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No. 27641

IN THE SUPREME COURT OF CANADA

(On Appeal from the Federal Court of Appeal)

BETWEEN:

ROY ANTHONY ROBERTS, C. AUBREY ROBERTS and **JOHN HENDERSON**, suing on their own behalf and on behalf of all other members of the **WEWAYKUM INDIAN BAND** (also known as the **CAMPBELL RIVER INDIAN BAND**)

APPELLANTS
(Plaintiffs)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(Defendant)

AND:

RALPH DICK, DANIEL BILLY, ELMER DICK, STEPHEN ASSU and **JAMES D. WILSON**, suing on their behalf and on behalf of all other members of the **WEWAIKAI INDIAN BAND** (also known as the **CAPE MUDGE INDIAN BAND**)

RESPONDENTS / APPELLANTS
(Defendants)
(Plaintiffs by Counterclaim)

BETWEEN:

RALPH DICK, DANIEL BILLY, ELMER DICK, STEPHEN ASSU, GODFREY PRICE, ALLEN CHICKITE, and **LLOYD CHICKITE**, suing on their behalf and on behalf of all other members of the **WEWAIKAI INDIAN BAND** (also known as the **CAPE MUDGE INDIAN BAND**)

FILED
SUPREME COURT OF CANADA
COUR SUPREME DU CANADA
AUG 7 2001
DÉPOSÉ

APPELLANTS
(Plaintiffs)

AND:

FILED
SUPREME COURT OF CANADA
COUR SUPREME DU CANADA
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DEPOSE

HER MAJESTY THE QUEEN

RESPONDENT
(Defendant)

RESPONDENT **HER MAJESTY THE QUEEN'S** FACTUM
IN RESPONSE TO THE APPEAL OF THE **WEWAIKUM (Campbell River) BAND**

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PART PAGE

INTRODUCTION

1. The Appellants, the Campbell River Indian Band and the Cape Mudge Indian Band in separate appeals, each claim entitlement to the other's reserve or compensation from the Crown in lieu. Each band claims that the Crown breached a fiduciary duty to that band to secure and protect the disputed reserves for that band to the detriment of the other. The Courts below, in concurrent findings, dismissed both bands' claims as being contrary to the historical record and their fully informed intentions of the day. The Courts below rejected the notion that the Crown was in breach of duty and found, instead, that the Crown's conduct was beyond reproach in this case. The Courts below further held that the claims were limitation barred.

2. This Court does not exist to retry cases. Absent a "*palpable and overriding error*" the Court should not substitute its own fact-findings for those of the Courts below. The Trial Court's fact findings were amply supported by the evidence in this case. Moreover, the findings of the Courts below give full effect to the intentions of the two bands as expressed by their own words and actions over the last century.

3. This case raises for the Court's consideration what is the nature and extent of the Crown's duty, if any, when two bands, who are both sub-tribal groups of a larger Indian tribe, make competing claims to the same reserves. The Crown says that in such circumstances it does not owe a fiduciary duty to act exclusively for either band. It can be said that the Crown must act with honour in dealing with aboriginal people, but this is not a case where either a private law or a *sui generis* fiduciary duty is engaged. In this case, each band was fully informed and in a position to make its own decision as to what steps, if any, or position to take.

4. Further, the Court is asked to again consider whether s. 39 of the *Federal Court Act* validly incorporates by reference the limitation legislation of the province in which the cause of action arose when it comes to Indian Reserves or lands reserved for Indians. This Court has previously considered this question, recently in *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344, and has applied provincial limitations legislation as validly incorporated federal law.

PART I - STATEMENT OF FACTS

5. For the purposes of this Appeal, the Respondent, Her Majesty the Queen (the "***Crown***") accepts, subject to the following additions and qualifications, as substantially correct paragraphs: 4 to 11, 13, 16, 30, 32 and 33 of the Factum filed by the Appellant Campbell River Indian Band (also known as the "*Wewaykum*", and hereinafter referred to as "***Campbell River***"). A separate Crown Factum has been filed in response to the Appeal of the Wewaikai Indian Band (also known as, and hereinafter referred to as "***Cape Mudge***").

6. The two Indian Reserves at issue in this case are:

- the Campbell River Reserve #11 (the "***Campbell River Reserve***") occupied by Campbell River (and claimed in this litigation by Cape Mudge), and
- the Quinsam Reserve #12 (the "***Quinsam Reserve***"), occupied by Cape Mudge (and claimed in this litigation by Campbell River)

Cape Mudge and Campbell River have each respectively occupied, for close to a century, the reserve now claimed by the other band.

7. The Federal Court of Appeal upheld the decision of the Trial Judge. Separate concurring reasons were delivered by McDonald J.A. and Isaac C.J.. McDonald J.A. (Linden J.A. concurring) dismissed the bands' Appeals after a review of the Trial Judge's findings of fact and law. None of the key findings of the Trial Judge challenged by the Appellants were varied or set aside. McDonald J.A. concluded that the bands had not proven any breach of fiduciary duty by the Crown. Isaac C.J., (Linden J.A. concurring) agreed with the findings of McDonald J.A. and the Trial Judge, but chose to dismiss the appeals on the basis of the B.C. *Limitation Act* and the equitable defences of laches and acquiescence.

A. Findings of Fact at Trial and on Appeal

1. Federal and B.C. Approval of the Laich-kwil-tach Reserves

8. The Campbell River and Cape Mudge people are two of the subgroups or bands comprising the Laich-kwil-tach Tribe or Nation. In 1889, Canada and B.C. approved an "*Official Plan*"depicting twelve "*Laich-kwil-tach Indian Reserves*", including the Campbell River and Quinsam Reserves [JR v. 7, p. 1136]. The Official Plan did not allocate these reserves among the various subgroups of the Laich-kwil-tach [FCTD, JR v. 23, p. 3877-8; FCA, JR v. 24, p. 4162 ¶18 & p. 4147 ¶47].

2. The Schedules of Reserves

9. Before 1900, the schedules of reserves produced by the Department of Indian Affairs ("***DIA***") only listed the Laich-kwil-tach Indians [FCTD, JR v. 23, p. 4003; FCA, JR v. 24, p. 4162 ¶20-21; JR v. 5, p. 722, v. 8, p. 1218, 1299]. Starting with the 1901 Schedule [JR v. 8, p. 1325], subgroups of the Laich-kwil-tach were listed separately. McDonald J.A. stated that:

> "***The compilation of such a summary was not mandated by statute nor was it a conclusive record of any Indian band's entitlement or interest in a particular reserve. The evidence revealed that these schedules were intended for use as an administrative document within the department and the local offices.*** *These schedules were published on a periodic basis and often contained errors which required correction."* [FCA, JR v. 24, p. 4162, ¶20] [emphasis added]

3. The 1907 Resolution

10. On March 20, 1907, the Cape Mudge people passed a resolution (the "***1907 Resolution***") to settle a dispute with Campbell River [JR v. 9, p. 1492]. At its heart, this dispute was over the right to fish in the Campbell River adjacent to the Campbell River Reserve. McDonald J.A. set out his findings with regard to this Resolution [FCA, JR v. 24, p. 4186-7, ¶71-72] as follows:

> *Finally, the Supreme Court of Canada has indicated that an "intent-based approach" should be adopted in order to give effect to the true nature and purpose of dealings involving Aboriginal peoples and Aboriginal lands. The Trial Judge correctly found that the central purpose of the 1907 Resolution was two-fold. First, the resolution was to resolve the dispute between the Wewaikai and the Wewaikum regarding which band had beneficial entitlement to the Campbell River and Quinsam reserves. Secondly, the resolution secured a continuing right to fish in the waters of the Campbell River for the Wewaikai, to be held in common with the Wewaikum.*
>
> *The 1907 Resolution was an attempt by the Crown to facilitate an agreement between the Wewaikai and the Wewaikum that would alleviate their territorial concerns, uphold their historical interests and maintain peace in the area. This required a balancing of the interests of both Indian bands, as well as the public interest. There is nothing in the evidence to suggest that the resolution of the reserve allocation and fishing issues as embodied by the 1907 Resolution favoured the interests of one Band over that of another. Simply stated, there is no evidence that the Crown was in breach of its fiduciary obligations to either Band. The 1907 Resolution was a bona fide and good faith attempt to resolve the outstanding dispute between the Indian Bands. There is no indication of favouritism, concealment of material facts, or improvidence."*

4. The Ditto Mark Error

11. After approval of the 1907 Resolution by Reserve Commissioner Vowell, [JR v. 9, p. 1501] a handwritten note was made on the schedule of reserves in Victoria B.C. [JR v. 9, p. 1453].

Unfortunately, the ditto marks below this note were not amended, and so made it appear as if the Quinsam Reserve was also allocated to Campbell River (the "***ditto mark error***") [FCTD, JR v. 24, p. 4042-3, FCA, JR v. 24, p. 4194-7, ¶84-86]. An illustration of how this "*ditto mark*" error occurred is set out below:

(Pre 1907 Schedule) [JR v. 8, p. 1325]

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

(Post 1907 Schedule) [JR v. 9, p. 1453]

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

[* handwritten annotation to schedule made after 1907 Resolution]

12. A new schedule, published in 1913, also contained the "*ditto mark*" error [JR v. 10, p. 1653].

5. McKenna-McBride Commission Hearings

13. In 1912 Canada and B.C. established the McKenna-McBride Commission. The Commission's primary mandate was to confirm the total acreage of reserve land in B.C. which would be eventually conveyed by B.C. to Canada [JR v. 10, p. 1625]. To accomplish this task, the Commission reviewed the acreage of each reserve as set out in the 1913 schedule of reserves.

Although the Quinsam Reserve ditto mark error was brought to the attention of the Commission, it did not correct the schedule, but left the matter for DIA [FCTD, JR v. 24, p. 4049 & FCA, JR v. 24, p. 4192-3, ¶80-82].

14. Portions of the report of the McKenna-McBride Commission (as modified by the Ditchburn/Clark Inquiry) were attached as schedules to three Orders-in-Council:

- B.C. Order-in-Council 911 was passed July 26, 1923 [JR v. 13, p. 2196];
- Federal Order-in-Council 1265 passed July 19, 1924 [JR v. 13, p. 2201] and
- B.C. Order-in-Council 1036 passed in 1938 to convey title to Indian Reserves from B.C. to Canada [JR v. 14, p. 2409].

