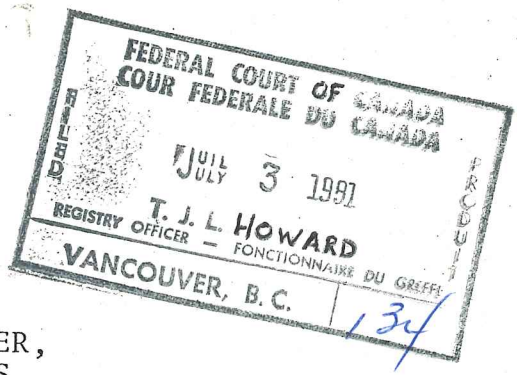
T-4656-75

Federal Court of Canada
Trial Division



BETWEEN:

DELBERT GUERIN, JOSEPH BECKER, EDDIE CAMPBELL, MARY CHARLES, GERTRUDE GUERIN and GAIL SPARROW suing on their own behalf and on behalf of all other members of the Musqueam Indian Band

PLAINTIFFS

and

HER MAJESTY THE QUEEN

DEFENDANT

REASONS FOR JUDGMENT

COLLIER J.

This action is brought by the Chief and Councillors of the Musqueam Indian Band on their own behalf and, in effect, for the whole band. The litigation was commenced on December 22, 1975. The band seeks a declaration that the Federal Crown was in breach of "its trust responsibility" in respect of the leasing, on January 22, 1958, of approximately 162 acres of land on Musqueam Indian Reserve No. 2. Very substantial damages are claimed.

At the material times, the legislation governing Indians, Indian bands and Indian lands was the *Indian Act*[1]. The hierarchy in Indian affairs in the 1950's was as follows: At the top was the Minister of Citizenship and Immigration. Then, a Deputy Minister, a Director of Indian Affairs, and under the latter, two Superintendents - one of Agencies and one of Reserves and Trusts. Those officials were in Ottawa.

In British Columbia, there was an Indian Commissioner for B.C. At the relevant times in this matter, William S. Arneil held that position. He died in 1971. Under him was a District Superintendent. One of the key figures in the matters giving rise to this litigation was Frank Earl Anfield. He had succeeded one H.E. Taylor as District Superintendent in 1954 or 1955. Anfield's position was sometimes described as Officer in Charge of the Vancouver Agency. He died on February 23, 1961.

The *Indian Act* provided that Indian reserves should be held by the Crown in right of Canada for the use and benefit of the respective bands for which they were set apart (ss.18(1)). Lands in a reserve could not be sold, leased or otherwise disposed of unless they were surrendered to the Crown by the band (s.37). Surrenders could be absolute or qualified, conditional or unconditional (ss.38(2)). To be valid a

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1. R.S.C. 1952 c.149, as amended by S.C. 1952-53, c.41; S.C. 1956, c.40; S.C. 1958, c.19.

surrender had to be made to the Crown and assented to by a majority of the electors of the band at a meeting (paras.39(1)(a) and (b)). A surrender had to be accepted by the Governor-in-Council.

Musqueam Indian Reserve No. 2 (the "reserve") fell, as did the Indian band, under the jurisdiction of the Vancouver Agency. In 1955 the reserve contained 416.53 acres. The band at that time numbered 235.

The Vancouver Indian Affairs branch recognized the reserve was a valuable one, and that it had potential. Anfield reported to Arneil on October 11, 1955 (ex. 5), in part as follows:

> The future of the valuable Reserve, situated within the charter area of the City of Vancouver, is of paramount concern to the Indians as well as others. Applications are on file for the acquisition by sale and lease of large areas of the unused, as well as the used portions of this Reserve, but it is practically impossible to get into any workable negotiations until this problem of individual land holdings is settled once and for all.
>
> The Department cannot lightly refuse allotment of domestic land holdings to individual Band members. This is their right. But to permit individual ownership of large unused areas with the right to lease on an individual basis can only end in economic disaster for the Band as a whole. The area is presently zoned against industry and for the present is restricted to agricultural use, but this could easily be changed to such uses as golf courses, and eventually to residential occupancy: these uses of course to be operative only on alienation of the reserve by sale or lease. Long term development of the reserve for the benefit of the Band should be by the leasing of large areas on the best possible terms.

In a later report to Arneil on September 17, 1956 (ex.9) Anfield suggested a detailed study be made of individual's land requirements on the reserve, the requirements for band purposes (such as halls, schools, etc.) and the extent of unrequired land. He recommended not just an expert land value appraisal be made, but a land use planning survey "...aimed at maximum development providing long term revenue for the Band...". He went on:

> ... It seems to me that the real requirement here is the services of an expert estate planner with courage and vision and whose interest and concern would be as much the future of the Musqueam Indians as the revenue use of the lands unrequired by these Indians. It is essential that any new village be a model community. The present or any Agency staff set up could not possibly manage a project like this, and some very realistic and immediate plans must be formulated to bring about the stated wish of these Musqueam people, the fullest possible use and development for their benefit, of what is undoubtedly the most potentially valuable 400 acres in metropolitan Vancouver today.

He then referred to a possible leasing of a low lying area to the City of Vancouver for sanitary fill purposes. He continued:

> ... Such an operation would fill the low lying area of about 150 acres to a level comparable to the rest of the Reserve. If any new village were located at the west end of the Reserve, the lease rentals would, if paid in advance, cover a considerable portion of the cost of moving. There would then be left for lease development some 300 acres of land levelled:

> another potential "British Properties"; as adjacent and unfearful of an Indian Reserve as is its famous counterpart in West Vancouver. Procedure to bring this result to pass would appear to be as follows:
>
> 1. To have the Band approve at Band fund cost an expert land use survey development plan, with valuation appraisal. (It is conceivable that this would be undertaken at cost by the U.B.C. or some large real estate corporation).
>
> 2. To secure from the Band, a resolution requesting (a) the location and development of a new village site of approximately 100 acres. (b) submission of documents for the surrender for leasing of all lands unrequired for such village site, to be approximately 316 acres, with all revenues to go to Band funds.
>
> 3. To advise all presently interested parties in land use on this Reserve that the unrequired areas, when defined and surrendered, will be publicly advertised for lease use and that such advertisement will not likely be within twelve months.

I turn, at this point, to a brief summary of the plaintiffs' allegations in this lawsuit. On October 6, 1957, by a majority vote, the members of the band approved a surrender to the Crown of 162 acres of prime land. The surrender was

> in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people.

But at the surrender meeting, the band were told by Anfield the land would be leased, on a long term basis, to the Shaughnessy Heights Golf Club, which proposed to build a new golf course

on the acreage. A lease was in fact formally entered into on January 22, 1958 between the defendant and the golf club. The band alleges that a number of the terms and conditions of the eventual lease are different from those they were told about before the surrender vote; that some of the lease terms were not disclosed to them at all. Those matters are asserted against the defendant in support of the claim of failure to exercise the requisite degree of care and management as a trustee. It is alleged, in addition, the defendant, as a trustee, failed to consider alternatives other than leasing for golf club purposes[2]. All this, it is claimed, has deprived the plaintiffs of increased revenue in the past; it will deprive the band of probable increased revenue in the future so long as the lease remains in force.

I return to the factual background preceding the surrender.

I have referred to two reports by Anfield. (Exs. 5 & 9).

In 1956 the golf club became interested in obtaining land for a new site. Its operation at that time was at 33rd Avenue and Oak Street in Vancouver. It leased its golf course land there from the C.P.R. The lease was to expire in 1960. The indications

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2. There are other allegations of fault on the part of the defendant, as trustee, in the statement of claim, and in further particulars filed in the action.

were it would not be renewed. The land was too expensive to purchase. The golf club began to explore, among other prospects, the possibility of obtaining land on the Musqueam Reserve.

There were others interested, as well, in acquiring land interests in the reserve. A representative of a well-known Vancouver real estate firm made, in February 1956, inquiries of Indian Affairs officials in Ottawa. Interest was expressed by the firm in a long term lease on certain land in Capilano Indian Reserve No. 5 in West Vancouver, and in securing land on the Musqueam Reserve. The real estate firm was also aware of the golf club's interest. (See Exs. 7 & 8). That firm's interest, in some kind of development, continued throughout 1956. Anfield and Arneil knew of this. (See Exs. 15 & 16).

The witness, C.E. Kelly, testified. I accept his evidence. From 1955 to 1957 he tried to work out some kind of arrangement with Indian Affairs officials, particularly Anfield, to develop lots on the reserve for housing. He suggested long term lease arrangements. When he mentioned he would be willing to discuss it with the band councillors, he was told by Anfield not to; to deal only with the Indian Affairs personnel.

The witnesses from the band called on behalf of the plaintiffs all testified they were never told of any

interest, or proposals for development, other than that evinced by the golf club. I accept their evidence.

I shall, at this stage, deal with the question of the credence and weight to be given to the testimony of the various members of the band. I have particularly in mind their testimony as to what they were told, or equally important, not told, by Anfield and others in 1955, 1956, 1957 and 1958 - as to the Shaughnessy proposals, the lease terms and other matters. I have in mind, as well, their testimony as to attempts to obtain copies of the lease, and as to when the band first became aware of the actual terms of the golf club lease. Counsel for the Crown argued all that evidence should be subjected to close scrutiny; Mr Anfield is dead; he was the key player for the Indian Affairs Branch; the band members have, over the years, now convinced themselves of certain things that did not really happen; it is all hindsight; there is no one on the defence side to refute the plaintiffs' witnesses.

I have, indeed, carefully scrutinized and considered the testimony of the band members, councillors, and chiefs and former chiefs. I have kept in mind that Mr Anfield is not here to present what, the Crown suggests, is an opposite version. I do not agree there would necessarily have been, if Mr Anfield and Mr Arneil were alive, an opposite version. I found the band members to be honest, truthful witnesses. They did not, in my assessment, conjure up the key evidentiary matters disputed by the defendant. Nor, in my view, was their evidence

based on hindsight and reconstruction. On some matters, which I will later refer to, the band members' testimony is, on analysis, supported by other evidence.

I therefore accept the plaintiffs' evidence as given by the various band members who were called as witnesses.

I return to the facts.

By October 1956, the band seemed to be in agreement with the general idea that unrequired land should be leased. (See Exs. 9 & 11). The band council authorized a land appraisal to be done. It was to be paid out of band funds. The Indian Affairs branch requested the appraisal be done by personnel of the *Veterans Land Act* administration. The Superintendent of Reserves and Trusts wrote (Ex. 13):

> This Reserve consists of some 416 acres and is located in the southwest section of the City of Vancouver and immediately opposite lands held by the University of British Columbia. It will be realized from this that the Reserve is situated in an area of comparatively high valued land and no doubt has considerable potential revenue for the Band if properly managed.

A Mr Alfred Howell did the appraisal. His report is dated December 28, 1956. Howell was a qualified appraiser as to land values. But he was not a land use expert as recommended by Anfield in Exhibit 9. The band was not given a copy of the Howell report. They did not see one until after this litigation started. But some of the contents of Howell's report were

given to the band councillors and band. I shall refer later to that evidence.

Howell, for valuation purposes, divided the reserve into four areas. An area of 220 acres (including the 162 acres eventually leased to the golf club) was classified as "First Class Residential Area". The other major area was low lying land of approximately 157.5 acres. It is not necessary to describe that or the other two areas. Howell used the comparative approach for the top 220 acres. He arrived at a figure of $5500 per acre, a total of $1,209,120. The low lying land he valued at $625 per acre.

