quite apparent that when the trial judge indicated a willingness to permit an amendment at trial but went on to order discovery on the issue, the Crown renounced the defence both at trial and through ministerial statements made out of court. It nevertheless went ahead and sought and obtained leave to raise it in the Federal Court of Appeal. Even although, as the Court of Appeal pointed out, the defence is a strictly legal one and the Band was probably not prejudiced by the absence of discovery, the Crown's behaviour does

not, in my view, exemplify the high standard of professionalism we have come to expect in the conduct of litigation.

4. The Surrender

Reference has already been made to the language of s. 18 and in particular to the fact that the Crown's fiduciary duty under it is "subject to the terms of any . . . surrender". The implications of this have to be considered in the context of the learned trial judge's finding that the Band surrendered the 162 acres to the Crown for lease to the golf club on specific terms which were not obtained. The trial judge found that the surrender itself created a trust relationship between the Crown and the Band. The subject of the trust, the trust *res,* was not the Band's beneficial interest in the land but the land itself. The Crown prior to the

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surrender had title to the land subject to the Indian title. When the Band surrendered the land to the Crown, the Band's interest merged in the fee. The Crown then held the land free of the Indian title but subject to the trust for lease to the golf club on the terms approved by the Band at its meeting on October 6, 1957. This trust was breached by the Crown when it leased the land to the club on terms much less favourable to the Band.

It was submitted on behalf of the Crown that even if the surrender gave rise to a trust between the Crown and the Band, the terms of the trust must be found in the surrender document and it was silent both as to the lessee and the terms of the lease. Indeed, it expressly gave the government complete discretion both as to the lessee and the terms of the lease and contained a ratification by the Band of any lease the government might enter into.

I cannot accept the Crown's submission. The Crown was well aware that the terms of the lease were important to the Band. Indeed, we have the trial judge's finding that the Band would not have surrendered the land for the purpose of a lease on the terms obtained by the Crown. It ill becomes the Crown, therefore, to obtain a surrender of the Band's interest for lease on terms voted on and approved by the Band members at a meeting specially called for the purpose and then assert an overriding discretion to ignore those terms at will: see *Robertson v. Minister of Pensions,* [1949] 1 K.B. *227; Lever Finance Ltd. v. Westminster (City) London Borough Council,* [1971] 1 Q.B. 222 (C.A.) It makes a mockery of the Band's participation. The Crown well knew that the lease it made with the golf club was not the lease the Band surrendered its interest to get. Equity will not permit the Crown in such circumstances to hide behind the language of its own document.

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I return to s. 18. What effect does the surrender of the 162 acres to the Crown in trust for lease on specific terms have on the Crown's fiduciary duty under the section? It seems to me that s. 18 presents no barrier to a finding that the Crown became a full-blown trustee by virtue of the surrender. The surrender prevails over the s. 18 duty but in this case there is no incompatibility between them. Rather the fiduciary duty which existed at large under the section to hold the land in the reserve for the use and benefit of the Band crystallized upon the surrender into an express trust

of specific land for a specific purpose.

There is no magic to the creation of a trust. A trust arises, as I understand it, whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries. I think that in the circumstances of this case as found by the learned trial judge the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the Band members had approved as being for their benefit. The Crown was no longer free to decide that a lease on some other terms would do. Its hands were tied.

What then should the Crown have done when the golf club refused to enter into a lease on the approved terms? It seems to me that it should have returned to the Band and told them. It was certainly not open to it at that point of time to go ahead with the less favourable lease on the basis that the Governor in Council considered it for the benefit of the Band. The Governor in Council's discretion in that regard was pre-empted by the surrender. I think the learned trial judge was right in finding that the Crown acted in breach of trust when it barrelled ahead with a lease on terms which, according to the learned trial judge, were wholly unacceptable to its *cestui que trust.*

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5. The Claim in Deceit

The appellants base their claim against the Crown in deceit as well as in trust. They were unsuccessful on this aspect of their claim at trial but have raised it again on appeal to this Court. While the learned trial judge found that the conduct of the Indian Affairs personnel amounted to equitable fraud, it was not such as to give rise to an action for deceit at common law. He found no dishonesty or moral turpitude on the part of Mr. Anfield, Mr. Arneil and the others. Their failure to go back to the Band and indicate that the terms it had approved were unobtainable, their entry into the lease on less favourable terms and their failure to report to the Band what those terms were all flowed, he found, from their paternalistic attitude to the Band rather than from any intent to deceive them or cause them harm.

Nevertheless, there was a concealment amounting to equitable fraud. It was "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" *(Kitchen v. Royal Air Force Association, [1958]* 1 W.L.R. 563, *per* Lord Evershed MR., at p. 573). The effect of the finding of equitable fraud was to disentitle the Crown to relief for breach of trust under s. 98 of the *Trustee Act,* R.S.B.C. 1960, c. 390, now R.S.B.C. 1979, *c.* 414. *A* trustee cannot be exonerated from liability for breach of trust under that section unless he has acted "honestly and reasonably".

The trial judge's findings on this aspect of the Band's claim are, I believe, sufficient to dispose of this ground of appeal.

6. The Measure of Damages

I come now to one of the most difficult issues on the appeal, namely the principles applicable to

determine the measure of damages. No assistance
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is to be derived on this issue from the Federal Court of Appeal which exonerated the Crown from any liability. I turn therefore to the approach taken by the learned trial judge.