The schedules attached to all three of these Orders in Council also included the ditto mark error [FCTD, JR v. 24, p. 4049].

6. Correction of Errors in the Schedule of Reserves

15. In the years after the McKenna-McBride Commission, errors in the schedules relating to the allocation of reserves for subtribal groups (including the ditto mark error) were brought to the attention of various DIA officials [FCTD, JR v. 23, p. 3895-6]. DIA directed the Assistant Indian Commissioner for B.C. to correct these errors [FCTD, JR v. 23, p. 3896].

16. To correct these errors, DIA consulted the affected Indian bands. McDonald J.A. quoted with approval the following passage of the Trial Judge's decision summarizing the procedure adopted by DIA in consulting with the Indians for the purpose of determining the correct sub-tribal or subgroup allocation of their reserves:

> ". . . ***Ditchburn's*** [Canada's Indian Commissioner for B.C.]***report recommended that where the opinions of the Indians appeared to conflict, the issue of the correct subtribal allocation of their reserves should be put before the bands at a meeting and the matter straightened out by way of resolutions passed by the bands and signed by the chiefs in order for the Department to be able "to rearrange the Schedule of Reserves to suit the Indians concerned"***. *If on the other hand, there was no disagreement, Ditchburn was of the opinion that the "matter can be straightened out easily without any vote being taken".*
>
> *It appears Ditchburn's procedure for effecting amendments to the schedule was put into practice with the appointment of Indian Agent Todd to the Kwawkewlth Agency in 1934. Todd was instructed to resolve the outstanding reserve allocation issues in anticipation of the publication of a revised schedule of reserves for British Columbia. Over the next eight years Todd held band meetings, conducted inquiries,*

took evidence from band elders and obtained declarations of the Chief and Principal Men of a number of bands in the Kwawkewlth Agency in an effort to place before the Department an accurate record of the Indians' own opinion as to the correct sub-tribal allocation of reserves in the Agency. . . .

. . . Based on the [evidence], I believe it can be inferred that Todd's practice in obtaining the Declarations of the Cape Mudge and Campbell River Indians would have been to:

1) call a separate meeting of the Campbell River and Cape Mudge Indians;
2) explain to each band at the meeting the allocation of reserves as shown on the 1913 schedule;
3) determine whether the schedule was "complete and correct", or whether any dispute existed between sub-groups as to the allocation of the reserves;
4) where there was a dispute between the sub-groups, to prepare a Declaration in accordance with the opinion of the Indians which was sworn by the Chief and Principal Men of each sub-group.

It would seem to me that if there had been any dispute between the Campbell River and Cape Mudge Indians as to the allocation of their reserves in 1936, they would not have sworn the Declarations as prepared by Todd. . . .Further, there is no evidence to suggest that the majority of the Campbell River and Cape Mudge Indians were dissatisfied with the allocation of their reserves as set out in the 1936 Declarations.

The collection of information for the purpose of preparing the 1943 schedule of reserves in British Columbia continued over the period from 1934 to 1943. Copies of the schedule were circulated to the Indian Agents between 1940 and 1943 and the revisions were then made by the Agents. With respect to the Kwawkewlth Agency, Todd enclosed a list of reserves showing the correct subtribal allocation of each reserve [document 2750] and recommended changes to conform to his list. Todd's revisions were noted by the Director of Indian Affairs and approved by the Department in July of 1943. ***The final published draft of the new 1943 schedule incorporated these revisions, including what I feel was the "correct" listing of Reserves No.11 and No.12.***"

[McDonald J.A. FCA, JR v. 24, p. 4195-6, ¶84 quoting decision of the Trial Judge at JR v. 24, p. 4074 - emphasis as added by McDonald J.A.]

17. In 1936 Campbell River's Chief and Principal Men signed a sworn declaration confirming a list of the "*only reserves belonging to this [Campbell River] band*" (the "***1936 Declaration***"). This

list did not include the Quinsam Reserve. The Declaration was expressed in clear and simple language. The text of the Declaration is reproduced below: [JR v. 14, p. 2381]

"WEWAYAKUM (CAMPBELL RIVER) BAND

We, the Chiefs and Principal Men of the Campbell River Band, do hereby state under oath that the Reserves shown below are the only reserves belonging to this band and that this list is complete.

Res. No.	*Name of Reserve*	*Acres*	*Location*
2	*Old Homayno*	*38*	*Head of Loughborough Inlet*
3	*Loughborough*	*21*	*Eastern shore of Loughborough Inlet opposite Williams Pt.*
4	*Matlaten*	*96*	*On Cardero Channel opposite Greene Point*
11	*Campbell River*	*350.5 less 90 acres sold*	*Mouth of Campbell River, Discovery Passage*

18. A similar Declaration was sworn by Cape Mudge [JR v. 14, p. 2380]. On May 16, 1938, the Federal Indian Commissioner forwarded to DIA the Campbell River and Cape Mudge Declarations and recommended that DIA's schedule be amended to conform with these Declarations [JR v. 14, p. 2397; FCTD, JR v. 23, p. 3904]. A new and revised schedule was finally published in 1943 [JR v. 14, p. 2428]. It correctly shows the Campbell River Reserve as allocated to Campbell River and the Quinsam Reserve as allocated to Cape Mudge [FCTD, JR v. 23, p. 3905-6].

B. Unreasonable Delay and Equitable Considerations

19. The Trial Judge found as a fact that Campbell River had unreasonably delayed the start of its action, [FCTD, JR v. 23, p. 3934-7] and that the balance of convenience favoured preservation of the *status quo*. Granting of the declaratory relief and injunctive relief sought by either of the two bands would have vested undue hardship on the members of the unsuccessful band who would be evicted and forced to relocate from their reserve [FCTD, JR v. 23, p. 3920].

C. Full Disclosure and No Fiduciary Breach

20. The Trial Judge found that the Crown had complied with its statutory duty, fiduciary duty and duty of care owed to Campbell River and Cape Mudge. The Trial Judge also found that:

> *"After an extensive review of the facts, I am satisfied there is no evidence to support either Cape Mudge's or Campbell River's allegations that material facts were either deliberately misrepresented to, or willfully concealed from the plaintiffs. Further, the Crown argues that the plaintiffs have not satisfied their onus and notes that for much of the century members*

> *of both bands had first hand knowledge of the most important events which are the subject of the action before me. In addition to having knowledge,* ***there is also evidence that members of both bands had available and sought out advice (including legal advice) as to their legal rights in 1932 and 1971****."* [FCTD, JR v. 23, p. 3928 - emphasis added]

21. These findings were affirmed by the Court of Appeal. McDonald J.A. (Linden J.A. concurring) stated:

> "*The Crown behaved in an appropriate manner and acted in good faith throughout the disputed events in this Case. The evidence fails to reveal any breach of the fiduciary obligations owed by the Crown in respect of either of the Indian bands in the allocation of these reserves.*" [FCA, JR v. 24, p. 4201, ¶97]

The Chief Justice (Linden J.A. concurring) also affirmed this finding, and stated:

> "*The Trial Judge found that there had been no breach of fiduciary duty, as the appellants had alleged. In the circumstances of this case, this finding was open to him and the appellants have not persuaded me that he was wrong.*" [FCA, JR v. 24, p. 4147, ¶46]

PART II - RESPONDENT'S POSITION ON THE ISSUES RAISED ON APPEAL

22. The Crown's position in regard to the points put in issue by Campbell River is as follows:

A. The Ditto Mark Error: The Courts below correctly concluded that the Quinsam Reserve was listed in the schedules to Orders in Council 911, 1265 and 1036 as a reserve for Campbell River due to a clerical error and that the reserve was properly allocated to Cape Mudge at all material times;

B. Effect of Schedules Appended to Orders in Council 911, 1265 and 1036: Orders in Council 911, 1265 and 1036 do not express an intention to give legislative force to the appended schedules of reserves. Alternatively, if these appended schedules were given legislative force, then the Courts below had the jurisdiction to correct a clerical error contained in these schedules;

C. Crown's Conduct was Beyond Reproach: The Courts below correctly found that the Crown has not breached any duty owed to Campbell River;

D. Statutory and Equitable Limitation Defences: Campbell River's causes of action for declarations of ownership and compensation are barred by the *Federal Court Act*, R.S.C., 1985, c. F-7, s. 39 incorporating the B.C. *Limitation Act*, R.S.B.C., 1979, c. 236 and prior enactments. The equitable defences of laches and acquiescence apply to bar any claim for relief advanced by Campbell River which is not barred by the statutory limitation periods.

23. The Crown submits that the constitutional questions be answered as follows:

Question 1: Can the British Columbia *Statute of Limitations*, R.S.B.C. 1936, c. 159 and subsequent enactments and amendments and the British Columbia *Limitation Act*, R.S.B.C. 1979, together with the Federal Court Act, R.S.B.C. 1985, c. F-7, particularly s. 39 constitutionally apply to extinguish any right and title of an Indian Band to the Campbell River and Quinsam Reserves in British Columbia, or any right to compensation in lieu of such right or title?

Answer: Section 39 of the *Federal Court Act* adopts by reference as valid Federal law the British Columbia limitation legislation and directs the application of this legislation to all actions

brought before the Federal Court. In doing so the legislation bars the right of action and upon expiry of the applicable limitation period extinguishes any cause of action by the band.

Question 2: Can British Columbia Order in Council No. 1036, dated July 28, 1938, constitutionally apply to alter any pre-existing Band entitlement to the Campbell River and Quinsam Indian Reserves in British Columbia?

Answer: For the reasons set out in paragraphs 47 to 53 below, the schedule appended to Order in Council 1036 was not given legislative force and therefore does not purport to alter any preexisting Band entitlement to the Campbell River and Quinsam Indian Reserves. Alternatively, if the schedule does have legislative force, then B.C. Order in Council 1036 does not have constitutional authority to alter any preexisting Band entitlement.