Even before the appraisal was carried out, Arneil and Anfield had met with City of Vancouver officials in connection with the leasing of the low lands to the City of Vancouver. Arneil and Anfield, at that meeting, had in mind, as well, leasing 150 acres to the Golf Club at "...a figure of say $20,000 to $25,000 a year." (See Ex. 12). In a later letter, dated February 5, 1957, Arneil referred to a "contemplated" meeting with city and golf club officials in respect of long term leases of land.

The Howell appraisal report is dated December 28, 1956. Copies of it did not seem to be generally available to Mr Arneil and Mr Anfield until some time in February of 1957. Arneil wrote the Indian Affairs Branch in Ottawa on February 5, 1957 (Ex. 18). He said that Howell had shown

him (Arneil) a copy of the appraisal. He requested Ottawa to send duplicate copies "...with any comments you care to make prior to my treating the report as official." The last paragraph of the letter was as follows:

> I might add that a meeting is contemplated with City Hall officials who desire to acquire a large area of land on long term lease, and also with officials of the Shaughnessy Golf Club who are similarly interested.

The documentary evidence at trial showed that meetings and discussions indeed took place between Anfield and Mr R.T. Jackson and Mr E.L. Harrison. Jackson was the president of the golf club in 1956, and the early part of 1957. Harrison was on the board of directors and succeeded Jackson as president some time in 1957.

The following is a summary of those meetings and discussions:

Exhibit 19 is a copy of a letter dated February 13, 1957, from Anfield to Jackson. The letter indicates the appraisal report had been received; the area in which the golf club was interested was zoned residential; that area was appraised at more than $5,000 an acre; on the basis of a possible rental of 150 acres, at a minimum of 5%, the annual rental would be $37,500. A hand-written note by Anfield, dated two days later, indicates the letter was withdrawn. Instead, the matter, including the appraisal values, was discussed with Jackson and Harrison and the Commissioner of the *Veterans Land Act*. Part of the note appears to me

to read: "appraisal values reviewed -- Shaughnessy Golf Club to review situation and advise further."

I note here that the golf club was, at this stage, being given information as to the appraised value of the lands. But the band, according to the members who gave evidence and whose testimony I have accepted, was, at that time, given no information.

Exhibit 20 is a memo by Anfield dated March 13, 1957. At the top is "Mr Harrison", underneath is a note "minimum rental expected for 150 acres would be in the neighbourhood of $40,000 a year." The rest of the memo is a note to the effect that the City of Vancouver was advised that a lease of a portion of the low lands would be in the neighbourhood of $16,560 a year.

On April 1, 1957 Anfield wrote Jackson (Ex. 21). The opening paragraph read as follows:

> We have been giving a lot of thought to the suggestion made at our recent discussions that we endeavour to come up with a relative value of the three different areas shown on the card-board sketch received from Mr Harrison recently.

The rest of Anfield's letter went on to refer to a discussion with Mr Howell as to certain areas outlined on Harrison's card-board sketch. Anfield advised the average value of $5500 per acre could not be reduced. He said "...(Howell)...thinks

that we would be well advised to stand on the basis of $5500 per acre value, capitalized at 6% to determine the rental right across the line." The second last paragraph was as follows:

> I thought I should let you have this information as I am well aware that the financial angle of this thing is going to be quite likely the determining factor in your thinking. I trust that this information may assist you and your committee in further consideration of any submission that your Shaughnessy Golf Club may care to make to this Department on behalf of the Musqueam Indians, to whom eventually, of course the submission must be presented, and whose decision will be final.

On April 4, 1957 Harrison, now the president of the golf club, wrote Anfield. This is a very important document. I set it out in full:

> Dear Sir:
>
> Re: Musqueam Indian Reserve No. 2
>
> Following our discussion yesterday, I am writing to set out the terms which I would be prepared to place before our members for their consideration as a basis for leasing part of the above Indian Reserve. These terms are as follows:
>
> 1. The area to be leased comprises approximately 160 acres of the Indian Reserve and is in the location discussed at our meeting yesterday.
>
> 2. We are to have the right to construct on the leased area a golf course and country club and such other buildings and facilities as we consider appropriate for our membership.
>
> 3. We will require a right-of-way over the part of the Reserve lying between Marine Drive and the leased area to give such convenient access as we need.

4. The initial term of the lease will be for the period of fifteen years commencing May 1st, 1957, and the club will have options to extend the term for four successive periods of fifteen years each, giving a maximum term of seventy-five years.

5. The rental for the first "fifteen years" of the term of the lease will be $25,000.00 per annum to be paid in advance on the anniversary date each year of the execution of the lease, the first payment of $25,000.00 to be made as soon as the lease has been prepared, executed and delivered.

6. The rental for each successive fifteen year period of the term will be determined by mutual agreement between your Department and the club and failing agreement, by arbitration pursuant to the "Arbitration Act" of the Province of British Columbia, but the rental for any of the fifteen year renewal periods shall in no event be increased or decreased over that payable for the preceding fifteen year period by an amount more or less than 15% of the initial rent as set out in 5 above.

7. The amount of rent to be paid for each successive fifteen year period shall be determined before we are required to exercise our option to extend for that period.

8. We will pay all taxes assessed against the leased area.

9. We will pay the reasonable cost of relocating on other parts of the Reserve, any Indian houses presently on the leased area.

10. At any time during the term of this lease, and for a period of up to six months after termination, we will have the right to remove any buildings and other structures constructed or placed by us upon the leased area, and any course improvements and facilities.

If you would advise me of your approval of these general terms by Monday, April 8th, I could arrange with our Directors to call a special meeting of the membership in the immediate future.

On April 7, 1957 there was a band council meeting. The evidence before me is that Mr Anfield arranged practically all of the band council meetings and full band meetings of the Musqueam Band. It was Anfield's practice to preside at those meetings. He frequently kept the minutes. In the case of this meeting there are two sets of minutes. One set was kept in hand writing by Andrew Charles Jr. (Ex. 23). He was a member of the band. He was 25 years old at the time. The other set of minutes was kept by Anfield. His practice appears to have been to have them typed at a later date.

I have compared the two sets of minutes. Anfield's are in a little more detail but the two sets cover, in substantially the same way, the items of business discussed in respect of the reserve. Charles Jr. noted that Anfield had advised the highest possible appraisal market sales value of the reserve was $1,346,000. Charles noted also that Anfield had "submitted" a formal application by the golf club to lease 160 acres. The initial term of the lease was to be for 15 years commencing May 1, 1957. The club was to have options to extend the term for four successive periods of 15 years. The Charles Jr. minutes do not record the proposed annual rental.

Anfield's minutes read as follows: (Ex. 24)

> 2. The Superintendent then placed before Council the application of Shaughnessy Golf Club of Vancouver for a long term lease of approximately 160

> acres of land as outlined generally on the McGuigan survey plan at a rental for the first lease period of 15 years of $25,000.00 per year, with options for four additional 15-year periods on terms to be agreed upon. (my underlining)

Both sets of minutes recorded that council passed a resolution approving the lease of unrequired lands to Shaughnessy Golf Club and the submission to the band as a whole of surrender documents in respect of the 160 acres.

The evidence on behalf of the plaintiffs is that not all of the terms of the Shaughnessy proposal were put before the band council at that meeting. William Guerin said copies of the proposal were not given to them. He did not recall any mention of $25,000 per year for rental. He described it as a vague general presentation with reference to 15-year periods. Chief Edward Sparrow said he did not recall the golf club proposal being read out in full.

I accept the evidence of William Guerin and Chief Sparrow on this point. The minutes by Charles Jr. and Anfield suggest, to me, only a general indication was given of the proposal by the golf club to lease approximately 160 acres for an initial term of 15 years, with options for additional 15-year periods. I note the Charles Jr. minutes record the exact words of term 4 of the golf club proposal. If the other terms, including rent, had been read out, I am sure Charles Jr. would have recorded them. I note the Anfield minutes on this point conclude with the words "...on terms to be agreed upon".

On April 11, 1957, Arneil wrote W.C. Bethune, the Superintendent of Reserves and Trusts, in Ottawa. That letter could not be found. But the Superintendent's reply to Arneil dated April 24, 1957 became Exhibit 26. Bethune questioned the adequacy of the $25,000 annual rental for the first 15 years. At an investment return of five to six per cent, he said the rental value per acre would be somewhere between $250 to $300. Using Bethune's figures, the rental value would have been between $40,000 and $48,000 per year for the first 15 years. The golf club proposal, for 150 acres, meant an investment return of approximately 3%. Bethune suggested to Arneil the matter should be discussed with Howell, and his opinion be obtained as to what Howell felt the Indian Affairs Branch could expect to obtain on leasing this area for a long term, as contemplated by the golf club.

Anfield then discussed the matter with Howell. He gave him copies of Bethune's letter. Anfield formally wrote Howell on May 16, 1957. He asked for Howell's written opinion as to whether the $25,000 per year rental for the first 15 years was "just and equitable". He pointed out that in a long term lease of 75 years it was conceivable the expected rate of return might not exceed 5%.

Howell was not given all the details of the Shaughnessy proposal. He did not know of term 6 where rent increases or decreases for the 15-year renewal periods were limited to 15%

of the initial rent of $25,000, or $3750. Nor was he made aware the golf club proposed to have the right, at any time during the term of the lease, or up to 6 months after termination, to remove any buildings or improvements.

I digress slightly. The original Shaughnessy proposal provided for the rent for each successive 15-year period to be mutually agreed upon. Failing agreement, the matter was to be decided by arbitration. There was no stipulation in the April 4 proposal, as in the lease ultimately entered into, that on arbitration the rent would be determined as if the land were in an uncleared and unimproved condition, and restricted to use as a golf course. The Shaughnessy proposal provided, as I read it, the rent could never be increased or decreased by more than $3750 per year in any of the successive 15-year periods.

Howell replied to Anfield on May 23, 1957 (Ex. 33). He had re-checked his values in respect of the high land on the reserve. He pointed out the true test of value would be to offer the area on the market for development, and see what offers resulted. He expressed the view a 75-year lease, adjustable over 15 years and made with a financially sound tenant, eliminated any risk factor. On that basis, he felt the then government bond rate of 3.75% was the most that could be expected. He went on to justify the reduction of the rate of return to 3%. Howell had spoken with the

secretary of the golf club. He had been told the club felt it might spend one million dollars in buildings and improvements. Howell wrote: "These improvements will revert to the land at the end of the lease". He went on to point out a golf course would enhance the value of the surrounding reserve property. He wrote further:

> However, if their offer is accepted, the Department will be in a much sounder position to negotiate an increase in rental in fifteen years' time, when the Club will have invested a considerable amount of capital in the property, which they will have to protect.

He concluded by expressing the opinion the wise course would be to accept the golf club's offer.

Howell gave evidence at trial. He said he approved, in 1957, the 3% return rate, for the reasons given in his letter: the then bond rate was 3.75%; the golf club was not a financial risk; the improvements would revert to the band. In cross-examination he said if he had known the improvements would not revert to the band, he would have recommended a rate of return of 4 to 6%. He had assumed, in giving his opinion to the local Indian Affairs officials, renegotiation of the rent would be based on the improved condition of the land and on the highest and best use principle. He expressed shock at the ultimate limiting 15% clause, which found its way into the lease which was signed.