The trial judge, at p. 430, stated as general principles that the measure of damages is "the actual loss which the acts or omissions have caused to the trust estate": *Fales v. Canada Permanent Trust Co.,* [1977] *2 S.C.R. 302, per* Dickson J. at p. *320,* and that the beneficiary is "entitled to be placed in the same position so far as possible as if there had been no breach of trust": *Toronto-Dominion Bank v. Uhren* (1960), *32 W.W.R.* 61 (Sask. C.A.), *per* Gordon J.A. at p. *66;* Culliton J.A. at p. *73.* The learned trial judge then considered whether the proper measure of damages might not be the difference in value between a lease on the terms approved by the Band and the lease which was in fact obtained from the golf club. He discarded this measure on the basis that the evidence of the witnesses for the golf club satisfied him that the club would never have entered into a lease on the terms approved by the Band. It was his conclusion that the difference in the value of the two leases could not be used as the proper measure in face of the evidence of the golf club witnesses that caused the learned trial judge to consider other approaches based on other uses of the land. Was he correct in this?
Viewed from one perspective it may be said that he was wrong. The Band authorized and was prepared to accept a lease of a certain value and received a lease of lesser value. *Prima facie* then, its loss was the difference between the two. On the other hand, how can it be said that the breach of trust cost the Band a lease which the club would never have entered into? The problem here seems to be one of causation. The breach of trust undoubtedly cost the Band something because they are fixed with a lease which is worth substantially less than the one they surrendered their land to receive. But against what is their loss to be measured
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if not against the value of the lease they expected to get?
The learned trial judge reviewed the evidence adduced by experts as to what would have been a fair return from a golf club lease over the period from 1958 to the date of trial based on the capital value attributed to the land over that period by these experts. This method of assessment made it clear that the golf club lease actually entered into did not yield a fair return. The learned trial judge, however, rejected the concept that the Band's loss was the difference in value between a "fair and reasonable" lease and the actual lease. He said, at p. 435:

> My problem, unfortunately, is not whether the present golf club lease is reasonable or not. It is to determine the amount of loss suffered on the basis a golf course lease would probably not have been entered into. I have outlined the evidence, on this one aspect of value, merely to illustrate, among other things, the remarkable increase in value of this and other land since 1957 and 1958. [Emphasis added.]

In other words, just as he had found that the lease the Band wanted would not have been entered into and therefore the value of that lease could not be used in assessing the Band's damages, he

likewise found that no golf club lease would have been entered into, presumably on the basis that a so-called "fair" lease could not have been obtained. The value of the land in 1957 and 1958 and its increase in value subsequently made use as a golf course uneconomic.

The trial judge therefore moved to other potential uses and concluded on the evidence that the 162 acres would at some point of time have been successfully marketed, as pre-paid ninety-nine-year leasehold lots for residential development. He found, however, that such a development would not have got underway for some years following the date of the golf club lease. Time would have been required for planning, for tenders and for negotiation. Moreover, development might have

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been slow at first. However, based on the evidence before him as to economic, business and population trends, real estate values, housing accommodation demand and raw land shortages over the period 1958 to 1973, he concluded that the area would probably have been well on the way to full development on a residential, leasehold basis by 1968 to 1971. He noted in passing that this type of development had taken place on other parts of the reserve and he made due allowance for the fact that those developments were probably assisted by the presence of the golf course.

Based then on the possibility that this type of development might have taken place on the 162 acres and applying the anticipated return from such development against the return from the golf club lease, the learned trial judge came up with a global assessment of $10 million. He acknowledged that this figure could not be mathematically documented but stated, at p. 441, that it was "a considered reaction based on the evidence, the opinions, the arguments and, in the end, my conclusions of fact". However, he did go on to set out the various factors and contingencies that he had taken into account in reaching his assessment. He did not allocate percentages to these contingencies.

It seems to me that what the trial judge was doing once he rejected the value of a golf club lease (either the one the Band authorized or one which could be described objectively as "fair") as the value against which the Band's loss was to be measured was to put a value as of the date of trial on the Band's lost opportunity to develop the land for residential purposes and assess the Band's damages in terms of the difference between that figure and the value of the golf club lease. Is this a proper approach to compensation for breach of trust?

The Crown submits that it is not. It points out that the Band was prepared to settle for a golf club lease and the lease it obtained was the best golf

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club lease available in 1958. The Band therefore suffered no loss. It seems to me, however, that this completely overlooks the terms of the trust and the failure of the Crown to return to the Band and tell them that those terms were not available. At that point the Band might well have abandoned the idea of a golf club lease entirely and canvassed other options. I do not think that that reality can be ignored. What the Crown did, therefore, was to commit the Band to an unauthorized long-term lease which deprived it of the opportunity to use the land for any other

purpose. I do not think it is open to the Crown to say: "You wanted a golf club lease and you got one: your only loss arises from the fact that you didn't get as good a one as you wanted".

The position at common law concerning damages for breach of trust and, in particular, the difference between the principles in trust law from those applicable in tort and contract, are well summarized in the following passages from Mr. Justice Street's judgment in the Australian case of *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, at pp. 404-06:

> The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.
>
> [¼]
>
> *Caffrey v. Darby* (1801) *6* Ves. Jun. 488; 31 E.R. 1159 is consistent with the proposition that if a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.
>
> [¼]
>
> The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.
>
> [¼]

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> The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries, is of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract. It is on this fundamental ground that I regard the principles in *Tomkinson's* case *[Tomkinson v. First Pennsylvania Banking and Trust* Co. [1961] A.C. 1007] as distinguishable. Moreover the distinction between common-law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account; the effect of such increases would, at common law, be excluded from the computation of damages but in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before.
>
> The reasoning which the House of Lords adopted in *Tomkinson's* case proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market

> fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach. [Emphasis added.]

This statement of the law has been cited with approval in *Underhill's Law of Trusts and Trustees* (13th ed. 1979), at pp. 702-03,

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and was also recently adopted by Brightman L.J. in *Bartlett v. Barclays Bank Trust Co. (No. 2),* [1980] 2 All E.R. 92 (Ch.), at p. 93: see also Waters, *Law of Trusts in Canada* (1974), at pp. 843-45.