PART III - ARGUMENT

Introduction

24. The Quinsam Reserve was originally set apart for the Laich-kwil-tach Indians and then allocated to Cape Mudge, being a subtribal group of the Laich-kwil-tach Tribe of Indians. The reserve was never allocated exclusively to Campbell River. The ditto marks in the schedule of reserves as it existed in the records of DIA prior to 1943 which indicated that the reserve was for Campbell River were a clerical error of no legal effect. This clerical error was corrected in the 1943 schedule. Alternatively, if the schedules had legislative force by reason of being appended to Orders in Council 911, 1265 and 1036, then the court has the jurisdiction to correct such a clerical error in order to give effect to the true intentions of both Campbell River and Cape Mudge at the material times.

25. Campbell River's claim to the Quinsam Reserve is based on a listing of this Reserve in the schedules appended to Orders in Council 911, 1265 and 1036. In order to succeed on this Appeal Campbell River must first establish that:

- the Courts below were wrong in finding that these schedules contained a clerical error; and
- that the schedules were themselves given legislative force merely as the result of being appended to provincial Orders in Council 911 and 1036 and federal Order in Council 1036.

26. The Crown submits that:

- both the Trial Judge and the Court of Appeal held that the listing of the Quinsam Reserve as belonging to Campbell River in various schedules was due to a clerical error. The question of whether such a clerical error occurred is a factual issue. The Trial Judge's findings establish not only the mechanical origins of this error, but also the fact that an allocation of the Quinsam Reserve to Campbell River would not have accorded with the views of the majority of the Campbell River people. Campbell River has not shown a "*palpable and overriding error*" in these findings of fact: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at p. 564-6.
- the second of the above contentions may be answered by examining the three Orders in Council. These Orders in Council simply confirm and approve the appended schedules. They do not express an intention to give legislative force to the appended schedules. Alternatively, if these schedules were given legislative force, then the Courts below had the jurisdiction to correct a clerical error contained in these schedules;

A. The Ditto Mark Error: The Courts below correctly concluded that the Quinsam Reserve was listed in the schedules to Orders in Council 911, 1265 and 1036 as a reserve for Campbell River due to a clerical error and that the reserve was properly allocated to Cape Mudge at all material times.

27. Campbell River is wrong in saying that there was no clerical "*ditto mark*" error [¶39, 47 & 83]: there is clear evidence which demonstrated the existence and origin of this error [see ¶11 above]. Moreover, the evidence accepted by the Courts below established that the majority of the Campbell River people accepted an allocation of the Quinsam Reserve to Cape Mudge. There is no basis to interfere with the concurrent findings of the Courts below: *Stein v. The Ship "Kathy K"*, *supra*, *Van der Peet*, *supra*. Finally, Campbell River misconstrues the intended effect of the McKenna-McBride Commission's "*Confirmation*" of the acreage of the Campbell River and Quinsam Reserves.

1. Campbell River Accepted the Allocation of Quinsam Reserve to Cape Mudge

28. Campbell River agrees with the findings of the Courts below that the Campbell River and Quinsam Reserves were approved in 1889 for the Laich-kwil-tach Tribe of Indians, and were not initially allocated to either the Campbell River or Cape Mudge subgroup [¶10, 53, 57 and 58]. Further, Campbell River does not base its claim on an underlying aboriginal entitlement. McDonald J.A. stated: [FCA, JR v. 24, p. 4157, ¶8]

> "*It is significant that the disputed areas are not part of the traditional territories of either Indian Band. Indeed, anthropological evidence establishes that the Laich-kwil-tach Indians migrated to the Campbell River area in the latter half of the 19th century, displacing the Comox Indians who lived in the area. Neither Indian Band raised any arguments at trial, or on appeal, regarding any aboriginal entitlement to these territories based on the Aboriginal title or the Aboriginal rights doctrines enshrined in section 35 of the Constitution Act, 1982.*"

Campbell River then contends at ¶44 that "[t]here is in fact *no evidence whatsoever* that Campbell River agreed to give up its right to Quinsam . . . " This argument highlights the inherent contradiction in Campbell River's position: If the Quinsam Reserve was not initially allocated to Campbell River (a proposition with which Campbell River agrees) and Campbell River does not claim any aboriginal entitlement, then Campbell River has no right in the Quinsam Reserve to give up or transfer. The evidence established that the Campbell River people accepted that the Quinsam Reserve was properly allocated to Cape Mudge by DIA in the years following the setting apart of Reserves for the Laich-kwil-tach Tribe of Indians.

(i) 1907 - Allocation of Quinsam Reserve to Cape Mudge, and Origin of the "*Ditto Mark*" Error

29. In 1907, the DIA schedule of reserves listed both the Campbell River and Quinsam Reserves as being for the "We-way-akay band" [JR v. 9, p. 1344]. On March 20, 1907, Cape Mudge met and passed a Resolution to settle a fishing dispute with Campbell River and to confirm an allocation of the Campbell River Reserve to Campbell River [JR v. 9, p. 1492].

30. Although the terms of the 1907 Resolution did not specifically refer to the Quinsam Reserve, other evidence accepted by the Courts below, confirmed that the allocation of the Quinsam Reserve to Cape Mudge was also settled at this meeting. In particular, on receipt and approval of the 1907 Resolution, Reserve Commissioner Vowell wrote to Agent Halliday advising that:*". . . a note to that effect has been made in the Schedule of Indian Reserves. . . .",* but questioned whether the Quinsam Reserve was "*still claimed by the We-Way-A-Kays*" [JR v. 9, p. 1501]. Halliday's reply advised that *"The reserve at* ***Quinsam is not included*** *in the transfer* ***as the matter was specifically brought up at the meeting*** *and it was decided only to allow the Wewaiaikum* [Campbell River] *band to have the one reserve at Campbell River."* [JR v. 9, p. 1514, emphasis added]

31. Thus the allocation of both the Campbell River **and** Quinsam Reserves was addressed at the 1907 meeting. Other evidence accepted by the Courts below further corroborated Campbell River's acceptance of an allocation of the Quinsam Reserve to Cape Mudge [FCTD, JR v. 23, p. 4022-3 & v. 24, p. 4042-4].

32. A separate resolution confirming the allocation of the Quinsam Reserve to Cape Mudge was unnecessary as there was no question about it. The Quinsam Reserve was already listed beside the "*We-way-akay Band*" [Cape Mudge] in the schedule of reserves. The stated purposes of the 1907 Resolution was to ***inform*** DIA of the Indians' opinion regarding the correct allocation of the Campbell River Reserve. As their opinion differed from the information in the schedule, Halliday deemed it "*necessary to get an expression of opinion from the Indians regarding the ownership of this [the Campbell River] reserve*" so that DIA could amend its schedule [JR v. 9, p. 1492]. The same procedure would not have been deemed necessary for the Quinsam Reserve as the Indians

were in agreement with the allocation of that reserve to Cape Mudge; an allocation which was in accordance with the schedule.

33. Commissioner Vowell's handwritten note on the schedule confirming the 1907 Resolution resulted in the inadvertent misplacement of ditto marks on the schedule [see ¶11 above & JR v. 9, p. 1453]. The ditto marks which previously indicated the "*We-way-akay Band*" [Cape Mudge] beside the Quinsam Reserve now appeared to indicate that the "*We-way-akum Band*" [Campbell River] was entitled to that reserve. The explanation for this clerical error and the fact that the schedule did not accord with the opinion of the Indians as to the correct allocation of the Quinsam Reserve was recognized on numerous subsequent occasions [JR v. 12, p. 2117, 2124 & 2129; v. 13, p. 2225, 2241, 2305, 2314, 2321 & 2324; v. 14, p. 2490, 2503 & 2508; FCTD, JR v. 23, p. 3885-7, 3895-6; v. 24, p. 4042-5].

(ii) No Claim to Quinsam Reserve by Campbell River before the McKenna-McBride Commission

34. The McKenna-McBride Commission held hearings at Campbell River in 1914. Charlie Smith and James Smith gave evidence before the Commission as representatives of Campbell River. The transcript of their evidence show that neither Charlie or James Smith referred to, or claimed, the Quinsam Reserve [JR v. 11, p. 1807-18; FCTD, JR v. 24, p. 4063]. On the other hand, Billy Assu, who gave evidence for Cape Mudge specifically referred to the Quinsam as a reserve of the Cape Mudge and made ***no*** reference to the Campbell River Reserve [JR v. 12, p. 1977-88]. Testimony by representatives of both Campbell River and Cape Mudge before the McKenna McBride Commission therefore confirmed the allocation of the Quinsam Reserve to Cape Mudge and the Campbell River Reserve to Campbell River [FCTD, JR v. 24, p. 4045].

(iii) The 1936 Declaration

35. Campbell River's Chief and Principal Men swore a declaration in 1936 confirming a list of the "*only reserves belonging to this [Campbell River] band*" [JR v. 14, p. 2381]. The text of the Declaration is reproduced above at paragraph 17 above.

36. There is no ambiguity in this declaration. A "*complete list*" of the reserves claimed by Campbell River did not include the Quinsam Reserve. The declaration is a sworn statement directly

contradicting Campbell River's claim of entitlement. It supports the Trial Judge's finding that any purported confirmation of the Quinsam Reserve for Campbell River did not accord with the opinions of the Indians or their Agent. The Trial Judge found that "*there is no evidence to impeach the significance of this declaration, or that the individuals who swore this declaration did so other than with full knowledge of its contents and of their own free will*" [FCTD, JR v. 24, p. 4066].

2. Purpose and Effect of the McKenna-McBride Commission's "*Confirmation*"

37. Campbell River argues [at ¶64 to 77] that the fact that the McKenna-McBride Commission adverted to the ditto mark error in the schedule of reserves, means that the Commission decided to confirm an allocation of the Quinsam Reserve to Campbell River. In fact, although the Commission was aware of the error, it was constrained by its mandate to confirm what was set out in the schedule. This interpretation was accepted by the Courts below, and accords with the evidence relating to the Commission's mandate and practice. An examination of this evidence shows that although errors in the schedule were brought to its attention, the Commission did not have the authority to address the allocation of reserves. It was constrained to adjust or confirm the acreage of such reserves in accordance with the schedule.