Howell was, in my view, an honest witness. I accept his evidence as set out in the previous paragraph. I am satisfied he would not have expressed the opinion he gave in Exhibit 33 if he had had all the facts before him.

Howell's letter was forwarded to Ottawa with the request that surrender documents for lease purposes be prepared for submission to the Musqueam band. On June 13, 1957, the Director of Indian Affairs in Ottawa recommended to the Deputy Minister the golf club's offer should be accepted. The Director expressed the view the annual rental was satisfactory; but no lease would be issued until an acceptable surrender was received from the Musqueam band. The Deputy Minister gave his approval.

On July 3, 1957, Bethune forwarded the surrender documents and other relevant material to Arneil. He said to Arneil he would like to see the 15% limitation, set out in the golf club proposal, removed. He suggested succeeding rentals should be established by mutual agreement, or failing that, by arbitration.

On July 12 Chief Sparrow and Anfield had a conversation. The chief had asked for certain figures in respect of the reserve valuation. On July 16, 1957 Anfield wrote Chief Sparrow (Ex. 38) in reply. Anfield advised the total appraised value of the reserve was $1,360,000. He set out

the different values for the various categories of land in the reserve. He went on:

> The golf club people are applying for 162 acres on the highland. This at $5500.00 an acre shows a valuation of $891,000.00 and the offer of $25,000.00 per year rental for the first ten year period in which the golf club will have to spend almost a million dollars of capital funds works out at an investment of 3%, which is considered by the appraiser to be a very high return for such land use.
>
> For your information the investment value of land on which large structures are placed goes between 5 and 6% and it is our appraiser's frank opinion that an investment of 3% for golf club purposes having in mind that the land in its improved state will eventually revert to the Band is considered a very satisfactory return.

The reference to the 10-year period was incorrect. At a band council meeting on July 26, Chief Sparrow pointed out the Shaughnessy proposal was for 15 year terms. Anfield wrote a letter correcting the error.

Anfield's advice as to Howell's opinion on rate of return is, in my view, an over-statement. The band was never given a copy of Howell's letter of May 23, 1957. Nor was the band told, at that time, the golf club proposed to have the right to remove any improvements made to the lands.

A band council meeting was held on July 25, 1957 at the reserve. Mr Anfield presided. For the band council there was Chief Sparrow and Councillor Gertrude Guerin. She is the mother of the present Chief, Delbert Guerin. Charles Jr.,

the secretary of the band council, was late. Anfield recorded the minutes.

The leasing of the 162 acres was discussed at length. One of the problems was that a number of band members claimed improvements in the area, and in other areas of the reserve. Certificates of possession had not been issued to those claimants. It was undoubtedly a difficult problem. Several alternative solutions were discussed. The council passed a resolution that a general meeting of the electors of the band be held on August 23, 1957. (This date was later changed). The purpose of that meeting was to consider and vote on the surrender to the Crown of the 162 acres.

There was further discussion on the proposed lease to the golf club. The two band councillors were of the opinion the review periods should be at 10 year intervals, rather than 15.

On September 9, 1957 the band council passed a resolution that the rental valuation, in respect of the proposed lease, be "reviewed and renegotiated" with the golf club.

On September 27, 1957 there was a band council meeting held at the reserve. Chief Edward Sparrow and councillors Gertrude Guerin and William Guerin attended. From the Department of Indian Affairs there was Anfield and a William Edward Grant. Grant was described as "officer in charge--Vancouver agency". Grant gave evidence at the trial. He joined the Indian Affairs branch in 1950 at Vanderhoof, B.C.

In the latter part of June, 1957, he was transferred to the regional office in Vancouver. He filled a new post, that of Relieving Indian Superintendent. His duties were to fill in for other superintendents in British Columbia who were ill, or on vacation, or otherwise absent from their regular duties. At about the same time (July, 1957) Mr Anfield was promoted to Assistant Indian Commissioner of British Columbia. Another member of the Department of Indian Affairs, W.A. Anderson, was also present at this council meeting.

Mr Harrison and Mr Jackson of the Shaughnessy Golf Club came to this meeting. The secretary, Mr Heina attended as well.

Andrew Charles Jr. took notes of the meeting.

In the presence of the golf club representatives, Chief Sparrow stipulated for 5% income on the value of the 162 acres. That amounted to approximately $44,000 per annum. The figure of $44,000 or $44,550 had actually been calculated by Councillor William Guerin. The golf club people balked at that figure. Some portions of Mr Howell's letter of May 23, 1957 were read out. Grant's recollection was that paragraphs 4, 5 and 6 were the only portions read.

At one stage at this meeting,the golf club representatives were asked to step outside. The band council and the Indian Affairs personnel then had a private discussion. Anfield expressed the view the demand of $44,550 was unreasonable. After considerable discussion the band council agreed on a

suggested figure of $29,000; they would recommend that amount to the band as a whole. The golf club representatives were then brought back into the meeting. The figure of $29,000 was put to them. They said they would recommend it to their board of directors.

William Guerin testified the councillors agreed to $29,000 because it was their understanding the first lease period was 10 years; subsequent rental negotiations would be every 5 years; the band council felt it could negotiate for 5% of the subsequent values.

Grant's recollection of the meeting is substantially the same as the version I have recounted. There are some discrepancies on minor details. It was Grant's recollection the $29,000 figure came from Anfield. He said Anfield advised council to go ahead with the lease and in 10 years demand a healthy increase from the golf club. It was Grant's further recollection that some limitation on maximum rent increases, put forward by the golf club, was discussed. He said the band council objected to this; Anfield said he would relay that view to the Department of Indian Affairs. Grant's testimony, which I accept, was that the band council reluctantly accepted the $29,000 figure.

On Sunday afternoon, October 6, 1957, there was a meeting of members of the band at the reserve. This was what has been termed the "surrender meeting". I, too, shall use that description.

The band officials present were Chief Edward Sparrow, Councillors Gertrude Guerin and William Guerin. Anfield presided at the meeting. Grant was present and took notes. Those notes were later edited somewhat by Anfield, then typed. Charles Jr. also made notes of the proceedings. The notes kept by Charles Jr. and Grant are substantially the same.

Prior to the meeting Anfield had made some notes. They appeared to be for his assistance in explaining matters to the band members.

According to Grant, Anfield had, at this meeting, a copy of a draft lease between the Crown and the golf club. It was Grant's recollection that Anfield made notes on the draft lease during the meeting. The draft was not an exhibit at trial. Grant may have been mistaken. The first draft lease submitted as an exhibit is dated October 17, 1957. It was apparently prepared by the golf club's solicitors. But Mr McIntosh, the solicitor, testified he drafted a lease in August or September of 1957. He thought it might form a basis for discussion in respect of the final lease terms. He had discussions with either Anfield or Arneil in respect of that first draft lease.

I am satisfied from reading the Grant and Charles Jr. notes, and from the evidence of Chief Sparrow, Charles Jr., William Guerin and Grant that the extent of the information imparted at the meeting, regarding the proposed surrender and lease, was as follows:

The golf club wanted to lease 162 acres; the value of the land in question was $5500 an acre. The original proposal had been a lease of 150 acres at $25,000 a year; the golf club had requested additional land; an increase to $29,000 per year had been obtained. The lease proposal was for 75 years, with renewal periods of 15 years. The owners of improved land within the proposed golf course area would receive 50% of the rental earnings; the remainder would be distributed among members of the band as a whole. In the first 10 years, that would amount to $132,400 for those owners of improved land, and a similar amount for the band as a whole. The meeting was told of the proposed 15% limitation on rental increases.

The notes kept by Charles Jr. state the proposed renewal periods were to be reduced from 15 years to 10. Grant's notes do not contain a similar record but they refer to the sums of $132,400 "during the first 10 years" (my emphasis).

Charles Jr's notes, as to the 15% limitation on rental increases, read: "...the government did not want any escalator clauses. (Limiting the increase of rental increases)." Grant testified the 15-year period and the rental increase limitation were strenuously objected to at the surrender meeting.

The following facts are in my opinion clear, and I make these findings:

(a) Before the band members voted, those present assumed or understood the golf club lease would be, aside from the first term, for 10-year periods, not 15 years.

This is clear from the evidence of Chief Sparrow, William Guerin, Charles Jr., and Grant. Support can also be found in the notes kept by Charles Jr., and Grant. Anfield's own pre-meeting notes (Ex. 50) state "...the Council have asked that the periods be 10 years instead of 15 years." Two newspaper items, published the day following the surrender meeting, referred to "a 10-year agreement" (Ex. 54) and "$29,000 for the first 10 years" (Ex. 55). Chief Sparrow testified the newspaper reports, attributing this information to him, were correct.

The first draft lease in evidence (Ex. 60), which came from the defendant's documents, contains written notations which appear to be in Anfield's writing. The initial term is stated to be 15 years. A note on the side of the document is "10". Another clause refers to succeeding 15-year periods. A note at the side refers to "6 periods of 10 years".

Finally on this point, both MacIntosh and Harrison recall there was at some stage in the discussions with the Indian Affairs officers, reference to 10-year periods instead of 15-year periods.

(b) Before the band members voted, those present assumed or understood there would be no 15% limitation on rental increases.

Anfield's pre-meeting notes read as follows: "...the Department do not wish this put in...". I have already referred

to Charles' notes and Grant's evidence on this point. On the draft lease (Ex. 60) Anfield's note in respect of the 15% limit, reads "not satisfactory to dept. or Indians".

There was no information given as to the method of negotiating future rental increases. The original golf club proposal (Ex. 22) merely provided for succeeding rentals to be agreed upon, or to be determined by arbitration.

I am satisfied that, at the time of the vote, the Indian Affairs personnel and the band were against any 15% rental limitation; the band voted on the basis there would be no such limitation.

(c) The meeting was not told the golf club proposed it should have the right, at any time during the lease and for a period of up to six months after termination, to remove any buildings or structures, and any course improvements and facilities.

Chief Sparrow, William Guerin and Charles Jr., all testified they understood from Anfield, either at the surrender meeting or a council meeting, all improvements would, on the expiration of the lease, revert to the band. Grant testified the surrender meeting was told that the band could keep all improvements made on the golf course land.

I turn now to another matter.

There are two other terms of the lease ultimately entered into on January 22, 1958 (Ex. 78) which were the subject of considerable testimony.

One was the method of determining future rents. Failing mutual agreement, the matter was to be submitted to arbitration. The new rent was to be the fair rent as if the land were still in an uncleared and unimproved condition and used as a golf club. The other term gave the golf club the right at the end of each 15-year period to terminate the lease. Six months' prior notice was all that was required. There was no similar provision in favour of the Crown.

These two matters were, I find, not before the surrender meeting. They were not in the original golf club proposal (Ex. 22). They first appeared in the draft leases, after the surrender meeting. But the two terms were not subsequently brought before the band council, or the band, for comment or approval.

I return to what went on at the surrender meeting.

The surrender documents (Ex. 53) were read out. The first portion provided for the surrender to the Crown of the 162 acres. The remainder was as follows:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.
>
> AND upon the further condition that all moneys received from the leasing thereof, shall be credits to our revenue trust account at Ottawa.

> And We, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.