In this case the Band surrendered the land to the Crown for lease on certain specified terms. The trial judge found as a fact that such a lease was impossible to obtain. The Crown's duty at that point was to go back to the Band, consult with it, and obtain further instructions. Instead of doing that it went ahead and leased the land on unauthorized terms. In my view it thereby committed a breach of trust and damages are to be assessed on the basis of the principles enunciated by Mr. Justice Street. The lost opportunity to develop the land for a period of up to seventy-five years in duration is to be compensated as at the date of trial notwithstanding that market values may have increased since the date of breach. The beneficiary gets the benefit of any such increase. It seems to me that there is no merit in the Crown's submission that "if a trustee is under a duty to alienate land by lease or otherwise, the date to assess compensation for breach of that duty is the date when the alienation should have taken place not the date of trial or judgment". Since the lease that was authorized by the Band was impossible to obtain, the Crown's breach of duty in this case was not in failing to lease the land, but in leasing it when it could not lease it on the terms approved by the Band. The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see *McNeil v. Fultz* (1906), 38 S.C.R. 198,) so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the Band to prove that it would have

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developed the land; in equity a presumption is made to that effect: see Waters, *Law of Trusts in Canada,* at p. 845.

I cannot find that the learned trial judge committed any error in principle in approaching the damage issue on the basis of a lost opportunity for residential development. It was urged upon us by counsel for the Band that the $10 million figure was inordinately low because the learned trial judge took into consideration the contingency that the golf club would decide to exercise its right to terminate the lease which it could do at any time. Counsel for the Band submitted that there was no evidence to suggest that the golf club would terminate the lease before the year 2033 and that

indeed there was evidence to the contrary. The golf club had only recently expended $750,000 on capital improvements. There was no other land available in Vancouver to which the golf club could move. Even if there were, relocation would require the golf club to spend substantial amounts of money in creating a new golf course quite apart from the cost of acquisition of the land.

Be that as it may, I do not think it is the function of this Court to interfere with the *quantum* of damages awarded by the trial judge if no error in principle in determining the measure of damages has been demonstrated. The trial judge was entitled to treat the termination of the lease by the club as a contingency tending towards diminution of the Band's damages and it is not for this Court to substitute the value it would have put upon that contingency for his. I would not, therefore, interfere with the *quantum.* The trial judge's task was not an easy one but I think he "did the best he could": (see *Penvidic Contracting Co. v. International Nickel Co. of Canada,* [1976] 1 S.C.R. 267, at pp. 279-80).

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7. Punitive Damages, Interest and Costs

The Court advised Crown counsel at the hearing of the appeal that it was not necessary to hear from him on the subject of punitive damages. That claim falls on the same grounds as the claim for damages in deceit.

I would not interfere with the trial judge's refusal to award pre-judgment interest. The award was made for breach of trust not tort. Section 3(1) of the *Crown Liability Act, R.S.C.* 1970, c. C-38, has therefore no application. Moreover, damages were assessed as of the date of trial and took the form of a global award.

The trial judge committed no error in awarding post-judgment interest at the statutory rate. I would not interfere with the discretion he exercised in relation to costs.

Disposition

For the reasons given, I would allow the appeal, set aside the judgment of the Federal Court of Appeal and re-instate the judgment of the learned trial judge. I would award the appellants their costs both here and in the Federal Court of Appeal.

The judgment of Dickson, Beetz, Chouinard and Lamer JJ. was delivered by

DICKSON J.—The question is whether the appellants, the Chief and Councillors of the Musqueam Indian Band, suing on their own behalf and on behalf of all other members of the Band, are entitled to recover damages from the federal Crown in respect of the leasing to a golf club of land on the Musqueam Indian Reserve. Collier J., of the Trial Division of the Federal Court, declared that the Crown was in breach of trust. He assessed damages at $10,000,000. The Federal Court of Appeal allowed a Crown appeal, set aside the judgment of the Trial Division and dismissed the action.

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I General

Before adverting to the facts, reference should be made to several of the relevant sections of the *Indian Act, R.S.C.* 1952, *c.* 149, as amended. Section 18(1) provides in part that reserves shall be

held by Her Majesty for the use of the respective Indian Bands for which they were set apart. Generally, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the Band for whose use and benefit in common the reserve was set apart (s. *37).* A surrender may be absolute or qualified, conditional or unconditional (s. 38(2)). To be valid, a surrender must be made to Her Majesty, assented to by a majority of the electors of the Band, and accepted by the Governor in Council (s. 39(1)).

The gist of the present action is a claim that the federal Crown was in breach of its trust obligations in respect of the leasing of approximately *162* acres of reserve land to the Shaughnessy Heights Golf Club of Vancouver. The Band alleged that a number of the terms and conditions of the lease were different from those disclosed to them before the surrender vote and that some of the lease terms were not disclosed to them at all. The Band also claimed failure on the part of the federal Crown to exercise the requisite degree of care and management as a trustee.

II The Facts

The Crown does not attack the findings of fact made by the trial judge. The Crown simply says that on those facts no cause of action has been made out. The following summary of the facts derives directly from the judgment at trial. Musqueam Indian Reserve (No. 2) in *1955* contained 416.53 acres, situated within the charter area of the City of Vancouver. The Indian Affairs Branch recognized that the reserve was a valuable one, "the most potentially valuable *400* acres in metropolitan Vancouver today". In 1956 the Shaughnessy Heights Golf Club was interested in obtaining land on the Musqueam Reserve. There were others interested in developing the land,

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although the Band was never told of the proposals for development.

On April 4, 1957, the President of the golf club wrote to Mr. Anfield, District Superintendent of the Indian Affairs Branch, setting forth a proposal for the lease of 160 acres of the Indian Reserve, the relevant terms of which were as follows:

> 1. The club was to have the right to construct on the leased area a golf course and country club and such other buildings and facilities as it considered appropriate for its membership.
> 2. The initial term of the lease was to be for fifteen years commencing May l, 1957, with the club to have options to extend the term for four successive periods of fifteen years each, giving a maximum term of seventy-five years.
> 3. The rental for the first fifteen year term was to be $25,000 per annum.
> 4. The rental for each successive fifteen year period was to be determined by mutual agreement between the Department and the club and failing agreement, by arbitration, but the rental for any of the fifteen year renewal periods was in no event to be increased or decreased by over that payable for the preceding fifteen year period by more than 15% of the initial rent.
> 5. At any time during the term of the lease, and for a period of up to six months after termination, the club was to have the right to remove any buildings and other structures it had constructed or placed upon the leased area, and any course improvements and facilities.