38. To further understand the intended effect of the McKenna-McBride Commission's "*Confirmation*" regarding the Quinsam Reserve, it is important to distinguish between such "*Confirmations*" and the Commission's more general "*Report*". As a Commission appointed jointly by Canada and B.C., the Commission's primary mandate was to confirm the total acreage of reserve land in B.C. which would be eventually conveyed by B.C. to Canada [JR v. 10, p. 1625-6, 1714]. To accomplish this task, the Commission reviewed the acreage of each reserve as set out in the schedule of reserves. If the scheduled acreage was sufficient, the Commission was constrained to direct a "*Confirmation*" of that acreage. Thus the Commission's final report contained under the heading "*Confirmations of Reserves*" a long list of reserves the acreage of which had been confirmed by the Commission [JR v. 12, p. 2081]. This task however did not involve an examination of the individual allocation of reserves. In addition to these "*Confirmations*", the Commission also prepared a more general report containing its analysis of the many matters brought to its attention.

39. This distinction between the Commission's "*Confirmations*", and its more general "*Report*" emanated directly from the June 10, 1913 Order in Council [JR v. 10, p. 1714] (passed in response to a May 20, 1913 Resolution of the Commission requesting clarification of its authority - JR v. 10, p. 1623). This Order-in-Council [JR v. 10, p. 1714] made it clear that the jurisdiction of the Commission was limited to settling the issues in dispute between the Provincial and Dominion Governments, i.e. confirmation of the size and location of individual reserves. It ***did not*** extend to "*any matters extraneous to the agreement*", i.e. an analysis of the beneficial entitlement of each reserve, and the reallocation of such reserves.

40. The Commission's own interpretation of its jurisdiction is contained in a letter from the Chairman of the Commission to the Superintendent General of Indian Affairs dated September 25, 1913 [JR v. 10, p. 1722]. In this letter, and in its practice, the Commission made it clear that its authority was limited. The re-allocation of reserves to other Indian groups was not within its jurisdiction and was left to DIA to be dealt with as an administrative matter:

- ***"We have to take these reserves as they appear in the Government list, and we are dealing with the land and not with the distribution of the Tribes at all - That is a matter for the Department to settle.***" [Commissioner MacDowall, Transcripts of the McKenna-McBride Commission - JR v. 11, p. 1903] [emphasis added]

- *". . . in as much as the matter dealt with*[which band was entitled to a particular reserve] *would appear to be one of strictly departmental nature, a copy of your letter with accompanying correspondence and sketch, has been transmitted to the Department of Indian Affairs for its information and attention."* [Letter from Acting Secretary of the McKenna-McBride Commission, May 3, 1915 - JR v. 12, p. 2014]

- "*Tatpoose, formerly a Klahoose Reserve but now claimed by the Homalco Tribe, 20.0 acres, at Surge Narrows (see Schedule of Indian Reserves 1913, p. 97).* ***This application apparently not for additional land but for re-allotment as for the Homalco Tribe . . . Land covered by Application already a Reserve; Application re allotment therefore matter for Departmental consideration.***" [emphasis added] [McKenna-McBride Commission - New Westminster Agency Additional Lands Applications - JR v. 12, p. 2043]

41. In the case of the Campbell River and Quinsam Reserves, the Commission determined that the acreage of each reserve was sufficient, and therefore directed a "*Confirmation*" of this acreage in accordance with the schedule of reserves [JR v. 12, p. 2081]. However, the Commission's "*Analysis of Evidence*", contained in its Final Report of June 30, 1916 recorded its finding that the schedule was in error in the ditto marks indicating that the Quinsam Reserve was for Campbell River: [JR v. 12, p. 2053 - p. A7, "*Analysis of Evidence - Table A*"]

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

And at page A6 of the same "*Analysis of Evidence*": [JR v. 12, p. 2052]

> *"This Band* [Cape Mudge] *claims also the Quinsam or Qunnsam Reserve No. 12, assigned in the Schedule to the Wewayakum Band* [Campbell River] *and this claim is endorsed by Agent Halliday."*

42. An annotated copy of the 1913 Schedule signed by Commissioner Nathaniel W. White, [JR v. 10, p. 1710] contains the handwritten word "*Wewayakay*" written in beside the Quinsam Reserve to correct the "*ditto*" mark error.

43. In summary on this point, the Commission's "*Confirmation*" of the Campbell River and Quinsam Reserves was therefore limited to defining and fixing the acreage of these reserves as set out in the schedule in anticipation of their eventual conveyance by B.C. to Canada. This "*Confirmation*" was never intended to reallocate the Quinsam Reserve to Campbell River. The apparent discrepancy between the schedule and the correct allocation of the Quinsam Reserve was however noted by the Commission in its Report. In the words of the Commission the correction of such a discrepancy was left as "*matter for Departmental consideration*".

44. Campbell River also suggests that the Ditchburn-Clark Inquiry endorsed an allocation of the Quinsam Reserve to Campbell River based on an analysis of each band's per capita acreage [¶75]. While the documents of the Ditchburn Clark Inquiry contain certain notes and calculations relating to the per capita acreage distribution of Cape Mudge and Campbell River's Reserves, these documents do not reveal a decision by the Inquiry to confirm the Quinsam Reserve for Campbell River. The closest these notes come to considering the issue of the Quinsam Reserve, is the cryptic note that "*. . . R.C. Report, Table A, page 388 marginal note if allowed, means a further reduction of 287.5 acres*" [JR v. 11, p. 1892]. This note should be contrasted with the statements of Mr. Ditchburn himself. Mr. Ditchburn (who was the Canadian Government's representative on the Ditchburn-Clark Inquiry) in his subsequent correspondence was clear in his opinion that the listing of the Quinsam Reserve for Campbell River occurred due to a clerical error:

- Ditchburn's letter of May 3, 1928 [JR v. 15, p. 2567] explained in detail the circumstances which in his opinion gave rise to the ditto mark error, and stated:

"In reply I beg to say that I am of the opinion that the Quinsam Reserve belongs to the We-way-akay (Cape Mudge) Indians and that ***the only reason for it appearing in the Official Schedule as belonging to the Wewayakums is on account of a typographical error*** *. . . "* [emphasis added]

- Ditchburn's February 8, 1932 letter to Magistrate Bates specifically refers to the Report of the McKenna-McBride Commission: [JR v. 13, p. 2315-6]

  ". . . The Royal Commission, on page 388 of its Report, in Table A, remarks re Quinsam: 'This reserve appears in the Schedule as one of the Wewayakum Band. It is not so regarded by that Band and is claimed by the Wewayakay Band, with right according to Agent Halliday. It has been counted as in Schedule in estimating per capita acreage.'

  It is apparent from the foregoing that the We-way-a-kum Band had not claimed Quinsam Reserve No. 12, yet, it confirmed the Reserve together with No. 11 for the We- way-a-kum Band ... as numbered and described in the official (1913) Schedule of Reserves. ***This, however, is believed to have been an oversight made by the Commission who followed the "ditto" mark against No. 12 Reserve*** *just as had apparently been done by the Department. . . . "* [Emphasis added]

45. Finally, Campbell River suggests that the Crown has only now, in response to its action, attempted to rectify the ditto mark error [¶81-82]. This contention overlooks the evidence of the procedure adopted and followed by DIA in the 1930's for correcting this and other errors in DIA's schedule [see ¶16 above, and JR v. 14, p. 2364, 2370, 2372 & 2397; v. 15, p. 2625]. DIA started this process with the appointment of Indian Agent Todd in 1934. Over the next eight years Todd held numerous band meetings, conducted inquiries, took evidence from band elders and finally obtained sworn Declarations of the Chief and Principal Men of numerous bands in the Kwawkewlth Agency, (including Campbell River's 1936 Declaration referred to above in ¶17, 35 and 36). This was all done to provide DIA with a complete schedule setting out the sub-tribal allocation of all reserves in the Agency, correct according to the Indians' own opinion [JR v. 14, p. 2372].

46. Todd's suggested revisions were forwarded to, and approved by DIA in July of 1943 [JR v. 15, p. 2625]. The new 1943 schedule incorporated these revisions including the correct listing of the Campbell River and Quinsam Reserves [JR v. 14, p. 2428]. As a result of this work the 1943 schedule correctly listed the allocation of the reserves in that Agency, including the allocation of the Campbell River Reserve to Campbell River and the Quinsam Reserve to Cape Mudge. In preparing the 1943 schedule careful consideration was given to ensuring that the allocation of all reserves listed was correct according to the opinion of the Indians. This process should be contrasted with

the absence of any evidence of a similar process being followed in preparing the 1901, 1902 or 1913 schedules. Considerably more weight should thus be given to the 1943 schedule as evidence of the correct allocation of the Kwawkewlth Agency reserves.

B. Effect of the Schedules Appended to Orders in Council 911, 1265 and 1036: Orders in Council 911, 1265 and 1036 do not express an intention to give legislative force to the appended schedules of reserves. Alternatively, if these appended schedules were given legislative force, then the Courts below had the jurisdiction to correct a clerical error contained in these schedules.

10

1. Schedules Do Not Have Legislative Force by Reason of Being Appended to Orders in Council 911, 1265 and 1036

47. B.C. Order in Councils 911 and 1036 and Federal Order in Council 1265 [JR v. 13, p. 2196, 2201 & v. 14 p. 2409] all attached as a schedule, a list of the reserves that were "*Confirmed*" by the McKenna McBride Commission. The "C*onfirmations of Reserves*" portion of these schedules all indicate by way of ditto marks the "*Wewayakum Band*" next to the Quinsam Reserve. The lists were derived from DIA's schedule of reserves. The Campbell River Band says that the appended schedules themselves have been given legislative force and cannot be corrected without enacting
20 further legislation, even if they contain a clerical error.

48. Campbell River's argument however fails to distinguish between the legal effect given to the actual Orders in Council, as opposed to the appended schedules. The Orders in Council simply confirm and approve the appended schedules. They do not express an intention to give legislative force to everything contained in the appended schedules.