A vote was taken. Forty-three members voted. There were 41 votes for the surrender and 2 against it. Another vote was then taken in respect of payment of 50% of revenue to individual owners. Twenty-five members voted in favour, and 3 against.

It is to be noted that the surrender (Ex. 53) is in very wide terms. The key words are "in trust to lease". There is no mention of the proposed lease to the golf club. The position of the defendant Crown, taken on examination for discovery, (Gordon A. Poupore, questions 351-353) is that once the surrender documents were signed the Crown could lease to anyone on whatever terms it saw fit. Counsel for the defendant, in argument, took the same position.

On October 24, 1957 Anfield wrote on behalf of Arneil (Ex. 63) to Ottawa. He attached a draft lease prepared by the solicitors for the golf club. The draft provided for 5 terms of 15 years each. Anfield said:

> ..There has been discussion with the Indians that this term should be reduced, possibly to 10 year periods. In this regard it should be stated that it is going to take 3 years to get this site into operable condition, in addition to which the Club is going to have to make a million dollar investment in a Club House and the cost of constructing and perfecting the golf course. It would hardly seem fair to expect a review of rentals, presumably upward, in as short a space of time as 10 years and we are inclined to recommend that the 15 year period is fair and equitable.

In respect of the 15% limitation on rental increases he wrote as follows:

> It is noted the draft lease includes an escalator clause limiting increase and decrease to 15% of the rental in the previous rental period. The Department, in their letter dated July 3, 1957, are obviously not happy about the inclusion of such a clause and this matter was discussed at very considerable length last summer with the Directors of the Shaughnessy Golf Club. They point out that they are not a commercial firm but a Club, with a limited membership and it is of the utmost importance that the total financial encumbrance over the lease period be reasonably secured. They are very definitely against the suggestion contained in the Department's letter aforementioned; that review of rentals be subject to agreement and, if necessary, by arbitration. They feel that any such course could be fatal in their overall planning. Having this in mind they submitted to us an opinion by Mr. Douglas W. Reeve, obtained by the Club, and a copy of this document is attached herewith. This report purports to present the considered views both of Mr. Reeve and of the Club Directors; with particular reference to whether or not this escalator clause, with its limitation of 15%, should be contained in the lease. The Directors point out to the Department in their request, that this 15% limitation be retained; that they will be turning back to the Musqueam Indian Band property of terrific value and with vast improvements, and they also stressed the point that a vital factor in this entire project is the stability of the Club in its overall financial undertaking of the project.

Mr McIntosh testified the 15% limitation of rent increase caused the most difficulty in negotiations with the Indian Affairs Branch. The Branch did not want any such clause. The golf club wanted it in all renewals. A compromise was reached providing a 15% limitation in respect of the first renewal. That compromise, according to Mr McIntosh, came as a result of a meeting with Harrison, Jackson and Arneil.

Neither the views expressed in Anfield's letter (Ex. 63), nor a copy of the letter containing them, nor a copy of the draft lease were given to the band council or band.

Put baldly, the band members, regardless of the whole history of dealings and the limited information imparted at the surrender meeting, were never consulted.

But it was their land. It was their potential investment and revenue. It was their future.

On November 25, 1957, Bethune wrote to Arneil (Ex. 66). He enclosed two copies of a draft lease prepared in Ottawa. The third paragraph of the letter was as follows"

> There is, however, one item that I would like you to seriously consider, namely the provision of paragraph three which provides for the cancellation of this lease at the end of any fifteen year period. This clause has been retained merely for the purpose of discussion. It seems paradoxical if the club wants a seventy-five year lease to insert the clause permitting them to cancel it after only fifteen years. On consideration you may come to the conclusion that the Indians have nothing to lose even if the lease is cancelled after the first fifteen years.

The evidence indicates that a copy of this letter was given to Mr Grant and to Mr McIntosh, the golf club's solicitor. But not to the band.

I make this comment at this stage. The evidence adduced by the plaintiffs is to the effect Anfield had no discussions with the band council, or the band, following the surrender meeting. None of the documents or letters passing between the golf club and Indian Affairs were given to the band council or the band. There were discussions among Anfield, Arneil and golf club officers, including the solicitors, in respect of the lease terms. The solicitor assumed all matters discussed were being communicated to the band. Neither the chief nor the band council were part of those discussions nor were they advised of them.

I accept that evidence adduced on behalf of the plaintiffs.

There are, I think, three explanations. None are exonerations. The surrender did not specify that any lease was to be made with the golf club. Nor did it provide that any ultimate lease, whomever with, had to be approved by the band or the band council. The probabilities are the Indian Affairs people took the view they were, by the terms of the surrender, free to negotiate for the best possible terms, without the necessity of consulting the band.

I digress to contrast the procedure in respect of the Musqueam lands with that carried out by Anfield, in 1955 and 1956, in respect of Capilano Indian Reserve No. 5. That reserve was held by the Squamish Indian Band. There the band surrendered 67 acres of the reserve. The operative part of the surrender (Ex. 112) read as follows:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people.
>
> Subject, however, to the following conditions:
>
> "That all leases granted under the authority of this Surrender to be at such rental and on such terms as our Band Council may from time to time approve by Resolution."

In that case public tenders were called for leases. The band rejected some of the first proposals. They ultimately approved a lease to Park Royal Shopping Centre Limited. The history of the leasing of land on the Capilano Indian Reserve No. 5 is set out in a memo by Mr Letcher dated May 13, 1960. (Ex. 136). The lands now contain the well known Park Royal Shopping Centre.

I point back, in respect of public tenders for lease, to one of Anfield's initial reports, in respect of the development of the Musqueam Reserve (Ex. 9, para.3, reproduced at p.5 of these reasons).

The second explanation, as to why there was no communication with the band after the surrender meeting, is probably that Anfield had, by reason of his promotion, more onerous duties. His replacement had not yet been appointed. That did not occur until some time in December of 1957, when Mr J.C. Letcher was appointed.

The third explanation is allied to the first. At that time, and for many years before, according to the evidence, a great number of Indian Affairs personnel, *vis-a-vis* Indian bands, and Indians, took a paternalistic, albeit well-meaning, attitude: the Indians were children or wards, father knew best. Grant described Anfield, from his observation of him, as falling within that description.

The practice today, and for the last ten years or so, contrasted with the practice in the 1950's and 1960's, was set out in the evidence of Poupore and others. Bands are now encouraged to obtain their own land appraisals and legal advice; not so earlier. There was testimony before me, which I accept, that the Musqueam band council had asked for their own appraisers and lawyers, but Anfield had told them those matters would be looked after by the Indian Affairs Branch. In the present era, bands are encouraged to attach key conditions to surrender documents. That was not usual in the past. Proposed leases are now given to bands for their study. That was not the former practice. Now, bands are given copies of documents affecting their lands. In Anfield and Letcher's time, bands were not usually given copies of documents. Nor was it the practice to see they had free access to departmental records.

I return to the leasing of the lands on the Musqueam Reserve.

The surrender of the lands was accepted by the defendant by Order-in-Council dated December 6, 1957. Further discussions regarding some of the terms of the lease then took place between the solicitors for the golf club and the B.C. Indian Commissioner's office.

On January 9, 1958 a band council meeting was held. Superintendent Letcher attended. For the band there was Chief Sparrow and councillors Gertrude Guerin and William Guerin. Charles Jr. took the minutes.

Letcher read a letter regarding the golf club lease. It indicated the renewal periods were 15 years instead of 10. Chief Sparrow pointed out the band had demanded 10-year periods. William Guerin said the council members were flabbergasted to learn about the 15-year terms. William Guerin testified Letcher said the band was "stuck" with the 15-year terms. I accept Guerin's evidence. The band council then passed a resolution that it agreed the first term should be 15 years, but insisted the renewal terms be set out at 10-year periods. The lease was finally signed on January 22, 1958. A copy was not given to the Musqueam band or the band council.

At this stage I shall set out the essential terms of the lease of January 22, 1958:

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

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

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

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

4. The maximum increase in rent for the second 15-year period (January 1, 1973 to January 1, 1988) is limited to 15% of $29,000., that is $4350 per annum.

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

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

Grant said the terms of the lease ultimately entered into bore little resemblance to what was discussed at the surrender meeting.

I agree.

Chief Edward Sparrow, William Guerin and Andrew Charles Jr. were present and voted at the surrender meeting of October 6, 1957. They testified they would not have voted to

surrender the 162 acres if they had known the ultimate terms of the lease entered into between the defendant and the golf club.

I accept their evidence. I found them to be honest, credible witnesses. Their testimony was not seriously affected, in my view, by hindsight.

I have already set out my findings as to what the members of the band knew, and did not know, at the time of the surrender vote. The balance of probabilities is, to my mind, the majority of those who voted on October 6, 1957, would not have assented to a surrender of the 162 acres if they had known all the terms of the lease of January 22, 1958.

I so find.

The next problem is: What is the legal effect of the various findings I have made?

The plaintiffs base their case on breach of trust. They assert the defendant was, in all the circumstances and at the material times, a trustee. The defendant denies she ever became, in fact or in law, a trustee.

The law, as to trusts in general, is succinctly, but not completely, stated in Underhill's *Law of Trusts and Trustees* (12th Ed. 1970), p.3:

> A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over

> which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.

The Crown can, if it chooses, act as a trustee. Megarry, V.C., in *Tito et al v Waddell et al*[3] dealt with that question, and with the position of the Crown as trustee, as follows, at pp.216-217:

> I propose to turn at once to the position of the Crown as trustee, leaving on one side any question of what is meant by the Crown for this purpose;and I must also consider what is meant by 'trust'. The word is in common use in the English language, and whatever may be the position in this court, it must be recognized that the word is often used in a sense different from that of an equitable obligation enforceable as such by the courts. Many a man may be in a position of trust without being a trustee in the equitable sense; and terms such as 'brains trust', 'anti-trust', and 'trust territories', though commonly used, are not understood as relating to a trust as enforced in a court of equity. At the same time, it can hardly be disputed that a trust may be created without using the word 'trust'. In every case one has to look to see whether in the circumstances of the case, and on the true construction of what was said and written, a sufficient intention to create a true trust has been manifested.
>
> When it is alleged that the Crown is a trustee, an element which is of special importance consists of the governmental powers and obligations of the Crown;for these readily provide an explanation which is an alternative to a trust. If money or other property is vested in the Crown and is used for the benefit of others, one explanation can be that the Crown holds on a true trust for those others. Another explanation can be that, without holding the property on a true trust the Crown is nevertheless administering

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3. [1977] 3 All E.R. 129

> that property in the exercise of the Crown's governmental functions. This latter possible explanation, which does not exist in the case of an ordinary individual, makes it necessary to scrutinise with greater care the words and circumstances which are alleged to impose a trust.
>
> In this case, counsel for the Attorney-General did not attempt to argue that the Crown could never be a trustee. He accepted to the full *Civilian War Claimants Association Ltd. v R,* and in particular a dictum of Lord Atkin. There, Lord Atkin said: "There is nothing, so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so"; and in *Attorney-General v Nissan,* Lord Pearce adopted this dictum.