On April 7, 1957 a Band Council meeting was held. Mr. Anfield presided. The trial judge accepted evidence on behalf of the plaintiffs that not all of the terms of the Shaughnessy proposal were put

before the Band Council at the meeting. William Guerin, a Councillor, said copies of the proposal were not given to them; he did not recall any mention of $25,000 per year for rental; he described it as a vague general presentation with reference to fifteen-year periods. Chief Edward Sparrow said he did not recall the golf club proposal being read out in full. At the meeting the Band Council passed a resolution which the trial

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judge presumed to have been drawn up by Mr. Anfield. The relevant part of the resolution reads:

> That we do approve the leasing of unrequired lands on our Musqueam I.R. 2 and that in connection with the application of the Shaughnessy Golf Club, we do approve the submission to our Musqueam Band of surrender documents for leasing 160 acres approximately as generally outlined on the McGuigan survey in red pencil.

These events followed the Band Council meeting:

(a) Mr. Bethune, Superintendent of Reserves and Trusts of the Indian Affairs Branch, in Ottawa, questioned the adequacy of the $25,000 annual rental for the first fifteen years. At an investment return of 5 to 6 per cent, the annual rental value would be between $40,000 and $48,000 per year for the first fifteen years. The golf club proposal meant an investment return of approximately 3 per cent. Mr. Bethune suggested that the opinion of Mr. Alfred Howell be obtained. Mr. Howell, with the *Veterans Land Act* administration, had earlier made an appraisal of the reserve lands at the request of the Indian Affairs Branch.

(b) On May 16, 1957 Mr. Anfield wrote Mr. Howell asking for the latter's opinion as to whether the $25,000 per year rental for the first fifteen years was "just and equitable". Mr. Howell was not given all the details of the Shaughnessy proposal. He was not told that rent increases would be limited to 15 per cent. Nor was he made aware that the golf club proposed to have the right to remove any buildings or improvements.

(c) In this reply to Mr. Anfield, Mr. Howell expressed the view that a seventy-five-year lease, adjustable over fifteen years and made with a financially sound tenant, eliminated any risk factor. On that basis he felt the then government bond rate of 3.75 per cent was the most that could be expected.

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At trial Mr. Howell said that if he had known the improvements would not revert to the Band, he would have recommended a rate of return of 4 to 6 per cent. He expressed shock at the 15 per cent clause. He had assumed that at the end of the initial term the rental could be renegotiated on the basis of "highest and best use" without any limitation on rental increase.

(d) On September 27, 1957 a Band Council meeting was held at the reserve, attended by members of the Band Council, Mr. Anfield, two other officials of the Department of Indian Affairs and representatives of the golf club. Chief Sparrow stipulated for 5 per cent income on the value of 162 acres, amounting to $44,000 per annum. The golf club people balked. They were asked to step outside while the Band Council and the Indian Affairs personnel had a private discussion. Mr.

Anfield said the demand of $44,000 was unreasonable. Eventually, the Band Council reluctantly agreed to a figure of $29,000. William Guerin testified the Councillors agreed to $29,000 because they understood the first lease period was to be ten years; subsequent rental negotiations would be every five years; and the Band Council felt it could negotiate for S per cent of the subsequent values.

Mr. Grant, officer in charge of the Vancouver agency of the Department of Indian Affairs, testified that there was "absolutely no question that the vote was for a specific lease to a specific tenant on specific terms" and that the Band did not give Mr. Anfield "authority to change things around".

(e) On October 6, 1957, a meeting of members of the Band was held at the reserve, the so-called "surrender meeting". The trial judge made these findings: (i) those present assumed or understood the golf club lease would be, aside from the first term, for ten-year periods, not fifteen years; (ii) those present assumed or understood there would be no 15 per cent limitation on rental increases;

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(iii) the meeting was not told that the golf club had proposed that it should have the right to remove any buildings, structures, course improvements and facilities.

The trial judge found further that two matters which subsequently found their way into the lease were not even put before the surrender meeting. They were not in the original golf club proposal. They first appeared in draft leases, after the meeting. The first of these terms was the method of determining future rents; failing mutual agreement, the matter was to be submitted to arbitration; the new rent would be the fair rent as if the land were still in an uncleared and unimproved condition and used as a golf club. The second term gave the golf club, but not the Crown, the right at the end of each fifteen-year period to terminate the lease on six month's prior notice. These two terms were not subsequently brought before the Band Council or the Band for comment or approval.

The surrender, which was approved by a vote of forty-one to two, gave the land in question to Her Majesty the Queen on the following terms:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever 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.
>
> AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.
>
> AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.

(f) On December 6, 1957 the surrender of the lands was accepted by the federal Crown by

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Order-in-Council P.C. 1957-1606, "in order that the lands covered thereby may be leased".

(g) On January 9, 1958, a Band Council meeting was held. A letter was read regarding the

proposed golf club lease. The letter indicated the renewal periods were to be fifteen years instead of ten years. Chief Sparrow pointed out that the Band had demanded ten-year periods. William Guerin said the council members were "flabbergasted" to learn about the fifteen-year terms. Guerin testified the Band was told it was "stuck" with the fifteen-year terms. The Band Council then passed a resolution agreeing the first term should be fifteen years, but insisting the renewal periods be ten-year terms.

(h) The lease was signed January 22, 1958. It provided, *inter alia:*

1. The term is for *75* years, unless sooner terminated.
2. The rent for the first 15 years is *$29,000* per annum.
3. For the 4 succeeding 15-year periods, annual rent is to be determined by mutual agreement, or failing such agreement, by arbitration

> ... such rent to be equal to the fair rent for the demised premises as if the same were still in an uncleared and unimproved condition [and used as a golf course.]