49. This Court in *A.G. B.C. v. A.G. Canada; Re an Act respecting the Vancouver Island Railway,* [1994] 2 S.C.R. 41 has determined that a schedule appended to legislation for the purpose of being "*ratified and confirmed*", is not itself given statutory force. The issue in that case was whether an
30 agreement containing an undertaking to "*continuously*" operate a railway, was given statutory force as a result of having been appended to, and ratified by a federal statute. The relevant wording of the federal statute in that case provided that:

> "2. ***The agreement, a copy of which, with specification, is hereto appended as a schedule****, for the construction, equipment, maintenance and working of a continuous line of railway of a uniform gauge of four feet, eight and one half inches, from Esquimalt to Nanaimo in Vancouver Island, British Columbia, and also for the construction, equipment, maintenance and working of a telegraph line along the line of the said railway,* ***is hereby***

> ***approved and ratified,*** *and the Governor in Council is authorized to carry out the provisions thereof according to their purport."*

50. Iacobucci J., speaking for the majority concluded that as a matter of statutory interpretation the above cited provisions of the federal statute were not intended to confer statutory force on the appended schedule. At p. 109 Iacobucci J. stated:

> *". . . I discern a common thread in the judgments of Rinfret C.J. and Kerwin J.,* [in *Ottawa Electric Railway Co. v. Corporation of the City of Ottawa*, [1945] S.C.R. 105] *namely, that* ***statutory ratification and confirmation of a scheduled agreement, standing alone, is generally insufficient reason to conclude that such an agreement constitutes a part of the statute itself.***" [emphasis added]

51. In this case both B.C. Order in Council 911 and Federal Order in Council 1265, "*approve and confirm*" these appended schedules pursuant to the following provision:

> "***That the Report of the Royal Commission*** *of Indian Affairs as made under date of the 30th day of June 1916, with the amendments thereto as made by the representatives of the two Governments, viz: Mr. W.E. Ditchburn, representing the Dominion Government and Major J.W. Clark, representing the Province, in so far as it covers the adjustments, readjustments or confirmation of the Reductions, Cut-offs and additions in respect of Indian Reserves proposed in the said report of the Royal Commission,* ***as set out in the annexed schedules, be approved and confirmed*** *as constituting full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfilment of the said Agreement of the 24th day of September 1912, and also of Section 13 of the Terms of Union, . . .*" [JR v. 13, p. 2192 & 2203 - emphasis added]

52. Both Orders in Council 911 and 1265 go on to authorize the completion of certain surveys of the scheduled reserves, and state that following "*completion and due acceptance of such surveys, conveyance be made by the Province to the Dominion in accordance with Section 7 of the said Agreement of the 24th day of September 1912.*" [JR v. 13, p. 2198 & 2204]. This conveyance was ultimately effected by B.C. Order in Council 1036, passed on July 29th 1938. Order in Council 1036 again appended a schedule of reserves identifying the land that was to be conveyed from B.C. to Canada. The operative wording of Order in Council 1036 is that ". . . *the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada . . .*" [JR v. 14, p. 2409].

53. Nothing in the wording of Orders in Council 911, 1265 or 1036 compels the conclusion that statutory force was actually conferred on the appended schedules. The schedules were appended

to these Orders in Council simply for the purpose of being "*approved and confirmed*", and served to simply identify the actual lands to which the Orders in Council were intended to apply.

2. The Court has Jurisdiction to Correct a Clerical Error

54. Alternatively, if the schedules appended to Orders-in Council 911, 1265 and 1036 do have legislative force, then the Trial Judge had the jurisdiction to correct a clerical error contained in these schedules: R. Sullivan, Driedger on the Construction of Statutes 3rd ed., (Toronto: Butterworths, 1994) at pages 104-110, *Dunstan et al v. Hell's Gate Enterprises Ltd. et al* (1985), 22 D.L.R. (4th), (B.C.S.C.), *Sale, Franche and Ricard et al v. Wills*, [1972] 1 W.W.R. 138, *R. v. Eaton*, [1973] 4 W.W.R. 101.

55. Both the Trial Judge and the Court of Appeal were satisfied that the listing of the Quinsam Reserve as belonging to Campbell River in the various schedules was due to a clerical error [FCA, JR v. 24, p. 4189-90, ¶77 & p. 4197, ¶86] The question of whether such a clerical error occurred is a strictly factual issue rooted in the Trial Judge's review and analysis of all the evidence at Trial. Campbell River has not shown a "*palpable and overriding error*" in these findings of fact: *Stein v. The Ship "Kathy K", supra, Van der Peet, supra.*

56. The presumption against the interpretation of legislation so as to prejudicially affect existing rights also bolsters correcting the ditto mark error. This presumption was affirmed by this Court in *Spooner Oils Ltd. v. Turner Valley Gas Conservation Sea Board*, [1933] S.C.R. 629. Duff C.J. (at page 638) stated:

> *"A legislative enactment is not to be read as prejudicially affecting accrued rights, or 'an existing status' unless the language in which it is expressed requires such a construction. The rule is described by Coke as a 'law of Parliament' meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference."*

57. This presumption supports an interpretation of Orders-in-Council 911, 1265 and 1036 which does not divest Cape Mudge of its interest in the Quinsam Reserve. The incorporation of the ditto mark error into the schedules appended to these Orders-in-Council does not express a clear and unequivocal intention to re-allocate this reserve to Campbell River.

58. Finally, it is important to note that the clerical error with respect to the Quinsam Reserve in the schedules to Orders-in-Council 911, 1265 and 1036 did not change the opinion of the Cape Mudge and Campbell River people as to the correct allocation of the Quinsam Reserve. The Trial Judge found that:

> "*... the Cape Mudge Indians continued to use and improve Quinsam for much of this century without interference from the Campbell River Indians. The only objection during this period came from James Smith, Bill Roberts and Johnny Galogumie who sought legal advice on their 'alleged' entitlement to Reserve No.12 in the 1930's. However, it appears that no action to enforce their claim was ever taken. Further, the evidence would suggest that Bill Roberts and James Smith's opinion as to the ownership of Reserve No.12 was not shared by the majority of the Campbell River Indians or the Chief*". [FCTD, JR v. 24, p. 4064]

C. No Breach of Fiduciary Duty: The Crown's Conduct was Beyond Reproach - The Courts below correctly found that the Crown has not breached any duty owed to Campbell River.

1. Crown's Duty Cannot be Considered in Isolation

59. Campbell River contends that the Crown owed "*fiduciary duties in respect of Quinsam* [Reserve] *exclusively to Campbell River*" [at ¶95] and those duties were breached when the Crown failed to protect its alleged interest in the Quinsam Reserve [at ¶94]. This argument of the band misses the real point in issue in these appeals. The dispute is not confined to one as between a single band and the Crown, as has arisen in other cases which have come before this Court; *Guerin et al v. The Queen*, [1984] 2 S.C.R. 335, *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344. Rather, in each of these two appeals the two bands both claim the same Reserve(s). It would be wrong to consider the duties alleged to be owing to either Campbell River or Cape Mudge in isolation.

60. It is also important to remember that while a fiduciary relationship may have existed between each of the appellant bands and the Crown during material years it is not every dealing between them that gives rise to fiduciary obligations on the part of the Crown. *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

61. Generally speaking, a fiduciary obligation arises within a fiduciary relationship when one person possesses unilateral power or discretion on a matter affecting a second "peculiarly

vulnerable" person; *Blueberry River*, *supra*, at 371, and see *Frame v. Smith*, [1987] 2 S.C.R. 99. At the heart of the fiduciary obligation is the notion that the fiduciary must act solely for the benefit of the vulnerable party and for no other; *Blueberry River*, *supra*, at 372, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. He / she must act with utmost loyalty and care. Disloyalty or dishonesty will constitute a breach of fiduciary obligation; *Giradet v. Crease* (1987), 11 B.C.L.R. (2d) 361 (B.C.C.A.) approved of in *Lac Minerals*, *supra*, at pp. 597,598 and 647 and in *Hodgkinson*, *supra*.

62. Neither band was peculiarly vulnerable and did not abnegate or entrust their respective power of decision as to what steps, if any, or position to take as regards the reserves in question; *Blueberry River*, *supra*, at 372. This is seen most clearly in the lead up to, and passage of, the 1907 Resolution and the signing of the 1936 Declarations. Each band, of its own accord, decided to have the Campbell River Reserve rest with Campbell River and the Quinsam Reserve with Cape Mudge.

63. Therefore, the indicia for a fiduciary obligation as set out in *Frame, supra,* - discretion, power to unilaterally affect interests, and vulnerability - do not exist here.

64. This Court has also found that the existence of a fiduciary obligation may be determined by asking the question: "*...whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.*":. *Hodgkinson*, *supra*, at p. 409.

65. Leaving aside that from and after 1907 decades have passed where neither band advanced a claim to the other's reserve and, in fact, confirmed the allocation of the now disputed reserve to the other band, the very nature of the situation presented by two bands' claiming each other's reserve precludes the Crown from having been in a position to act exclusively for one band.

66. Where a band advances a claim over a reserve known to be set apart for and used by another band the first band cannot reasonably expect that the Crown would act exclusively in the interests of the first band and, in doing so, to the detriment of the second band.

67. It can be said that the Crown must act with honour in dealing with aboriginal people, but this is not a case where either a private law or a *sui generis* fiduciary duty is engaged. In this case,

each band was fully informed and in a position to make its own decision as to what steps, if any, or position to take. The Crown balanced both Campbell River and Cape Mudge's interests and facilitated a consensual resolution of any dispute between them [FCTD, JR v. 24, p 4055-7; FCA, JR v. 24, p 4183-4, ¶67]. The Crown cannot be said to have favoured one band's interests to the detriment of the other. This balancing of the two bands' interests is another distinctive element of the *sui generis* relationship between the Crown and aboriginal people.

2. The Crown's Conduct was Beyond Reproach

68. In any event, if a fiduciary obligation was owed the Crown did not breach any fiduciary obligation to either band. The concurrent findings of the Courts below are that the Crown acted properly throughout. In particular the Trial Judge found that:

- the Crown acted in good faith in responding to inquiries by both Appellant bands regarding the allocation of the Campbell River and Quinsam Reserves; [FCTD, JR v. 24, p. 4057]
- both Appellant bands were, throughout this century aware of the Crown's position regarding the allocation of the Campbell River and Quinsam Reserves; [FCTD, JR v. 24, p. 4052]
- there was no evidence that the Crown failed to prudently advise both Appellant bands; [FCTD, JR v. 24, p. 4052, 4059 & 4122]
- there was no evidence that the Crown or its employees deliberately misrepresented material facts to either Appellant band; [FCTD, JR v. 24, p. 4052, 4059 & 4122]
- both Appellant bands had accepted the *status quo* for many decades, after making inquiries as to their legal rights to the reserves. During this period both bands confirmed by their express statements and conduct on numerous occasions the present state of the allocation of the Campbell River and Quinsam Reserves [FCTD, JR v. 23, p. 3934].