In the *Tito* case, Megarry, V.C., found, on the particular facts and particular documents, the Crown there was not a trustee in the true sense. He referred to *Kinloch v Secretary of State for India in Council*[4]. As to that case, he said, at pp.220-221:

> That case, of course, concerned facts which were very different from the facts of the case before me. Yet it supports certain principles or considerations which are of relevance and importance. First, the use of a phrase such as "in trust for", even in a formal document such as a Royal Warrant, does not necessarily create a trust enforceable by the Courts. As Lord O'Hagan said: "There is no magic in the word 'trust'. Second, the term 'trust' is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction, but also other relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind, so familiar in this Division are described by Lord Selborne LC as being 'trusts in the lower sense'; trusts of the latter kind, so unfamiliar in this Division, he called 'trusts in the higher sense'.

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4. (1882) 7 App. Cas. 619.

> I pause at that point. This classification of trusts seems to have made little impact on the books:see, e.g. Lewin on Trusts, Underhill on Trusts and Trustees and Halsbury's Laws of England. There is, indeed, a certain awkwardness in describing as a trust a relationship which is not enforceable by the courts, though the so-called trusts of imperfect obligation perhaps provide some sort of parallel. Certainly in common speech in legal circles 'trust' is normally used to mean an equitable relationship enforceable in the courts and not a governmental relationship which is not thus enforceable. I propose to use the word 'trust' simpliciter (or for emphasis the phrase 'true trust') to describe what in the conventional sense is a trust enforceable in the courts, and to use Lord Selborne LC's compound phrase 'trust in the higher sense' to express the governmental obligation that he describes.

I have concluded there was, in the case before me, a legal or "true trust", created between the defendant and the band. The Crown, in my view, became trustee, effective October 6, 1957, of the 162 acres. The band was the beneficiary.

The surrender documents (Ex. 53), themselves, set out that the 162 acres were surrendered to the Crown, to be held by it "...forever in trust to lease...". The *Indian Act* contemplates, as I see it, the defendant becoming a trustee, in the legal sense, for Indian bands. In the statute, there are references to land being held by the Crown for the use and benefit of bands, and moneys being held by the Crown for the use and benefit of bands. (See paragraphs 2(a), (h), (o)). Section 18, for example, provides that reserves are held for the use and benefit of the bands. Similarly, subsection 61(1) provides that "Indian moneys" are held by the Crown for the use and benefit of Indians or bands.

All of the above, in my opinion, supports the conclusion of a trust, enforceable in the courts.

During argument in this case, counsel for the defendant sought to argue that if there were any trust at all, it was a "political trust", and only enforceable in Parliament. I do not know exactly what is meant by "political trust". Rand, J., in *St. Ann's Island Shooting and Fishing Club Limited v The King*[5], in referring to the *Indian Act*, used the expression "political trust". At page 219, he said:

> But I agree that s. 51 requires a direction by the Governor in Council to a valid lease of Indian lands. The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

Counsel for the plaintiffs objected to any argument being made on this point, because of the failure to plead it. I gave the defendant leave, on terms, to amend the defence to raise the point: if an amendment were made, then the plaintiffs would have the right to examine for discovery the appropriate minister of the Crown as to the facts on which the defendant relied in support of the plea. The defendant chose not to take advantage of the opportunity to amend the defence.

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5. [1950] S.C.R. 211

I therefore do not propose to deal further with the defence of "political trust".

The next issue is as to the terms of the trust.

The defence argued, if there were a legally enforceable trust, its terms were those set out in the surrender document (Ex. 53);the trust permitted the defendant to lease the 162 acres to anyone, for any purpose, and upon any terms which the government deemed most conducive to the welfare of the band; there was no obligation to lease to the golf club on the terms discussed at the surrender meeting; nor was there any duty on the defendant to obtain the approval of the band in respect of the terms of the lease ultimately entered into.

I do not accept that contention.

The defendant, through the persons handling this matter in the Indian Affairs Branch, knew, early on, the defendant was a potential trustee in respect of any land which might be leased to the golf club. At a meeting of April 7, 1957, the band council had passed a resolution (drawn presumably by Mr Anfield) as follows:

> That we do approve the leasing of unrequired lands on our Musqueam I.R. 2 and that in connection with the application of the Shaughnessy Golf Club, we do approve the submission to our Musqueam Band of surrender documents for leasing 160 acres approximately as generally outlined on the McGuigan survey in red pencil:and further that we approve the entry by the said applicant for survey purposes only pertinent to said surrender: said surveys to be at the applicants cost and risk entirely.

I have said the Crown knew, at that stage, it was a potential trustee. It knew of the intent of the band to surrender the lands. The resolution, set out above, does not refer to an unqualified surrender for leasing to anyone. The whole implication of the resolution is that the contemplated surrender was for purposes of a lease with the golf club on terms.

The Indian Affairs Branch, from then on, did not give, on the evidence before me, any realistic consideration to leasing the 162 acres to any other interested party. From April 7, 1957 on, all discussions with the band council were confined to the proposed lease, of those particular lands, to the golf club.

In my view, the surrender of October 6, 1957, imposed on the defendant, as trustee, a duty as of that date, to lease to Shaughnessy Golf Club on these conditions:

(a) A total term of 75 years.

(b) The rental revenue for the first 15 years to be $29,000.

(c) The remaining 60 years of the lease to be divided into six 10-year terms.

(d) Future rental increase to be negotiated for each new term; no provisions regarding arbitration or the manner in which the land would be valued.

(e) No 15% limitation on rental increases.

(f) All improvements on the land, on the expiration of the lease, to revert to the Crown.

The defendant, through the personnel and officials of the Indian Affairs Branch, breached her duty as a trustee. The 162 acres were not leased to the golf club on the terms

and conditions authorized by the band. Substantial changes were made, as can be seen in the final lease document. In respect of those changes, no instructions or authorization were sought by the defendant, as trustee, from the band, the *cestuis que trust*. Band approval ought to have been obtained. There was a duty on the defendant, through her personnel, to do so.

I have already found the probabilities are the band members would not have, if all the terms of the lease of January 22, 1958, had been before them, surrendered the 162 acres.

The defendant, is, therefore, liable for breach of trust.

The defences of limitation of action and laches

The defendant raised the defence, assuming breach of trust, that this action is out of time: it is barred by the relevant statutes of limitation, or by the equitable principle of laches.

The plaintiffs led evidence to show neither the band nor its councillors had knowledge of the actual terms of the golf club lease until some time in March of 1970.

Andrew Charles Jr. testified he asked Superintendent Letcher, a number of times, for a copy of the golf club lease. He said he was told the band was not allowed to have a copy of the lease. In those years, and until the late 1960's, it was not the practice, as I have related, of the Indian Affairs Branch to give band councils copies of documents. All that

Superintendent Letcher could say was he could not recall being asked for a copy of the lease.

I accept the evidence, led on behalf of the plaintiffs, that despite requests for copies of the lease, they were unsuccessful in obtaining a copy until March, 1970. In that month, Councillor Delbert Guerin (now Chief) had discussed generally the Shaughnessy Golf Club lease with Mr W.G. Allen, a land use officer with the department. Mr Allen examined the lease, and on March 17, 1970, wrote Guerin outlining some of the terms. The terms, particularly the 15% ceiling on rent increase for 1973 to 1978, astounded Guerin and others. Later, the band obtained a full copy.

The defendant led some evidence to try and establish that certain chiefs or councillors of the band knew, or ought to have known, the terms of the lease, at least as early as 1963 or 1964. This evidence came from the witness John F. Ellis.

In 1960 Ellis was in the real estate business. He represented a syndicate, which ultimately became Musqueam Recreations Ltd. It was interested in obtaining land for the development of a golf driving range and a par 3 golf course. Ellis had known Chief Edward Sparrow for many years. He spoke with him. The Chief referred Ellis to one of his sons, Willard Sparrow. The latter was, at that time, a member of the band council. Willard Sparrow was elected Chief for 1963 and 1964.

Negotiations between the band and Musqueam Recreations Ltd. went on for over three years. The band, at some stage, decided to surrender the land sought. There were approximately 58

acres (ultimately) involved. The land was, at the instigation of the Indian Affairs Branch, publicly advertised for tenders for lease. According to Ellis, the advertisements stipulated the lease renewals would be for 10 year periods; the rent would be negotiated, on each renewal, as if the land were uncleared and unimproved.

In 1963 Ellis and his advisers prepared a draft lease. Prior to that, Ellis had visited Shaughnessy Golf Club. He was given a copy of the golf club lease to peruse. He made copies of the essential terms. He then attended two band council meetings, in March and April of 1963, at which the proposed lease with Musqueam Recreations Ltd. was discussed with the band council. He took the draft leases to those meetings.

Ellis felt there was some discussion, at one of those meetings, as to why Shaughnessy Golf Club had 15 year renewal terms while the proposal under discussion, as set out in the public advertisement, was for 10 year terms. He frankly said, if this point was discussed, the knowledge as to 15 year terms might have come from his excerpts made from the Shaughnessy Golf Club lease, and not from any of the council members. My notes indicate he paused for a noticeable period of time before he answered the question put to him. I can understand that. These matters took place many years ago. He knew the terms of the Shaughnessy lease. I suspect he assumed, at that time, the band and its council knew the terms of the Shaughnessy lease. They, in fact, did not.

In the final Musqueam Recreations Ltd. lease, the rental payments are as follows:

(a) Fixed annual rents for the first, second and remaining eight years of the first 10 year term.

(b) Fixed annual rents for the subsequent 10 year terms to be negotiated;failing agreement, the rents to be determined under the provisions of the *Exchequer Court Act*.

(c) But the annual rent payable at anytime shall never be less than 10% of the gross revenue of the lessee.

There is a further provision that no increase or decrease of rent, arrived at in respect of a new 10 year period, shall exceed 15% of the fixed annual rent of the preceding 10 year period.

It was Ellis' recollection the band council had requested a 15% ceiling on rent increases; he suggested it should work both ways;the provision, as set out above, was then agreed to.

The proposed draft lease contained a clause, similar to the one in the Shaughnessy lease, in respect of removal of improvements. The band council objected to it. The final lease provides the improvements revert to the Crown.

In rebuttal to the evidence of Ellis, the plaintiffs called Gertrude Guerin, who was band chief in 1962, and Robert Point, who was a councillor in 1962 and secretary in 1963.

Chief Willard Sparrow and John Sparrow (the latter, according to Ellis, had attended some meetings with Willard) died some years ago. Mrs Guerin and Point testified that, in the discussions in respect of the Musqueam Recreations Ltd. lease, no mention was made by anyone of the terms of the Shaughnessy lease.

I accept their evidence.

Mr Ellis tried to be fair in his testimony. But his evidence was obviously coloured by his knowledge of the actual terms of the Shaughnessy lease. The band council, as I have said, did not have that knowledge. I do not think Mr Ellis can be right in his recollection that the band council proposed a 15% limit on increases in rent "because it was in the Shaughnessy lease". That proposal would not be in their interest. It was something the band strenuously objected to when that particular Shaughnessy proposal was discussed at the surrender meeting of October 6, 1957, and at band council meetings preceding it. I suspect the Musqueam Recreations Ltd. group proposed the limit on increases; that the band stipulated for a limit on decreases.

The plaintiffs called other witnesses to rebut the implication of Mr Ellis' evidence. Some were councillors who had discussed the Shaughnessy lease with Willard Sparrow before he died in the late 1960's. Others were on the band council in subsequent years. All of them testified they had no knowledge of the 15% limitation clause, the 15 year renewal terms, and the right to remove improvements contained in the Shaughnessy lease.

Again, I accept the evidence of those witnesses.