4. The maximum increase in rent for the second 15-year period (January *I, 1973* to January 1, 1988) is limited to *15%* of $29,000, that is $4,350 per annum.
5. The golf club can terminate the lease at the end of any 15-year period by giving 6 months' prior notice.
6. The golf club can at any time during the lease and up to 6 months after termination, remove any buildings or other structures, and any course improvements and facilities.

The Band was not given a copy of the lease, and did not receive one until twelve years later, in March 1970.

(i) Mr. Grant testified that the terms of the lease ultimately entered into bore little resemblance to what was discussed at the surrender meeting. The judge agreed. He found that the majority of those

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who voted on October 6, 1957 would not have assented to a surrender of the 162 acres if they had known all the terms of the lease of January 22, 1958.

III Assessment at Trial and on Appeal of the Legal Effects of the Facts as Found

The plaintiffs based their case on breach of trust. They asserted that the federal Crown was a trustee of the surrendered lands. The trial judge agreed.

The Crown attempted to argue that if there was a trust it was, at best, a "political trust", enforceable only in Parliament and not a "true trust", enforceable in the courts. This distinction was recognized in two leading English cases dealing with the position of the Crown as trustee: *Tito v. Waddell (No. 2),* [1977] 3 All E.R. 129; *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619.

In *Kinloch* Lord Selborne L.C. said at pp. 625-26:

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions *of* the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its

nature and effect.

Counsel for the Band objected to any argument on the "political trust" defence because the Crown had failed to plead it. Collier J. gave leave, on terms, to amend the defence to raise the point but the Crown chose not to take advantage of the opportunity to amend. Collier J. therefore refused to consider the point.

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The Crown then argued that if there were a legally enforceable trust its terms were those set out in the surrender document, permitting it to lease the 162 acres to anyone, for any purpose, and upon any terms which the Crown deemed most conducive to the welfare of the Band. In the Crown's submission the surrender document imposed on it no obligation to lease to the golf club on the terms discussed at the surrender meeting; nor did it impose any duty on the Crown to obtain the approval of the Band in respect of the terms of the lease ultimately entered into.

The trial judge rejected these submissions. He held, citing the *Tito* case, *supra,* that the Crown can, if it chooses, act as a trustee. He held also that the surrender of October 6, 1957 imposed on the Crown, as trustee, a duty as of that date, to lease the surrendered land to the golf club on the conditions contemplated by the Band. Substantial changes were made to these conditions, in respect of which no instruction or authorization was sought by the Crown, as trustee, from the members of the Band, the *cestuis que trust.* The judge found the Crown liable for breach of trust.

In respect of damages, there was a great deal of evidence at trial, most of it by experts. Citing *Fales v. Canada Permanent Trust Co.,* [1977] 2 S.C.R. 302, at p. 320, the judge held that the measure of damages is the actual loss which the acts or omissions have caused to the trust estate, the plaintiffs being entitled to be placed in the same position so far as possible as if there had been no breach of trust. The judge proceeded on the basis that the Band would not have agreed to the terms of the lease as signed and the club would not have agreed to a lease on the terms found by the judge to be the terms of the trust. Therefore it would have been possible for the Band at some point to have leased the land for residential purposes on a ninety-nine-year leasehold basis on extremely favourable terms. In quantifying the award, the judge confessed to being unable to set out a precise *rationale* or approach, mathematical or otherwise. He said that the award was obviously

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a "global" figure: a considered reaction based on the evidence, the opinions, the arguments and, in the end, his own conclusions of fact. The judge assessed the plaintiffs' damages at $10,000,000.

The Federal Court of Appeal, speaking through Mr. Justice Le Dain, proceeded on the premise that the case presented on behalf of the Band, rested on the existence of a statutory trust in the private law sense based primarily on the terms of s. 18(1) of the *Indian Act.* Section 18(1) reads:

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

> the band.

Le Dain J. scrutinized this section and concluded that it was not consistent with a "true trust" in the sense of an equitable obligation enforceable in a court of law. Especially telling, in his opinion, was the discretion vested by s. 18(1) in the Governor in Council to determine whether a particular purpose to which reserve land is being put, or is proposed to be put, is "for the use and benefit of the Band". In his view this discretion indicated it was for the government, not the courts, to determine what was for the use and benefit of the Band. Such a discretion, in his opinion, was incompatible with an intention to impose an equitable obligation, enforceable in court, to deal with the land in a certain manner. Section 18(1) was therefore incapable of making the Crown a true trustee of those lands:

> The extent to which the government assumes an administrative or management responsibility for the reserves of some positive scope is a matter of governmental discretion, not legal or equitable obligation. I am, therefore, of the opinion that s. 18 of *the Indian Act*
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> *[page 374]*
>
> does not afford a basis for an action for breach of trust in the management or disposition of reserve lands.

Le Dain J. also rejected the alternative contention on behalf of the Band that a trust was created by the terms of the surrender document, especially the words "in trust to lease the same . . . " and that the Crown was in breach of that trust by its alleged failure to exercise ordinary skill and prudence in leasing the land:

> ... it is my opinion that the words "in trust" in the surrender document were intended to do no more than indicate that the surrender was for the benefit of the Indians and conferred an authority to deal with the land in a certain manner for their benefit. They were not intended to impose an equitable obligation or duty to deal with the land in a certain manner. For these reasons I am of the opinion that the surrender did not create a true trust and does not, therefore, afford a basis for liability based on a breach of trust.