69. According to Campbell River the Crown's schedules listing reserve lands by way of "*ditto marks*" resulted in confusion regarding the entitlement to Campbell River's reserves [at ¶100]. The Crown acknowledges that the early schedules contained errors, and in particular contained the "*ditto mark error*" described above at ¶11. It is, however, incorrect to suggest that the Crown did nothing to correct these errors. The process described in paragraphs 15, 16, 45 and 46 above, and in the Trial Judge's reasons [see JR v. 24, p. 2074-7] was instituted by DIA for the very purpose of correcting these errors, and ultimately resulted in the publication of the 1943 schedule, which correctly listed the allocation of the Campbell River and Quinsam Reserves.

70. Campbell River also asserts that the Crown failed to "*enforce*" its alleged claim to the Quinsam Reserve, "*encouraged Cape Mudge to trespass*" on this reserve, and "*obstructed*" Campbell River's claims by failing to pay for certain advice [at ¶101]. Campbell River is wrong in these contentions because:

- for the reasons set out above [at ¶27-58] Campbell River does not have a right to the Quinsam Reserve. As a result the Crown was never under a duty (fiduciary or otherwise) to "*enforce*" Campbell River's alleged claim;
- Campbell River has not cited any evidence in support of its statement that Cape Mudge was "*encouraged*" by DIA to trespass on the Quinsam Reserve. The evidence at Trial showed that Cape Mudge has openly occupied and used the Quinsam Reserve for much of the last century without objection from a majority of the Campbell River people [FCTD, JR v. 24, p. 4064-5]. During this period Cape Mudge logged, cleared and surveyed the Quinsam Reserve and constructed roads and houses on the reserve. The only objection to such use (prior to the start of this litigation) appears to have come from three individuals: James Smith, Bill Roberts and Johnny Galogumie who sought advice from a magistrate on their alleged entitlement to the Quinsam Reserve in the 1930's. No action to enforce their alleged claim was however taken. Moreover, the Trial Judge found that the opinion of these three individuals was not shared by the majority of the Campbell River people or their Chief [FCTD, JR v. 24, p. 4064-5].
- DIA did not obstruct Campbell River's efforts to obtain information regarding the Quinsam Reserve. The evidence at Trial established that by 1932, DIA's records regarding the Campbell River and Quinsam Reserves were all made available for inspection by members of the band and their representative Magistrate Bates. In fact Magistrate Bates, and Campbell River members Bill Roberts and James Smith, travelled to Victoria to review these records and meet with Commissioner Ditchburn for two days on February 1 and 2, 1932 [JR v. 13, p. 2318; v. 15 p. 2569 & 2671]. The Trial Judge found that there was "*no suggestion in the documentary evidence that the knowledge of these individuals was incomplete or that they failed to understand their legal position.*" [FCTD, JR v. 24, p. 4068][1]. Following this trip

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[1]The Trial Judge also found that:"... *both bands, through their political connections and participation in native organizations such as the Allied Tribes and North American Brotherhood had from the 1920's onward access to advice on Indian land matters through their connections with Andrew Paull (who was legally trained), Arthur O'Meara or lawyers retained by the Indians to act in defending their potlatch charges.*" [FCTD, JR v. 24, p. 4069].

to Victoria, Ditchburn wrote to Magistrate Bates, on February 8, 1932, a comprehensive letter setting out in detail the entire history of the survey and allocation of the Campbell River and Quinsam Reserves [JR v. 13, p. 2314]. This letter made full disclosure of all relevant facts including the standing of the Reserves as shown in the 1902 Schedule, a quotation of the full text of the 1907 Resolution and DIA's explanation of the ditto mark error. Ditchburn's letter also accurately summarizes the evidence before the McKenna-McBride Commission in 1914 including references to specific volume and page numbers of the Commission's Report.[2] Campbell River was therefore accurately informed in 1932. They had the opportunity to inspect all relevant documents and to consult with Magistrate Bates as to the possibility of any legal claim to the Quinsam Reserve.

71. Campbell River also alleges that the Crown breached its duty in obtaining the 1936 Declaration from the band's Chief and Principal Men [at ¶102-104]. This is incorrect. This Declaration was prepared by DIA, along with other similar Declarations after several years of consultation with the bands of the Kwawkewkth Agency. During this period DIA held band meetings, conducted inquiries and took evidence from band elders [JR v. 14, p. 2372]. The purpose of these consultations was to prepare Declarations (and subsequently a schedule) which correctly listed, according to the views of the local aboriginal peoples, the sub-tribal allocation of their reserves. In the words of DIA's Commissioner Ditchburn: *"in order that the disputed points may be straightened out, and whatever decision is arrived at, it should be covered by resolutions passed by the bands and signed by the chiefs in order that this Department may then be in a position to re-arrange the Schedule of Reserves to suit the Indians concerned."* [JR v. 13, p. 2236]. Based on this evidence the Trial Judge correctly found that *"there is no evidence to impeach the significance of this declaration, or that the individuals who swore this declaration did so other than with full knowledge of its contents and of their own free will."* [FCTD, JR v. 24, p. 4066].

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[2]Campbell River members were by the 1930's also fully aware of the contents of the McKenna-McBride Commission Report. This is clear from correspondence sent by band members. In a letter of May 8, 1937, Bill Roberts referred to the Quinsam Reserve as having been confirmed for the Campbell River Indians *"in the report of the Royal Commission on Indian Affairs in 1913"* [JR v. 14, p. 2394]. On May 20, 1937, James Smith wrote to DIA and quoted directly from the report of the McKenna-McBride Commission (including a citation of the Volume and page reference) [JR v. 14, p. 2396].

72. Campbell River argues that there was no evidence that at the time of signing the 1936 Declaration, Campbell River was aware of the McKenna - McBride Commission "*confirmation*" of the Quinsam Reserve [at ¶ 102]. Not so. Ditchburn's 1932 letter to Campbell River and Magistrate Bates *specifically* refers to the page and volume of the Commission's report and its "*confirmation*" of the Quinsam Reserve [JR v. 13, p. 2314].

73. Finally, not every failure by a fiduciary to use due care and skill will constitute a breach of a fiduciary obligation. This important distinction was emphasised by this Court in *Lac Minerals Ltd.*, *supra*, at page 597:

> *"Furthermore,* ***not all obligations existing between the parties to a well recognized fiduciary relationship will be fiduciary in nature****. Southin J. in Giradet v. Crease & Co. (1987), 11 B.C.L.R. (2d) 361 (S.C.), observed that the obligation of a solicitor to use care and skill is the same obligation as that of any person who undertakes to carry out a task for reward. Failure to do so does not necessarily result in a breach of fiduciary duty but simply a breach of contract or negligence."*

74. There is nothing about the Crown's conduct which can be said to amount to a breach of duty. Quite the opposite is in fact the case, as submitted above.

75. In summary, the concurrent findings of the Courts below found that the Crown acted in good faith and beyond reproach throughout the relevant time periods. The evidence accepted by the Trial Judge establishes that Campbell River was accurately informed and aware of DIA's position regarding the Quinsam Reserves and that Campbell River had the benefit of independent advice. The use and occupation of the Quinsam Reserve by Cape Mudge was open and unconcealed over a period of many decades. During this period, Campbell River confirmed by their express statements and conduct on numerous occasions the present allocation of the Quinsam Reserve. In contrast to the cases relied on by Campbell River where the Crown was found to have concealed information and acted unconscionably, the evidence and findings in this case establish that the Crown did not breach any fiduciary duty to Campbell River. There is no basis to interfere with these findings; *Stein v. The Ship "Kathy K", supra, Van der Peet, supra.*

D. Statutory and Equitable Limitation Defences: Campbell River's causes of action for declarations of ownership and compensation are barred by the *Federal Court Act*, R.S.C., 1985, c. F-7, s. 39 incorporating the B.C. *Limitation Act*, R.S.B.C., 1979, c. 236 and prior enactments. The equitable defences of laches and acquiescence apply to bar any claim for relief advanced by Campbell River which is not barred by the statutory limitation periods.

1. Introduction

76. The purpose of limitation periods and factors that support the rationale for applying limitation periods are discussed in the Crown's response to the Cape Mudge factum at paragraphs 94 to 100.

2. Applicability of the B.C. *Limitation Act* as Incorporated by Reference as Valid Federal Law

77. Section 38, now s. 39, of the *Federal Court Act*, which applies to this litigation, adopts the limitations legislation in place in the Province where the cause of action arose; *Blueberry River*, *supra*, at 402. McLachlin J., (with the concurrence of the majority on this issue) stated at p. 402:

> *"The Crown argues that if it breached its fiduciary duty to the Band, by conveying the reserve to the DVLA* [Director Veterans Land Act]*, the action on the breach is statute-barred. The Bands dispute this contention.*
>
> ***Section 38(1) of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), which applies to this litigation (now R.S.C. 1985 c. F-7, s. 39(1)), adopts the limitations legislation in place in the province where the cause of action arose. The relevant legislation in British Columbia is the Limitation Act,*** *R.S.B.C. 1979, c. 236 (previously Limitations Act, S.B.C. 1975, c. 37).* ***Section 8 of that Act places a general ultimate 30-year limitation on any action: no action may be brought after the expiration of 30 years from the date on which the right to do so arose.*** *In addition, s. 3(2) fixes a 10-year limitation on actions for breach of trust, and s. 3(4) places a 6-year limitation on actions which are not listed in the Act. There is no specific limitation in the Act on claims for breach of fiduciary duty.* ***The 6- and 10-year limitations, but not the general 30-year ultimate limitation, may be postponed in certain circumstances.*** *It is important to determine whether these limitations will affect recovery by the plaintiffs.*
>
> *(a) The sale of surface rights*
>
> *I earlier concluded that no* ***breach of duty with respect to the sale of the surface rights*** *has been proven. If it had been,* ***it would be statute-barred, because the sale to the DVLA took place in March, 1948, 30 years and 6 months prior to the filing of this claim*** *in September 1978.* [emphasis added]

and at p. 408 concluded with the following statement:

> *"Other arguments, neither presented nor considered below, were presented by the Bands and interveners in support of relaxing or not applying the limitation periods prescribed by the*

B.C. Limitation Act. I find them unpersuasive in the context of this case and consider them no further."