If councillors, during the negotiations for the Musqueam Recreations Ltd. lease had been told by Ellis, or anyone else, of the terms of the Shaughnessy lease, I am convinced the information would have, over the years, been passed on.

The evidence of Mr Ellis is, understandably, vague and imprecise. I cannot accept it as proof of knowledge, in 1963, by the band and councillors, of the impugned terms of the Shaughnessy lease.

I find the band and its members were not aware of the actual terms of the Shaughnessy lease, and therefore of the breach of trust, until March of 1970.

This action was not commenced until December 22, 1975. Chief Delbert Guerin, from March of 1970 until litigation was authorized, was endeavouring to obtain further information and legal advice as to what, if anything, could be done. I accept that explanation.

The defence that this action is statute barred runs as follows: If there were a breach, or breaches, of trust, they occurred on January 22, 1958; the time within which action must be brought is six years from that date. The defendant relies on the British Columbia *Statute of Limitations* in effect prior to July 1, 1975[6].

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6. R.S.B.C. 1960 c.370

Reference must also be made to ss. 2(11) of the *Laws Declaratory Act*[7]:

> 2(11) Except as provided in the *Trustee Act*, no claim of a cestui que trust against his trustee of any property held on an express trust shall be held to be barred by any Statute of Limitations.

and to s. 93 of the *Trustee Act*[8]:

> Protection of Trustees
>
> 93.(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions apply:-
>
> (a) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:
>
> (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to such action or other proceeding, in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the Statute runs against a married woman

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7. R.S.B.C. 1960 c.213. This statute was later extensively amended. Ss.2(11) is no longer present in the new Act, the *Law and Equity Act* R.S.B.C. 1979 c.224.

8. R.S.B.C. 1960 c.390

> entitled in possession for her separate use, whether with or without a restraint upon anticipation, but does not begin to run against any beneficiary unless and until the interest of such beneficiary is an interest in possession.
>
> (2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.
>
> (3) This section applies only to actions or other proceedings commenced after the first day of January, 1906, and does not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations. [51 & 52 Vict., c.59, s.8]; R.S. 1948, c. 345, s.86.

Section 93 was repealed effective July 1, 1975 when the new *Limitation Act* of British Columbia[9] came into effect.

I reject the defence contention that this action is out of time.

Where there has been fraud, or fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the complainant discovers the fraud, or until the time when, with reasonable diligence, the fraud ought to have been discovered:

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9. R.S.B.C. 1979 c.236

Massey & Renwick Ltd. v Underwriters' Service Bureau Ltd. et al [10]

Nesbitt, Thomson & Co. Ltd. v Pigott et al [11]

Taylor v Davies et al [12]

Eddis et al v Chichester Constable et al [13]

The fraud asserted, to stop the running of the statute need not be civil fraud in the sense of deceit or moral fraud. Equitable fraud is sufficient. In *Kitchen v Royal Air Force Association et al* [14], the plaintiff had a cause of action arising out of the death of her husband. Solicitors were instructed. They did not commence legal proceedings before the relevant statutory time limit came into play. Subsequently the company, against whom the action might have been brought, made an *ex gratia* payment. This payment was not disclosed by the solicitors to the plaintiff. Nor was the course of conduct carried on disclosed to the plaintiff. She did not discover all this until some years later. She then brought action against the solicitors for negligence. The action was not brought until six years after the allegedly negligent acts of the solicitors had been committed. The solicitors sought to rely on the statute of limitations.

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10. [1940] S.C.R. 218 per Duff, C.J., at p. 244. See also the statement of Maclean J. at trial: [1938] Ex. C.R. 103 at 126-128.

11. [1941] S.C.R. 520 at 523 and 530

12. [1920] A.C. 636 at 648-653 (J.C.P.C.)

13. [1969] 2 Ch. 345 (C.A.) per Denning, M.R. at 355-356

14. [1958] 1 W.L.R. 563

Lord Evershed, M.R., in upholding the finding of the trial judge, that the concealment or non-disclosure prevented the running of the limitation, said at pp. 572-573:

> ...A necessary consequence of the concealment was, as they must, if they had given any thought to the matter at all, have realized, was a concealment also from the plaintiff of the real effect of their having thrown away--and I use that word deliberately--any case which she might have possessed under the Fatal Accidents Acts in the previous May. Does, however, that concealment amount to fraud? I repeat that there is no finding and no justification for any finding of dishonesty as that word is ordinarily understood. But it is now clear that the word "fraud" in the section which I have read, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beamen v A.R.T.S. Ltd.* that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwick did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.
>
> ...

and at p. 574:

> ...
>
> Assuming, as I do, that the plaintiff was the appellants' client, she was entitled to rely upon them to look after her interests, and it was in breach of that confidence, as I think, that they did what they did in October and November, and concealed from her facts which would undoubtedly, if disclosed, have brought to light what her true rights against the appellants were. Therefore, though I have felt considerable difficulty about this part of the case, on the whole I have come to the conclusion that there is here just enough established by the plaintiff to enable her to say that there was concealment by fraud by the appellants, and so to deprive them of the right to set up against her the Statute of Limitations.

The principles of the *Kitchen* case were approved in *Joncas et al v Pennock*[15] and *Zbryski v City of Calgary*[16].

The conduct of the Indian Affairs Branch personnel in this case amounted, in my opinion, to equitable fraud. There was not, as argued by the plaintiffs, fraud in the sense of deceit, dishonesty, or moral turpitude on the part of Anfield, Arneil and others. But the failure to return to the band or council, after October 6, 1957, for authorization as to the proposed terms of the lease, was, in view of all that had gone on "...an unconscionable thing for the one to do to the other". There was a concealment amounting to equitable fraud. The explanations for this failure to go back to the band, I have earlier theorized about. I repeat, however, my comment: "None are exonerations".

I find, also there was not, in the circumstances, lack of reasonable diligence on the part of the band and its councils in ascertaining the terms of the golf club lease. I have already described the parental, wardship attitude of the Indian Affairs Branch in past years, and the practice in respect of documents and records dealing with band affairs. Here, the Musqueam Band had no reason to think a lease, with terms different to what they had been led to believe would be the case, had been entered into. The first review period did not come up until 1973. What appears to have been a chance

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15. (1962) 32 D.L.R. (2d) 756 (Alta S.C.T.D. & A.D.)
16. (1965) 51 D.L.R. (2d) 55 (alta S.C.T.D.)

discussion between Delbert Guerin and Allen brought to light, in 1970, the true state of affairs.

The defendant pleaded the *Limitation Act* of British Columbia (previously cited), which came into effect on July 1, 1975. Counsel for the defendant, in argument, expressed his view the former statute, and not the 1975 statute, applied. But the pleading was not withdrawn.

If the new Act is applicable, then in my view, the running of time against the plaintiffs is postponed by the provisions of s.6. I set out the relevant portions:

> 6.(1) The running of time with respect to the limitation period fixed by this Act for an action
>
> (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or
>
> (b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee, or previously received by the trustee and converted to his own use,
>
> is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.
>
> (2) For the purposes of subsection (1), the burden of proving that time has commenced to run so as to bar an action rests on the trustee.
>
> (3) The running of time with respect to the limitation periods fixed by this Act for an action
>
> ...
>
> (h) for breach of trust not within subsection (1)
>
> is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) For the purpose of subsection (3)

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;

(b) "facts" include
(i) the existence of a duty owed to the plaintiff by the defendant; and
(ii) that a breach of a duty caused injury, damage or loss to the plaintiff;

(c) where a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person;

(d) where a question arises as to the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

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

...

On the evidence before me as to concealment, first knowledge, means of knowledge and diligence (which I have already outlined), the plaintiffs have, in my opinion, brought themselves within the curative provisions of ss. 6(3).

There remains the plea of laches.

The plaintiffs, it is said, have slept too long on their rights; they knew, or ought to have known, in 1958 or shortly after, of the matters they now complain about; the defendant has been prejudiced by the delay in bringing suit. The main prejudice argued on behalf of the defendant is that Mr Anfield has died. His evidence, to rebut the plaintiffs' claim, is no longer available.

Anfield died on February 23, 1961. The plaintiffs could have, if they had been, on January 23, 1958, aware of the true facts, waited until at least January of 1964 to commence action. The contention of prejudice by Anfield's death loses, therefore, a good deal of force. Mr Arneil died in 1971. He would undoubtedly have been called as a witness if this action had come to trial before his death. But he was not the key figure, as Anfield was, in the dealings with the band and council. As I said earlier in these reasons, I have kept in mind that Anfield is not here to present what, the Crown suggests, is an opposite version of the facts. But I do not agree there would necessarily have been, if Anfield and Arneil were alive, an opposite version.

On the other side of the coin, some members of the band, to whom I have made reference, died before this action came to trial. Undoubtedly, other members, who might have contributed evidence, have also died since January 1958.

The law, as to the operation and effect of the doctrine of laches is, to my mind, accurately set out in *Halsbury's Laws of England*[17], at para. 1476:

> 1476. The defence of laches. A plaintiff in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the Statutes of Limitation, *vigilantibus et non dormientibus lex succurrit*. A court of equity refuses its aid to stale demands, where the plaintiff has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his laches.
> ...

and, at para. 1477:

> ...
> In determining whether there has been such delay as to amount to laches, the chief points to be considered are (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the plaintiff has become aware of it.
> ...

again, at para 1478:

> 1478. Acquiescence as an element in laches. The chief element in laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time. Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them.
>
> Hence acquiescence depends on knowledge, capacity and freedom. As regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them. Where a plaintiff is kept in ignorance of his cause of action through the defendant's fraud, time will only begin to run from the time when the plaintiff discovers the

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17. vol. 16 (4th Ed.) See, also, *Snell's Principles of Equity* (27th Ed. 1973) 35

> truth or ought reasonably to have done so. It is not necessary, however, that the plaintiff should have known the exact relief to which he was entitled; it is enough that he knew the facts constituting his title to relief. As regards capacity, there is no acquiescence, and laches is not imputed, while the party is a minor or is mentally disordered.
>
> ...

and, at para. 1480:

> 1480. Change in defendant's position. Regard must be had to any change in the defendant's position which has resulted from the plaintiff's delay in bringing his action. This may be, for instance, because by the lapse of time he has lost the evidence necessary for meeting the claim. A court of equity will not allow a dormant claim to be set up when the means of resisting it, if it turns out to be unfounded, have perished.
>
> ...

and, finally at para. 1481:

> ...
>
> Apart from statute, time alone was no bar to an action in a case of express trust. Time still is no bar in certain cases of breach of trust, although, where there is no statutory bar, an action for breach of trust, like any other equitable claim, may be barred by acquiescence, whether this consists in assent to the breach of trust or in subsequent condonation, or by other circumstances which, combined with delay, make it inequitable to allow the action.
>
> ...

I have already found the conduct of the Indian Affairs Branch personnel amounted to equitable fraud; that the plaintiffs did not have actual or constructive knowledge of the real terms of the golf course lease until March 1970;

that the plaintiffs cannot, on the evidence and in the circumstances here, be said to have been guilty of lack of due diligence in not ascertaining the lease terms sooner. I have, as well, dealt with the alleged prejudice to the defendant, by reason of this suit not having been brought until 1975. I have found against that contention.