Even if he had been able to find a "true trust", Le Dain J. would have refused to follow Collier J. in concluding that the terms of such a trust were defined by the Indians' understanding of conditions the Crown was to secure in the lease. These conditions did not appear in the surrender document and they did not comply with ss. 37 to 41 of the *Indian Act,* governing the conditions of a surrender:

> From these provisions it is argued that the conditions of a surrender, in order to be valid, must be voted on and approved by a majority of the electors of a band, be certified by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and be submitted to and approved by the Governor in Council, all of which presuppose that the conditions will be in written form. I agree with these contentions. These solemn formalities have been prescribed as a matter of public policy for the protection of a band and the proper discharge of the government's responsibility for the Indians. They are also important as ensuring certainty as to the effect of a surrender and the validity of a subsequent disposition of surrendered land. It is to be noted that they are the only provisions of the Act excluded from the power of the Governor in Council under s. 4(2) to declare by proclamation that particular provisions of the Act shall not apply in certain cases. The oral terms found by the trial
>
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> judge were not voted on and approved by a majority of the band. They were deduced by the trial judge from the testimony of three members of the band and a former official of the Indian Affairs branch as to what was said at the meetings, and in some cases as to what was not said. The oral terms of the surrender found by the trial judge were not accepted by the Governor in Council, as required by the Act. What was accepted by Order in Council P.C. 1957-1606 of December 6, 1957, was the "attached surrender dated the sixth day of October, 1957". It was an unqualified acceptance of the written surrender, with no reference, express or implied, to other terms or conditions.

Le Dain J. concluded that the oral conditions of the surrender found by the trial judge could not afford a basis in law for finding liability and awarding damages.

Having found no basis for the trust alleged, the Federal Court of Appeal allowed the Crown's appeal.

IV Fiduciary Relationship

The issue of the Crown's liability was dealt with in the courts below on the basis of the existence or non-existence of a trust. In dealing with the different consequences of a "true" trust, as opposed to a "political" trust, Le Dain J. noted that the Crown could be liable only if it were subject to an "equitable obligation enforceable in a court of law". I have some doubt as to the cogency of the terminology of "higher" and "lower" trusts, but I do agree that the existence of an equitable obligation is the *sine qua non* for liability. Such an obligation is not, however, limited to relationships which can be strictly defined as "trusts". As will presently appear, it is my view that the Crown's obligations *vis-à-vis* the Indians cannot be defined as a trust. That does not, however, mean that the Crown owes no enforceable duty to the Indians in the way in which it deals with Indian land.

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In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

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

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

(a) The Existence of Indian Title

In *Calder v. Attorney General of British Columbia,* [1973] S.C.R. 313, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. With Judson and Hall JJ. writing the principal judgments, the Court split three-three on the major issue of whether the Nishga Indians' aboriginal title to their ancient tribal territory

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had been extinguished by general land enactments in British Columbia. The Court also split on the issue of whether the Royal Proclamation of 1763 was applicable to Indian lands in that province. Judson and Hall JJ. were in agreement, however, that aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation. Judson J. stated expressly that the Proclamation was not the "exclusive" source of Indian title (pp. 322-23, 328). Hall J. said (at p. 390) that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment".

The Royal Proclamation of 1763 reserved "under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid" (R.S.C. 1970, Appendices, p. 123, at p. 127). In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder is* consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M'Intosh, 8* Wheaton 543 (1823), and *Worcester v. State of Georgia, 6* Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.

In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European

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colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. Marshall C.J. explained this principle as follows, at pp. 573-74:

> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans would interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. [Emphasis is mine.]

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani v. Southern Nigeria (Secretary),* [1921] *2* A.C. 399. That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in Council, supra; Tito v. Waddell (No. 2), supra*

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and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act,* or by any other executive order or legislative provision.

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada,* [1921] 1 *A.C.* 401, at pp. 410-11 (the *Star Chrome* case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation.

(b) The Nature of Indian Title

In the *St. Catherine's Milling* case, *supra,* the Privy Council held that the Indians had a "personal and usufructuary right" in the lands which they had traditionally occupied. Lord Watson said that "there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished" (at p. 55). He reiterated this idea, stating that the Crown "has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden" (at p. 58). This view of aboriginal title was affirmed by the Privy Council in the *Star Chrome* case. In *Amodu Tijani, supra,*

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Viscount Haldane, adverting to the *St. Catherine's Milling* and *Star Chrome* decisions, explained the concept of a usufructuary right as "a mere qualification of or burden on the radical or final title of the Sovereign . . ." (p. 403). He described the title of the Sovereign as a pure legal estate, but one which could be qualified by a right of "beneficial user" that did not necessarily take the form of an estate in land. Indian title in Canada was said to be one illustration "of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle." Chief Justice Marshall took a similar view in *Johnson v. M'Intosh, supra,* saying, "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy ... " (p. 588).

It should be noted that the Privy Council's emphasis on the personal nature of aboriginal title stemmed in part from constitutional arrangements peculiar to Canada. The Indian territory at issue in *St. Catherine's Milling* was land which in 1867 had been vested in the Crown subject to the interest of the Indians. The Indians' interest was "an interest other than that of the Province", within the meaning of s. 109 of the *Constitution Act, 1867*. Section 109 provides:

> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

When the land in question in *St. Catherine's Milling was* subsequently disencumbered of the native title upon its surrender to the federal government by the Indian occupants in 1873, the entire beneficial interest in the land was held to have passed, because of the personal and usufructuary

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nature of the Indians' right, to the Province of Ontario under s. 109 rather than to Canada. The same constitutional issue arose recently in this Court in *Smith v. The Queen,* [1983] 1 S.C.R. 554, in which the Court held that the Indian right in a reserve, being personal, could not be transferred to a grantee, whether an individual or the Crown. Upon surrender the right disappeared "in the process of release".

No such constitutional problem arises in the present case, since in 1938 the title to all Indian reserves in British Columbia was transferred by the provincial government to the Crown in right of Canada.