78. The decision in *Blueberry River* is not distinguishable from the case at bar for the reasons set out in the Crown's response to the Cape Mudge factum at paragraph 102.

3. Constitutional Law and Section 39 of the *Federal Court Act*

79. The Court has stated Constitutional Question 1 with respect to the B.C.*Limitation Act* as set out at ¶23 above. With reference to this Constitutional Question, what the B.C.*Limitation Act* does is extinguish the cause of action in the person who formerly had such. It is not an extinguishment of any Indian interest. The *Limitation Act* addresses the date by which a claim must be brought to court. If it is not brought within the applicable period, the cause of action is extinguished and cannot be enforced through the courts.

80. Prior to 1992, s. 39(3) of the *Federal Court Act* provided that provincial limitation periods applied in proceedings by or against the Crown. In 1990, subsection (3) was repealed (S.C. 1990, c. 8, s. 10, effective Feb. 1, 1992) and, in its place s. 32 of the*Crown Liability and Proceedings Act, R.S.C.* 1985, c. C-50 was enacted. After 1992, s.39 of the*Federal Court Act* applies as regards all proceedings in the Federal Court. Section 32 of the *Crown Liability and Proceeding Act* applies specifically as regards proceedings by or against the Crown. Both sections incorporate by reference as federal law the limitation legislation of the Province in which the cause of action arose, in this case, British Columbia.

81. The point is that both s. 39 of the *Federal Court Act*, and s. 32 of the *Crown Liability and Proceedings Act*, are a valid exercise of Parliament's exclusive jurisdiction in respect of proceedings before the Federal Court of Canada and the liability of the federal Crown. Provincial limitation laws incorporated by reference through s. 39 and s. 32 of these enactments operate as valid federal law and therefore does not infringe on the federal legislative jurisdiction in respect of "*Indians and Lands Reserved for Indians*".

82. In brief, Campbell River's argument that the provisions of the B.C. *Limitation Act* are constitutionally inapplicable to reserve land [at ¶127-131] is based on a misapprehension of the difference between valid incorporation by reference of provincial legislation and invalid delegation of legislative authority to a province. Parliament could have repeated in the*Federal Court Act* and

the *Crown Liability and Proceeding Act* the same limitation provisions contained in the B.C. *Limitation Act* as legislation applicable to proceedings before the Federal Court, and defining the terms on which the liability of the federal Crown can be engaged. Alternatively, it was equally within Parliament's competence to **adopt by reference** the provincial limitation legislation as it exists from time to time. This Court in *Coughlin v. Ontario Highway Transport Board,* [1968] S.C.R. 569 expressly approved such a process of adoption by reference. At p. 575, Cartwright J. (as he then was) stated:

> *"In my opinion there is here* ***no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist****, a course which has been held constitutionally valid by this Court in Attorney General for Ontario v. Scott (1955), 1 D.L.R. (2d) 433, and by the Court of Appeal for Ontario in R. v. Glibbery (1962), 36 D.L.R. (2d) 548."*

4. The *Indian Act*

83. Contrary to Campbell River's argument, there is no inherent conflict between laws which place finite limits on the time within which litigation relating to reserve land may be brought and the protection generally afforded to reserve land under the *Indian Act.* It is important to distinguish between laws which govern the conduct of litigation, and laws which generally govern reserve lands.

84. Campbell River suggests [at ¶119] that the *Indian Act* establishes a "*comprehensive scheme*" relating to reserve lands. The *Indian Act* however does not establish a comprehensive scheme relating to the litigation and adjudication of disputes regarding reserves. The adjudication of such disputes is within the jurisdiction of the Courts, and in the case of the Federal Court, is governed by the provisions of the *Federal Court Act*, including s. 39 of that *Act*, and in the case of the Crown is governed by s. 32 of the *Crown Liability and Proceeding Act*, both of which incorporate by reference as federal law the provincial limitation legislation. Taken to its logical conclusion, Campbell River's argument would also suggest that Federal Court's jurisdiction under the *Federal Court Act* to adjudicate disputes, and make orders regarding the entitlement to possession of reserve lands, could be construed as conflicting with the provisions of the *Indian Act.* This would result in an absurd interpretation of both the *Federal Court Act* and the *Indian Act.* It is submitted that an equally absurd result would follow if the application of any limitation period in the adjudication of such disputes were to be held to be in conflict with the provisions of the *Indian Act.*

85. It should also be noted that limitation periods may well serve to protect a band's interest in its reserve from claims by other parties, and thus compliment the protection afforded to reserve land under the *Indian Act*. It is presumably for this reason that Campbell River (and Cape Mudge) have both relied, in their pleadings, on statutory and equitable limitation periods to defend against the other band's claims.[3]

86. Campbell River also suggests [at ¶129] that an analogy be drawn between the interpretation given by the courts to s. 88 of the *Indian Act* and the interpretation to be given to s. 39 of the *Federal Court Act*. Section 39 is distinguishable, however, from s. 88 for the following reasons:

- s. 88 operates over a vast range of provincial laws of general application in making such laws applicable to Indians and lands reserved for Indians and, in this way, is less specific than is s. 39, and
- s. 39, on the other hand, evinces a clear and plain intention to incorporate by reference as valid federal law the provincial limitation legislation in force from time to time in the province in which the cause of action arose. This is so irrespective of how s. 88 may be interpreted, a point which need not be answered in this case.

87. Moreover the "*clear and plain*" test applied by this Court in *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, to s. 88 of the *Indian Act* with respect to the extinguishment of aboriginal rights arises only in connection with the extinguishment of *constitutionally protected aboriginal rights*. This issue does not arise in the context of the current litigation for the following reasons:

- As noted above at ¶28, Campbell River has not claimed any aboriginal right or title to the Quinsam Reserve. Therefore there is no question as to the extinguishment of an "*aboriginal right or title*".
- In the alternative, even if Campbell River had asserted an aboriginal right, the mere assertion of such a right does not attract the protection of the *Constitution Act, 1982* s. 35. Section 35 only operates to protect a *proven and existing aboriginal right*. The incorporation and application of a limitation period as valid federal law under s. 39 of the *Federal Court*

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[3]See: Campbell River Reply and Statement of Defence to the Cape Mudge Counterclaim in action No. T-2652-85, ¶14 & 16 [JR v. 2, p. 58-59], and Cape Mudge Further Amended Statement of Defence and Counterclaim in action No. T-2652-85, ¶14 & 15 [JR v. 2, p. 152-3].

Act simply creates a bar to the prosecution through litigation of an alleged claim: it does not "*extinguish*" any established and proven aboriginal rights.

88. From a broader policy perspective, this Court has indicated in the context of aboriginal claims that negotiation is preferable over litigation: *Delgamuukw*, *supra* at p. 1123 and 1134. The existence and application of limitation periods encourages negotiation of historical claims and thereby affords avenues of relief that would not otherwise be available if the claim were litigated. The federal Specific Claims Policy provides a means to resolve historical claims of bands that disclose an outstanding lawful obligation related to the administration of land and other Indian assets or the fulfilment of treaties, all within the scope of the Policy. Generally speaking, when a band seeks to negotiate a claim within the Specific Claims process rather than litigate, limitation periods are not applied to preclude resolution of the Band's claim.

5. *Federal Real Property Act*

89. Campbell River also relies on the *Federal Real Property Act* S.C. 1991, c. 50, and in particular s. 14 which states that "*No person acquires any federal real property by prescription*". The Crown submits that s. 14 only applies in cases where a party seeks to establish title to land *against the Crown*. In this case there is no question as to the Crown's underlying title to the Quinsam Reserve. The dispute is limited to determining the beneficial entitlement to the Quinsam Reserve which must be resolved as between Cape Mudge and Campbell River. Regardless of whether the claims of either Cape Mudge or Campbell River ultimately prevail, the entitlement claimed is a beneficial interest to the land comprising the Quinsam Reserve: the Crown's underlying title to the land will not be defeated or lost by prescription or any other means.

90. Moreover, the Crown does not assert that Cape Mudge (or any other party) has "*acquired*" any entitlement to the Quinsam Reserve by prescription. The Crown only contends that Campbell River's cause of action for a declaration of entitlement to the Quinsam Reserve is barred by the applicable limitation periods. The *Federal Real Property Act* therefore does not assist Campbell River.[4]

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[4]It should also be noted that s. 14 of the *Federal Real Property Act* came into force in 1950 (*Public Lands Grants Act* S.C. 1950, c. 19, s. 5). Thus, even if this section were to have application in this case, it would only apply to claims not statute barred prior to 1950.

6. No Enduring Right to the Quinsam Reserve

91. It is important to note that the Trial Judge found that the cause of action alleged by Campbell River arose on the date of the relevant Orders-in-Council relied on by Campbell River, the last of which was passed in 1938. No new cause of action arose after 1938 [FCTDF, JR v. 23, p. 3927]. The 30-year limitation period therefore expired, at the latest, in 1968; 17 years prior to the commencement of the band's action in 1985.

92. Campbell River seeks to circumvent the limitation periods by suggesting that its claim for a "*declaration of possession*" [at ¶110] as to ownership of the Quinsam Reserve is not subject to a limitation period. In particular, Campbell River argues that the Orders in Council which allegedly conveyed the Quinsam Reserve to the Crown "*in trust*" for Campbell River remain in effect and must be enforced [¶107 and 112]. This argument cannot succeed.

- For the reasons set out above [at ¶47-53] the Orders in Council were not intended to confer legislative force on the appended schedules: *A.G. of B.C. v. A.G. of Canada, supra*. Thus Campbell River has not established a statutory entitlement to the Quinsam Reserve;
- Alternatively, even if a statutory duty or trust were established, any claim to enforce such a statutory duty or trust would itself be subject to specific limitation periods under the B.C. *Limitation Act*. Section s. 3 (1)(a) of the *Limitation Act* prescribes a two-year limitation period for claims arising from a breach of statutory duty:
- Section 3(2) of the *Limitation Act* prescribes a 10 year limitation period for claims for breach of trust or actions to recover trust property.[5] Under s. 3(2) trustees of every description (including constructive trustees as defined in section 1 of the *Act*) have the protection of a 10 year limitation period regardless of the nature of their breach. Whether the trustee is alleged to have committed a fraudulent breach of trust, or to have converted trust property to their own use, the right of action against them is extinguished after 10 years. Pursuant to s. 14 of the *Limitation Act* these provisions are specifically made to apply retroactively to causes of action arising before the enactment of the *Limitation Act* in 1975: *Bera v. Marr* (1986), 27 D.L.R. (4th) 161 (B.C.C.A.).