All that, in my view, removes the plaintiffs from the reach of the equitable doctrine of laches. I see here no inequity in permitting the plaintiffs' claim to be enforced. The defendant--for practical purposes the plaintiffs' fellow citizens--has not been induced, by any delay, to alter any position.

The defence of laches fails.

In argument, counsel for the defendant requested the defendant be granted, in the circumstances, relief from personal liability for any breach of trust. Reference was made to s.98 of the old *Trustee Act*[18]. That section is in substantially the same words in the present *Trustee Act*[19]. I set out the present section:

> 98. If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.

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18. R.S.B.C. 1960, c.390

19. R.S.B.C. 1979, c.414, s.98

The court referred to, in the previous and present legislation, is the Supreme Court of British Columbia. The provision cannot, therefore, confer relieving jurisdiction on this court.

Even if this court had such jurisdiction, I would not, in the circumstances here, grant relief, in whole or in part, to the defendant. The Indian Affairs Branch personnel in entering into the golf club lease acted, in my opinion, honestly. There was no deliberate or wilful dishonesty towards the band. But the personnel, and ultimately the defendant, did not act reasonably in signing the lease without first going back to the band. I cannot see that it would be fair to excuse the defendant.

DAMAGES

I have found the defendant was in breach of the trust she accepted.

I have found, as well, the probabilities are the band, if it had known the terms of the lease of January 22, 1958, would not have voted, on October 6, 1957, to surrender the lands to be leased to the golf club.

That leads to the extremely difficult question of damages. A great deal of evidence, at this lengthy trial, was on that subject. Most of it was given by experts in various fields.

The measure of damages is the actual loss which the acts or omissions have caused to the trust estate: *Fales et al v Canada Permanent Trust Co.*[20] The plaintiffs are

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20. [1977] 2 S.C.R. 302, per Dickson J. at 320

> ...entitled to be placed in the same position so far as possible as if there had been no breach of trust. All of the evidence bearing on this question would be admissible...
>
> *Toronto-Dominion Bank v Uhren* [21]

One of the most difficult questions for decision looms, in view of my factual findings, at the outset of the enquiry into damages. If the plaintiffs had, in effect, turned down the lease of January 22, 1958, what, likely, would have occurred?

There are a number of possibilities, some of which were canvassed in evidence, some in argument, and some in neither.

One possibility, not discussed in evidence or argument, was further negotiation and agreement between the golf club and the band, through the Indian Affairs Branch. The defendant called Mr McIntosh, Mr Jackson, Mr Harrison, Mr Pipes and Mr Gillespie. I shall refer to those gentlemen, collectively, as the golf club witnesses. I conclude, from their evidence, it was unlikely the golf club would have agreed to deletion of the 15% limitation on increase of rent in the second 15-year period, or to any reduction in the rental terms from 15 years to 10. I also think it unlikely, based on the evidence of McIntosh, the golf club would have relinquished its proposal to have the right to remove improvements at any time the lease came to an end. Nor do I think the golf club would have agreed to negotiations and arbitration for future rental based on the highest and best use of the land.

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21. [1960] 32 W.W.R. 61 (Sask C.A.), per Gordon J.A. at p.66. See also Culliton, J.A. at p. 73)

I put aside, therefore, any estimate of damages on the basis of a suitable or desirable golf club lease from the band's point of view, as contrasted with the lease now in force.

The chief witness for the plaintiffs, on the question of damages, was Mr A.G. Oikawa. He is a real estate appraiser, and consultant in matters relating to real estate evaluation, marketing studies and feasibility studies.

The defendant, in respect to evaluation of the 162 acres, called Mr W. Palmer, Mr K.W. Behr and Mr D.D. Davis.

Palmer is the manager of the appraisal division in Vancouver of A.E. Lepage Western Limited. He is also senior vice president and chief appraiser of the national appraisal operations of that organization. Behr is an appraiser with the A.E. Lepage organization. Davis is an experienced real estate appraiser. He has been in the real estate business with Ker & Ker Ltd. for over forty years. That company is one of the larger real estate companies in Vancouver.

Oikawa, Palmer, Behr and Davis were in agreement on one important point: the 162 acres was, in 1957 and 1958, and still is, a prime piece of residential property in the City of Vancouver. All four appraisers agreed the highest and best use for this property, from 1958 to the present, is as prime residential, not as a golf course.

Oikawa, and the other three, part company as to the marketability of the property in 1958, having in mind the restriction the land could only be leased, not sold.

In Oikawa's opinion the land could have been sub-divided for residential single family dwellings on a prepaid, 99-year leasehold basis. He envisaged approximately 438 lots. He felt they could have been marketed over five years. He conceded there were no leases of that kind in Vancouver in 1958. A prepaid, 99-year lease was not, however, a unique concept. But it was an unknown type of holding in Vancouver in 1958. Oikawa felt, based on his research, economic conditions and the demand for residential lots, that this 162 acres could have been developed, in 1958 and thereafter, on the leasehold basis I have briefly described.

His opinion was not shared by the three appraisers called by the defence. It was their view the land could not have been developed on a prepaid, 99-year lease basis. It was their opinion the golf club lease, as entered into, was the best probability at the time; the Indian Affairs Branch was justified in entering into the lease now in effect.

There was evidence before me that some persons were interested in trying to obtain Indian lands for housing development in 1957 and 1958, even on a leasehold basis. The witness Kelly had broached a plan, for Musqueam land, to the Indian

Affairs Branch personnel. I have already referred to that evidence. Those plans were not, however, on the scale envisaged by Oikawa in his evidence. There had been some proposals, in those same years, for housing and apartment development, when tenders were invited in respect of the leasing of land on Capilano Indian Reserve No. 5.

The University Endowment Lands (U.E.L.) were, and are, almost contiguous to the Musqueam Reserve. In 1956, a report, called the Turner Report, had been completed and submitted, in the latter part of the year, to the government of the day of British Columbia. Portions of the report were put in evidence (Ex. 179). It recommended the development of a good deal of the U.E.L. for single family and multiple use housing, with shopping plazas and other amenities. The proposed development was to be on a long term leasehold basis.

Robert P. Murdoch gave evidence for the plaintiffs. He is now the manager of the U.E.L. He joined the organization on July 1, 1956, as assistant manager. Following the release of the Turner Report he and his staff received a large number of enquiries from persons interested in obtaining lots or housing accomodation. Most were unfamiliar with the leasehold concept. Most, when it was explained to them, still expressed interest. The staff kept a record of those who, if the Turner Report became a reality wanted to be considered potential buyers. Unfortunately, that record has been lost. Murdoch

said there were quite a number of potential leasehold purchasers. The greatest intensity of interest and inquiry was in the mid and late 1950's. Murdoch saw no difficulty, if the Turner Report had been acted upon, in marketing two to three hundred lots per year until the supply ran out.

I have earlier concluded a lease to the Shaughnessy Heights Golf Club could not have been entered into on the terms approved by the band in October, 1957:

(a) $29,000 per year for the first rental period;

(b) renewal on a negotiated rental basis every succeeding 10 years, without any restriction on the basis on which the land would be valued;

(c) no 15% limitation on any increase in rent for the second 10 year term;

(d) at the termination or expiration of the lease, all improvements would revert to the band.

Three estimates of the economic return, on the basis of lease as a golf course, were given to me: by Oikawa, Davis and Behr.

Oikawa first established the market value of the 162 acres, at various dates, on the basis of development on a pre-paid, 99-year residential lease basis. His research told him 6%, in 1958, was a reasonable rate of return. He arrived at an economic rent, as of January 22, 1958, of $97,080 per annum. The plaintiffs naturally contrast this with the $29,000 figure actually paid for the first 15 years.

Davis used a somewhat different approach. His is, understandably, and as he stated, theoretical. His view was

the land could not have been marketed on a leasehold basis. But, to arrive at figures, he calculated the value, at various dates, on a freehold basis. He then reduced that figure because the land was to be marketed as leasehold. In 1958 he used the same economic rent percentage as Oikawa: 6%. That amounted, by his method, to $61,460 per year.

Davis did another valuation. He estimated the market value of the 162 acres, at various dates, on the basis that the highest and best use was as a golf course. He started out with the initial $29,000 rental per year figure of the lease now in force. His estimates of annual rental value, as a golf course, for various dates were as follows:

1958:	$ 29,000
1968:	99,630
1973	194,820
1978	372,000

Oikawa's estimates of rental value, based on his method, which I have outlined above, were:

1958:	$ 97,080
1968:	231,750
1973:	615,740
1978:	1,428,300

Behr accepted the $29,000 per annum rental in 1958 as valid. He used the N.H.A. interest rate, the Consumer Index, Industrial Composite Wages per week, and Construction Wages to arrive at price trend increases from 1958 to 1978. He calculated the weighted increases over the base year. He then applied

those weighted increases to arrive at the reasonable economic rent in the subsequent years. His results were:

1958:	$ 29,000
1968:	63,800
1973:	69,310
1978	103,440

All of the above points to one conclusion. Davis put it this way:

> Knowing what we know today, with the tremendous increase in land values and higher interest rates, all of the foregoing points out to the fact that based upon the years 1968, 1973 and 1978, the rental being obtained from Shaughnessy Heights Golf Club is far too low. However, in 1958 we were not aware of any of these facts, and the writer would have to conclude, thinking as to how we did in 1958, that this is a reasonable lease.

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

At this stage, and before stating my conclusions, I propose to set out, in the form of a table, the various valuations given by the appraisers.

	Market Value Freehold	Market Value Leasehold	Rental Value P.A.		Rental Value P.A. as golf course
Howell	890,000				
1958 Oikawa	1,540,000	1,618,000	97,080	6%	
Palmer & Behr	1,625,000		81,250	6%	29,000 (Behr)
Davis	1,687,500	1,024,300	61,460	6%	29,000
1968 Oikawa	2,916,000	3,090,000	231,750	7½%	
Behr	3,907,000		280,900	7.19%	63,800
Davis	4,725,000	2,578,400	219,160	8½%	99,600
1973 Oikawa		7,244,000	615,740	8½%	
Behr	9,414,200		712,650	7.57%	69,300
Davis	9,450,000	4,867,000	438,030	9%	194,800
1978 Oikawa		15,870,000	1,428,300	9%	
Behr	17,854,000		1,535,440	8.6%	103,440
Davis	16,875,000	8,173,800	858,250	10½%	372,000
1983 Oikawa		19,837,500	1,884,600	9½%	Oikawa adds 5% annually from 1978 to arrive at market value
1988 Oikawa		23,805,000	2,380,500	10%	Oikawa adds 5% annually from 1983 to arrive at market value

Notes:

1. Behr's rental values are calculated on freehold market value.
2. Oikawa and Davis used their leasehold values to calculate rental value.

There are suprisingly few glaring disparities among these evaluations. When one compares the market values, for the various years, of Oikawa, calculated on a leasehold basis, and those of Behr and Davis, calculated on a freehold basis, the differences are not that great. But Davis' market value on a leasehold basis is considerably lower than Oikawa's, particularly for later years. I accept Oikawa's estimates as more realistic. He prepared them on a cost of development basis. Davis' method was to arrive at freehold value, then, by somewhat arbitrary percentage reductions, arrive at leasehold value.

There is one noteworthy disparity: The freehold value estimated by Howell in 1956, and the values estimated by the others as of 1958. I do not find any breach of trust responsibility, in respect of that, on the defendant. I am satisfied Howell did his best, as of December 1956. In 1958 land values had increased. In 1978 and 1979, when Oikawa, Palmer, Behr and Davis carried out their research, they had the benefit of hindsight, better techniques and better research tools.