It is true that in contexts other than constitutional the characterization of Indian title as "a personal and usufructuary right" has sometimes been questioned. In *Calder, supra,* for example, Judson J. intimated at p. 328 that this characterization was not helpful in determining the nature of Indian title. In *Attorney-General for Canada v. Giroux* (1916), 53 S.C.R. 172, Duff J., speaking for himself and Anglin J., distinguished *St. Catherine's Milling* on the ground that the statutory provisions in accordance with which the reserve in question in *Giroux* had been created conferred beneficial

ownership on the Indian Band which occupied the reserve. In *Cardinal v. Attorney General of Alberta,* [1974] S.C.R. 695, Laskin J., dissenting on another point, accepted the possibility that Indians may have a beneficial interest in a reserve. The Alberta Court of Appeal in *Western International Contractors Ltd. v. Sarcee Developments Ltd.,* [1979] 3 W.W.R. 631, accepted the proposition that an Indian Band does indeed have a beneficial interest in its reserve. In the present case this was the view as well of Le Dain J. in the Federal Court of Appeal. See also the judgment of Kellock J. in *Miller v. The King,* [1950] S.C.R. 168, in which he seems implicitly to adopt a similar position. None of these judgments mentioned the *Star Chrome* case, however, in which the Indian interest in land specifically set aside as a reserve was held to be the same as the "personal
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and usufructuary right" which was discussed in *St. Catherine's Milling.*

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.
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(c) The Crown's Fiduciary Obligation

The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery. In the present appeal its relevance is based on the requirement of a "surrender" before Indian land can be alienated.

The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or

commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling, supra,* at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act,* have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions is the present Act being ss. 37-41.

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians ...." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to
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decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation (1975), 25* U.T.L.J. 1, at p. *7,* that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:

> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. See, *e.g. Laskin v. Bache & Co. Inc.* (1971), *23* D.L.R. (3d) 385 (Ont.C.A.), at p. 392;
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Goldex Mines Ltd. v. Revill (1974), 7 O.R. 216 (Ont.C.A.), at p. 224.

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

Section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with surrendered land. In the present case, the document of surrender, set out in part earlier in these reasons, by which the Musqueam Band surrendered the land at issue, confirms this discretion in the clause conveying the land to the Crown "in trust to lease ... upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.

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I agree with Le Dain J. that before surrender the Crown does not hold the land in trust for the Indians. I also agree that the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of surrender. The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision, *supra,* makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust *res,* so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender. j

Nor does surrender give rise to a constructive trust. As was said by this Court in *Pettkus v. Becker,* [1980] *2* S.C.R. 834, at p. 847, "The principle of unjust enrichment lies at the heart of the constructive trust." See also *Rathwell v. Rathwell,* [1978] 2 S.C.R. 436. Any similarity between a constructive trust and the Crown's fiduciary obligation to the Indians is limited to the fact that both arise by operation of law; the former is an essentially restitutionary remedy, while the latter is not. In the present case, for example, the Crown has in no way been enriched by the surrender transaction, whether unjustly or otherwise, but the fact that this is so cannot alter either the

existence or the nature of the obligation which the Crown owes.

The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character.

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As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis.* Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.

The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. The *Indian Act* makes specific provision for such narrowing in ss.18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be *a prima facie* breach of the obligation. In the present case both the surrender and the Order in Council accepting the surrender referred to the Crown's leasing the land on the Band's behalf. Prior to the surrender the Band had also been given to understand that a lease was to be entered into with the Shaughnessy Heights Golf Club upon certain terms, but this understanding was not incorporated into the surrender document itself. The effect of

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these so-called oral terms will be considered in the next section.

(d) Breach of the Fiduciary Obligation

The trial judge found that the Crown's agents promised the Band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms. The lease obtained was much less valuable. As already mentioned, the surrender document did not make reference to the "oral" terms. I would not wish to say that those terms had nonetheless somehow been incorporated as conditions into the surrender. They were not formally assented to by a majority of the electors of the Band, nor were they accepted by the Governor in Council, as required by subss. 39(1)(b) and (c). I agree with Le Dain J. that there is no merit in the appellants' submission that for purposes of s. 39 a surrender can be considered independently of its terms. This makes no more sense than would a claim that a contract can have an existence which in no

way depends on the terms and conditions that comprise it.

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable

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behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.

While the existence of the fiduciary obligation which the Crown owes to the Indians is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is both more general and more exacting than the terms of any particular surrender. In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppel. The Crown cannot promise the Band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the Band to alter its legal position by surrendering the land, and then simply ignore that promise to the Bands detriment. See. *e.g. Central London Property Trust Ltd. v. High Trees House Ltd.,* [1947] K.B. 130; *Robertson v. Minister of Pensions,* [1949] *1* K.B. 227 (C.A.)

In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the Band. It must make good the loss suffered in consequence.

VI Limitation of Action and Laches

The Crown contends that the Band's claim is barred by the *Statute of Limitations,* R.S.B.C. 1960, *c.* 370, because it was not filed by January 22, 1964, *six* years from the date the lease was signed. The trial judge, however, found that the Band and its members were not aware of the actual terms of the lease, and therefore of the breach of fiduciary duty, until March of 1970. This was not for lack of effort on the Band's part. The Indian Affairs Branch, in conformity with its then policy, had refused to give a copy of the lease to the Band, despite repeated requests.

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It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or

common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association,* [1958] *1* W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. The limitations period did not therefore start to run until March *1970.* The action was thus timely when filed on December 22, 1975.

Little need be said about the Crown's alternative contention that the Band's claim is barred by laches. Since the conduct of the Indian Affairs Branch personnel amounted to equitable fraud; since the Band did not have actual or constructive knowledge of the actual terms of the golf club lease until March *1970;* and since the Crown was not prejudiced by reason of the delay between March 1970 until suit was filed in December 1975, there is no ground for application of the equitable doctrine of laches.

VII Measure of Damages

In my opinion the *quantum* of damages is to be determined by analogy with the principles of trust law: see, *e.g. In Re West of England and South Wales District Branch, ex parte Dale & Co.* (1879), 11 Ch. D. 772, at p. 778.

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Reviewing the record it seems apparent that the judge at trial considered all the relevant evidence. His judgment, as I read it, discloses no error in principle. I am content to adopt the *quantum of* damages awarded by the judge, rejecting, as he did, any claim for exemplary or punitive damages.

I would therefore allow the appeal, set aside the judgment in the Federal Court of Appeal and reinstate without variation the trial judge's award, with costs to the present appellants in all courts.