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[5]Campbell River has alleged that pursuant to Order-in-Council No. 1036 legal title to the Campbell River and Quinsam Reserves was conveyed by the Province to the Crown "***in trust*** *for the use and benefit of the Plaintiff [Campbell River] Band*": Campbell River Further Amended Statement of Claim in action T-2652-85, para. 17 and 18 [JR v. 2, p. 84-5].

- Section 3(4) of the *Limitation Act* sets a 6 year limitation period for all claims not specifically listed in the *Act* which has been held by this Court in *Blueberry River* to include claims for breach of fiduciary duty;
- Section 8 of the *Limitation Act* sets an absolute limitation period of 30 years on all actions, including claims for breach of fiduciary duty. This Court in *Blueberry River* held at p. 402 that:

> "***Section 8 of that Act places a general ultimate 30-year limitation on any action: no action may be brought after the expiration of 30 years from the date on which the right to do so arose.*** *In addition, s. 3(2) fixes a 10-year limitation on actions for breach of trust, and s. 3(4) places a 6-year limitation on actions which are not listed in the Act. There is no specific limitation in the Act on claims for breach of fiduciary duty.* ***The 6- and 10-year limitations, but not the general 30-year ultimate limitation, may be postponed in certain circumstances.***" [emphasis added]

- Moreover, upon the expiry of any limitation period under the *Limitation Act* the cause of action is extinguished pursuant to s. 9.

93. Under the *Limitation Act* the 2, 6, 10 and 30 year limitation periods referred to above are all calculated to run from the "*date on which the right to do so arose*": that is the date on which a cause of action first accrues according to common law principles, whether known or unknown to the plaintiff at that time: *Wittman v. Emmott* (1991), 77 D.L.R. (4th) 77 (B.C.C.A.); leave to appeal refused (1991) 58 B.C.L.R. (2d) XXXIV. In the case of declaratory relief, the cause of action arose as of the date of the event giving rise to the declaratory relief, i.e. 1938.

7. No Continuing Breach or Continuing Trespass

94. Contrary to what Campbell River argues [at ¶111 - 114] the Crown was not under a "*continuous fiduciary duty*" since 1938, nor has Cape Mudge "*committed a continuous trespass*" since the 1930's. Even if Campbell River were to establish a fiduciary duty and breach thereof (which they cannot), neither a "*continuing duty*" nor a "*continuing trespass*" will avoid the application of a limitation period.

95. Implying an ongoing obligation to rectify a breach would effectively mean that no statutory limitation period would ever apply to protect a fiduciary. Such a "*continuing duty*" would result in actions being brought long after the occurrence of the events upon which the cause of action was based. This would clearly interfere with the operation of the 30 year ultimate limitation period in s.

8 of the *Limitation Act* by indefinitely postponing the start of the 30 year period. [*Blueberry River, supra*, at p. 402; *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 (F.C.), at p. 34-5; *Costigan v. Ruzicka* (1984), 13 D.L.R. (4th) 368 n (Alta. C.A.) at p. 374, (leave to Appeal to this Court refused), *Buckland v. Ibbotson* (1902), 28 V.L.R. 688 (V.S.C.) at p. 701 [6].

96. Campbell River [at ¶112] relies on this Court's decision in *Blueberry River* in support of its "*continuing duty*" argument. It is important to distinguish, however, that the breach of fiduciary duty in *Blueberry River* (committed by the Crown when it failed to correct its earlier error) occurred *within* the 30 year limitation period: *Blueberry River* at p. 406-7. All causes of action in *Blueberry River* which were outside the 30 year limitation period were held to be limitation barred and the causes of action extinguished pursuant to the *Limitation Act*. In this case the Trial Judge specifically found that "*no new cause of action arose after 1938.*" [FCTD, JR v. 23, p. 3927].

97. In *National Coal Board v. Galley,* [1958] 1 W.L.R. 16 (C.A.) the English Court of Appeal held (at p. 27) that a continuing wrong and a continuing cause of action is not "*constituted by repeated breaches of recurring obligations nor by intermittent breaches of a continuing obligation.* ***There must be a quality of continuance both in the breach and in the obligation***". [emphasis added] Campbell River's alleged cause of action against the Crown arose only once. The fact that Campbell River may allege that it has suffered a loss of use of the Quinsam Reserve between 1938 and the present does not give rise in law to a continuing cause of action.

98. Further, even exceptional causes of action such as trespass do not continue forever. In actions for possession of land, time under the applicable limitation period commences to run against the dispossessed land owner from the date on which any adverse possession commenced: that is the first day on which the trespass occurred.

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[6] A continuing duty would also conflict with s. 9 of the *Limitation Act* the effect of which is to extinguish the right of action on expiry of the applicable limitation period. An extinguishment of the cause of action, of necessity also implies an extinguishment of any alleged continuing duty to rectify a breach which gave rise to the original cause of action. Inventing a continuing duty to rectify such a breach would frustrate the legislative intent that underlies *Limitation Act* and in particulars ss. 8 and 9 of that *Act*.

99. Under the pre 1975 B.C. *Statute of Limitations*, the original owner's right to bring an action for possession of his land, and ejectment of the trespasser, was preserved for 20 years from the date of the initial trespass. On the expiry of the 20 year limitation period, the original owner's right to recover possession of the land became statute barred and the person continuing in occupation after that date ceased thereupon to be a "*trespasser*". Thus, even the "*continuing*" cause of action for damages for trespass terminates on the same day that the original owner's right to recover possession of the land is extinguished.[7]

8. Equitable Defences of Laches and Acquiescence

100. The Crown submits that equitable defences, including laches and acquiescence are always applicable in a case where a party is seeking *equitable relief,* and relies on the authorities and arguments set out in paragraphs 119 to 121 of the Crown's Factum in reply to the Cape Mudge Appeal.

101. Moreover, Campbell River is clearly wrong in suggesting that the Crown does not have "*clean hands*", or that Campbell River did not have knowledge of facts giving rise to its causes of action. Both of these assertions conflict directly with the findings of the Courts below [summarized at ¶20, 21 and 68 above]. Campbell River has not established that these conclusions were based on a palpable and overriding misapprehension of the evidence: *Stein v. The Ship "Kathy K", supra, Van der Peet, supra.*

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[7]Under s.16 of the pre-1975 *Statute of Limitations* in force in B.C. between 1897 and 1915, a 20 year limitation period applied to all actions for the recovery of land: *Statute of Limitations, R.S.B.C. 1897* c.123 s.16. This 20 year period started to run from the time possession was lost and serves to bar both bands' claims even before the current *Limitation Act* was enacted (as set out at ¶112 of the Crown's response to Cape Mudge).

E. Remedies

102. Campbell River argues [at ¶134-139] that damages may be awarded in lieu of its claims for a declaration of possession and an injunction to enjoin Cape Mudge from trespassing on the Quinsam Reserve. This raises two issues:

- first, the apparent willingness of Campbell River to abandon its claim for a declaration of entitlement is inconsistent with the arguments in the preceding sections of its Factum that it has an "*enduring*" and "*legislated*" right to the Quinsam Reserve. If however, Campbell River's claims against the Crown are limited to a claim of damages, then Campbell River has conceded that according to *Blueberry River* "*its claim for compensation for the Crown's breach of fiduciary duty is governed by the B.C. Limitation Act, which is incorporated by reference under s. 39 of the Federal Court Act*" [Campbell River Factum, ¶114];
- second, an award of compensation in lieu of Campbell River's claim for possession of the Quinsam Reserve cannot be made against the Crown. In this case Campbell River's claims for possession (and an injunction) are made against Cape Mudge [see JR v. 2, p. 90]. Therefore any award of compensation in lieu of such claims can likewise only be made against Cape Mudge (and should be distinguished from claims for damages for the Crown's alleged breach of fiduciary duty). No such claims for damages or compensation against Cape Mudge have however been pleaded by Campbell River [see JR v. 2, p. 90].

PART IV - NATURE OF ORDER SOUGHT

103. That Campbell River's Appeal be dismissed with costs.

104. In the alternative, if this Court allows Campbell River's Appeal, that the issue of the final determination of any equitable compensation or damages due to Campbell River, including the issue of whether such amount shall include an investment component calculated on a compound interest basis, be referred back to the Federal Court Trial Division, to be fixed and determined by the Trial Judge.

105. That the constitutional questions be answered as follows:

Question 1: Can the British Columbia *Statute of Limitations*, R.S.B.C. 1936 and subsequent enactments and amendments and the British Columbia *Limitation Act,* R.S.B.C. 1979, together with the *Federal Court Act*, R.S.B.C. 1985, c. F-7, particularly s. 39 constitutionally apply to extinguish any right and title of an Indian Band to the Campbell River and Quinsam Reserves in British Columbia, or any right to compensation in lieu of such right or title?

Answer: Section 39 of the *Federal Court Act* adopts by reference as valid Federal law the British Columbia limitation legislation and directs the application of this legislation to all actions brought before the Federal Court. In doing so the legislation bars the right of action and upon expiry of the applicable limitation period extinguishes any cause of action by the band.

Question 2: Can British Columbia Order in Council No. 1036, dated July 28, 1938, constitutionally apply to alter any pre-existing Band entitlement to the Campbell River and Quinsam Indian Reserves in British Columbia?

Answer: For the reasons set out in paragraphs 47 to 53 above, the schedule appended to Order in Council 1036 was not given legislative force and therefore does not purport to alter any preexisting Band entitlement to the Campbell River and Quinsam Indian Reserves. Alternatively, if the schedule does have legislative force, then B.C. Order in Council 1036 does not have constitutional authority to alter any preexisting Band entitlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Mitchell R. Taylor

J. Raymond Pollard

Georg Daniel Reuter

Kimiko Kobayashi

COUNSEL FOR THE RESPONDENT HER MAJESTY THE QUEEN

DATED: August 2nd, 2001 AT: Vancouver, British Columbia