There is another equally noteworthy agreement in these valuation estimates. In the research and conclusions of each, the value of the 162 acres had increased approximately ten times from 1958 to 1978.

After a lengthy consideration of the evidence I have concluded the 162 acres would have, at some stage, been successfully marketed as prepaid, 99-year

leasehold lots for single family, and eventually, multi-family use. As to that kind of development, I accept the opinion of Oikawa over the others.

But I am not persuaded the area would have necessarily been developed in 1958, or as quickly as Oikawa opined. One must keep in mind the band, in 1957 and 1958, was trying to market, on a leasehold basis, more than the 162 acres. There was, according to Howell, 220 acres of prime residential land available.

Some of that land, excluding the 162 acres, has since been developed on a 99-year leasehold basis. A 40 acre development, known as Musqueam Park, began at the north east corner of the golf course in 1965. This development was on a 99-year lease basis, but not prepaid. The majority of the houses were built in 1967 and 1968.

In 1971 and 1972 another area, called Salish Park, was developed. The land is on a prepaid, 99-year lease basis.

I have no doubt the success of the Musqueam Park and Salish Park developments was contributed to, to some extent, by the presence of the golf course. I do not accept the view, advanced by the Crown and some of its witnesses, that it was largely responsible for the success of those two areas. Nor do I accept the view, propounded by some of the defendant's expert witnesses, that large areas of this kind (220 acres) could not be successfully developed, on a residential leasehold basis, without the existence of some kind of golf course, or other attracting amenities.

As I see it, the land, but for the golf club lease, might well have remained undeveloped for a few years after 1958. Advertising would likely have been done. Tenders for leasehold development would likely have been invited. I am satisfied proposals would have been made, and 99-year lease agreements reached. Development might have been, at first, slow, limited, and somewhat experimental. In my view, the area would probably have been well on the road to full development, on a residential, leasehold basis, by approximately 1968 to 1971. I have chosen that somewhat arbitrary period of time on the basis of Oikawa's evidence as to economic, business, population, and real estate value trends, housing accomodation demand, and raw land shortages, all during the period 1958 to 1973.

I turn now to quantum.

The plaintiffs put forward, in argument, four suggested approaches for the calculation of damages.

The first was to determine the loss of reasonable economic rent to the band from 1958 to the expiry of the lease in 2033. I do not propose to set out the details of this calculation. The estimate was a minimum damage loss of approximately 45 million dollars. This method presupposes Oikawa's rental income of $97,080 per year as of 1958, and his estimates for 1968, 1973 and 1978. The calculation (I am oversimplifying it) then uses the differences between those figures and the golf club rental figures to the date of trial. Estimates are then made as to future loss.

I find only limited assistance in this method. It assumes the land could have produced, in the market, the rental returns indicated from 1958 on. But my finding is, as earlier set out, it was unlikely that return could have been reached as early as 1958. This approach also assumes the golf club lease will be in effect until 2033. That may not be a realistic assumption.

The second method is a variation of the first, with certain other factors taken into consideration. The total figure, under this approach, is again approximately 45 million dollars. It is subject to the same comments I made in respect of the first method.

The third suggestion for estimating quantum is based on the loss to the band on the assumption the land should, and would have been, in 1958, developed on a residential, prepaid, 99-year lease basis. The reversionary interest is, as well, estimated. The damage calculation is estimated at approximately 53 million dollars.

The fourth approach is "...to determine the loss to the band of the opportunity to develop the land..." as of the date of trial. It is the difference between what the band has received under the present lease, and what it could receive from the date of trial to 2033, based on the highest and best use, as put forward by Oikawa. Plus, the value of the reversionary interest. It assumes the land having sat undeveloped until

the date of trial. The estimated damages, under this suggested method, are approximately 71 million dollars.

I make this comment. None of these suggested approaches are completely unrealistic. The calculations, based on acceptance of all the plaintiffs' evidence as to damages, are, to my mind, relatively conservative.

But, as I have indicated, none of these approaches take into account a very realistic contingency: In 1988, or at a later rental review period, the golf club may decide, because of the obviously high rents in sight, to terminate the lease. The agreement gives it the right to do so.

I cannot accept the damage loss estimates calculated by the plaintiffs.

The estimates put forward are based, really, on acceptance by me of all of the postulates of Oikawa. I was impressed by his knowledge, research, and ability. But, as I have indicated, I take a less optimistic view than he did, of the market possibilities in 1958. At the same time, I do not subscribe to the views of the expert witnesses for the defence that, in 1958, the golf club lease as entered into, was the only feasible business reality.

My views are, in effect, somewhere between those of the plaintiffs and those of the defendant. But I have no doubt the plaintiffs, by the breach of trust by the defendant, have suffered a very substantial loss.

Counsel for the defendant argued the plaintiffs' damages, accepting Oikawa's evidence at face value, could not exceed $1,618,000. That was the value of the 162 acres on a prepaid, 99-year basis in 1958. That submission does not take into account a number of things. I shall refer only to two. It gives no consideration to the reversionary value of the improvements at the end of the leases. Nor does it take into account the investment return on the monies received for prepaid leases.

Counsel for the defendant also argued that, on all the evidence, the plaintiffs had suffered no loss; that they might even have, somehow, gained. I did not follow, or understand, that submission when it was made. After reconsideration, I am still in the same position.

Even though damages may be difficult, or almost impossible of calculation, if a court is satisfied damage or loss has indeed been sustained, then a court must assess damages as best it can. Even if it involves guesswork.

In *Frigidaire Corporation v Steedman*[22], Masten, J.A. is reported to have said this:

> Where, as here, the liability has been finally determined, the Court will not be deterred from ascertaining the damages by any difficulty in securing complete evidence nor by the impossibility of applying a mathematical measurement so as to ascertain precisely the amount of damages. See Carson v. Willits (1930), 65 O.L.R. 456, and cases there cited. Here the difficult question

22. [1934] O.W.N. 139 at 144

> arises as to the amount of the loss through economic depression or insolvency of tenants, or other similar cause, which the plaintiff might probably have suffered if the contract had been carried out according to its terms and the plaintiff had been given possession of the tenant's notes as provided in the agreement. To estimate what might probably have happened in circumstances that never arose is in the nature of guessing, but the authorities make it plain that such is the duty of the Court. The learned Justice of Appeal said that he concurred in the estimate of 15 per cent. and agreed that the judgment of the Court should be in the terms proposed by Middleton, J.A.

On the same subject, Spence, J., in *Penvidic Contracting Co. Ltd. v International Nickel Co. of Canada Ltd.*,[23] said, in delivering the judgment of the court:

> The difficulty in fixing an amount of damages was dealt with in the well known English case of *Chaplin v. Hicks*, which had been adopted in the Appellate Division of the Supreme Court of Ontario in *Wood v. Grand Valley Railway Company*, where at pp. 49-50, Meredith C.J.O. said:
>
> There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is in *Chaplin v. Hicks* [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and

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23. [1976] 1 S.C.R. 267, at 279-280

> at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at £100. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that "where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case": per Fletcher Moulton, L.J. at p.795.
>
> When *Wood v. Grand Valley Railway Company, supra,* reached the Supreme Court of Canada, judgment was given by Davies J. and was reported in 51 S.C.R. 283, where the learned justice said at p.289:
>
> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if *the amount of the verdict is a matter of guesswork.*

A recent remark, but I suspect directed to assessing damages in the particular case, was made by Waller L.J.:[24]

> I agree with the judge that the assessment of damage is an exercise in guesswork.

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24. *Joyce v Yeomans* [1981] 1 W.L.R. 549 (United Kingdom C.A.) at 555

I assess the plaintiffs' damages at $10,000,000.

In considering the amount to be awarded, I experimented, during my deliberations, with various approaches. I did so in the hope I could eventually set out some, even perhaps vague, mathematical basis for coming to this sum. But I found myself unable to set out a precise rationale or approach, mathematical or otherwise. The dollar award is, obviously, a global figure. It is a considered reaction based on the evidence, the opinions, the arguments and, in the end, my conclusions of fact.

I shall set out, however, for the parties, factors and contingencies I have had in mind. The list is not exhaustive:

(a) The difficulty in determining when the 162 acres would have been developed, in what way, and at what monetary return. This, on the basis the present lease would never have been consummated.

(b) The contingency that the area might not, even today, be satisfactorily developed, or providing a realistic economic return.

(c) The astonishing increase in land values, inflation, and interest rates since 1958, and the fact no one could reasonably, in 1958, have envisaged that increase.

(d) The counter-factor to (c) is that those same tremendous increases must be taken into account in any damage award.

(e) The possibility the present lease will remain in effect until its expiry in 2033.

(f) The very real contingency, in my view, the lease may be terminated at a future rental review period.

(g) The monies which the plaintiffs have received to date under the present lease, and what might be received in the future if the lease remains.

(h) The value of the reversion of the improvements, whether at the end of prepaid, 99-year residential leases, or at the end of the golf club lease.

I add this. I have not overlooked the evidence of other experts, not already referred to, called by the parties in respect of damages. For the plaintiffs there were Messrs. Collisbird, Frizzell, Jefferson, Wheeler and Tattersfield. For the defendant there was Mr Goldberg, and some calculations by Mr Boyle. I have not found it necessary to refer to their evidence. But that does not mean I have not considered it.

EXEMPLARY OR PUNITIVE DAMAGES

The plaintiffs sought, in addition to compensatory damages, exemplary or punitive damages. Exemplary damages may come into play whenever the conduct of a defendant has been sufficiently outrageous to merit punishment[25]. The English courts have narrowed the situations in which punitive damages can be awarded[26].

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25. See *McGregor on Damages* (14th Ed.1980) para. 309 *et seq.*

26. See *Rookes v Barnard* [1964] A.C. 1129. See also *Broome v Cassell & Co.* [1972] A.C. 1027

But they have set out certain categories in which an award of exemplary damages might be made [27]:

> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category--I say this with particular reference to the facts of this case--to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service.

I cannot classify the actions of Anfield, Arneil, and the officials in Ottawa, as oppressive, arbitrary, or high-handed. I have already found against any allegations of dishonesty, moral fraud, or deliberate, malicious concealment. The Indian Affairs Branch personnel thought they had the right to negotiate the final terms of the lease without consultation with the band. I have found, in effect, they did not have that right. That finding does not convert their actions into oppressive or arbitrary conduct, warranting punishment by way of exemplary damages.

That concludes my reasons in respect of damages.

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27. Per Lord Devlin in the *Rookes* case at p. 1226

SUMMARY

There will be a declaration that the defendant was in breach of trust and the plaintiffs have incurred damage as a result.

The damages are assessed at $10,000,000.

I shall not issue a formal pronouncement (judgment) with these reasons. The plaintiffs have claimed interest, if damages should be awarded. That issue has not been argued. There are outstanding matters of legal costs, including possible submissions on the amount of costs, and the basis of taxing or awarding. The plaintiffs may, therefore, bring on a motion for judgment in which those matters, and any others outstanding, can be dealt with. The parties shall arrange a hearing date with the District Administrator. Failing agreement, I shall fix a date.

Lastly. I regret the delay in handing down this decision.

Vancouver, B.C.
July 3, 1981.

J.