The following are reasons delivered by

ESTEY J.—The facts and issues in this appeal are fully dealt with in the reasons for judgment of my colleague, Wilson J., and need no repetition by me. I hasten to say at the outset that I respectfully agree with the disposition proposed by each of them. This action, in my respectful view, however, should be disposed of on the very simple basis of the law of agency.

There is no difference between the parties on the factual relationship between them. The only issue is, what is the appropriate juridical basis upon which the remedy and consequential relief should be founded. The nature of the interests of the Indian Band, the Federal Crown and the Crown in the right of the Province has been long ago settled in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, and in *Ontario Mining Co. v. Seybold,* [1903] A.C. 73, affirming (1899), 31 O.R. 386; all of which was, only in 1982, re-examined and affirmed in the unanimous decision of this Court in *Smith v. The Queen,* [1983] 1 S.C.R. 554. In 1938, prior to the surrender in question, the title to the Indian reservation land in British Columbia was transferred to

the Crown in the right of Canada by British Columbia Orders in Council 208 and 1036 pursuant to Article 13 *of* the Terms of Union of 1871. Consequently, the primary constitutional issue discussed
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in the *Smith* and *St. Catherine's Milling* cases, *supra,* do not arise.

The *Indian Act, R.S.C. 1952, c.* 149, as amended, the Constitution, the pre-Confederation laws of the colonies in British North America, and the Royal Proclamation of 1763 all reflect a strong sense of awareness of the community interest in protecting the rights of the native population in those lands to which they had a longstanding connection. One common feature in all these enactments is reflected in the present-day provision in the *Indian Act, s. 37,* which requires anyone interested in acquiring ownership or some lesser interest in lands set aside for native populations, from a willing grantor, to do so through the appropriate level of government, now the Federal Government. This section has already been set out by my colleagues. In the elaborate provisions in the *Indian Act,* there are many alternative ways of protecting the interests of the Indians and of reflecting the community interest in that protection. The statute and the cases make provision for a surrender of the Indian interest in Indian lands as defined in the Act. And cases such as *St. Catherine's, supra,* indicate the extent to which the Indian Band must go in order to sever entirely the connection of the native population from the lands in question. This type of surrender would be better described as a release, in the modern lexicon.
Unfortunately, the statute employs the word "surrender" in another connotation. In order to deal with what has been found to be the personal interest of the Indian population in Indian lands, the Act requires the Band to "surrender", the land to the Crown in the right of Canada in order to effect the proposed alternate use of the land for the benefit of the Indians. The Act, in short, does not require the Indian to limit his interest in Indian lands to present and continuous occupation. The Band may vicariously occupy the lands, or part of such lands, through the medium of a lease or licence. The marketing of the personal interest is not only permitted by the statute, but the machinery is provided for the proper exploitation of
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this interest by the Indians, subject always to compliance with the statute *(vide St. Ann's Island Shooting and Fishing Club Ltd. v. The King,* [1950] S.C.R. 211). The step to be taken by the Indian Band in seeking to avail itself of the benefits of their right of possession in this manner is, unhappily, also referred to in the statute and in the cases as a "surrender", of the lands and their interest therein to the Crown. This is not a release in the sense of that term in the general law. Indeed, it is quite the opposite. It is a retention of interest and the exploitation of that interest in the manner and to the extent permitted by statute law. The Crown becomes the appointed agent of the Indians to develop and exploit, under the direction of the Indians and for their benefit, the usufructuary interest as described in *St. Catherine's.*

The appellants clearly, and beyond any argument here, did not release their interest in the lands in the *St. Catherine's* sense but appointed the Crown in the right of Canada to carry out the

commercial exploitation of the Indian interest in the manner prescribed in detail in *Surrey (Corporation of) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.), *The King v. McMaster,* [1926] Ex.C.R. 68, and *St. Ann's, supra.*

On the facts here, there is no issue but that the Indian Band had determined to exercise their interest in the land through the medium of a lease to the golf club. There is no serious issue with the findings of fact by the learned trial judge as to the detailed instructions given by the Indians to the representatives of the Government of Canada on the terms of the lease, including the rent, the term, rights of renewal, removal of fixtures, and many other features common to the preparation of a lease. There is no issue but that the Government representatives, for whatever reason, did not carry out these instructions. Nor did those officials keep the Indian Band apprised of the program of negotiations in the final stages. Most seriously of all, the respondent did not give the instructing Indian's a copy of the final lease or a written

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description of its contents for many years after the lease was executed.

One need turn no further than *Halsbury's Laws of England* (4th ed.), vol. 1, p. 418, to determine the application to these clear and relatively straightforward facts of the principles of the law of agency:

> Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent.
>
> [¼]
>
> The essence of the agent's position is that he is only an intermediary between two other parties.

The fact that the agent is prescribed by statute in no way detracts in law from the legal capacity of the agent to act as such. The further consideration1that the principal (the Indian Band as holder of the personal interest in the land) is constrained by statute to act through the agency of the Crown, in no way reduces the rights of the instructing principal to call upon the agent to account for the performance of the mandate. The measure of damages applied by the learned trial judge is in no way affected by ascribing the resultant rights in the plaintiff to a breach of agency. Indeed, it is consonant with the purpose of the statutory agency as prescribed by Parliament, now and historically, that the agent (the Crown), in all its actions, shall serve only the interests of the native population whose rights alone are the subject of the protective measures of the statute. If anything, the principal in this relationship is more secure in his rights than in the absence of a statutorily prescribed agency. The principal is restricted in the selection of the agent, but the agent is nowhere protected in the statute from the consequences in law of a breach of that agency.

For these reasons, I would, with great respect to all who hold a contrary view, hesitate to resort to the more technical and far-reaching doctrines of

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the law of trusts and the concomitant law attaching to the fiduciary. The result is the same but, in my respectful view, the future application of the Act and the common law to native rights is much simpler under the doctrines of the law of agency.

I therefore share with my colleagues the conclusion that this appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: Davis and Company, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

Solicitor for the intervener: William T. Badcock, Ottawa.

[_] The Chief Justice took no part in the judgment.