Court File No. 09-CV-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED INDALEX HOLDINGS (B.C.) LTD. 6326765 CANADA INC. and NOVAR INC.

BOOK OF AUTHORITIES THE MONITOR
(Motion Returnable November 10, 2010)

October 13, 2010

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TO: SERVICE LIST

Index

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INDEX

7.	Ari N. Kaplan, *Pension Law*, (Toronto: Irwin Law Inc., 2006).
8.	*Guerin v. The Queen*, [1984] 2 S.C.R. 335.
9.	Patricia J. Myhal, "Doing One's Duty: Pension Plan Administrators, Agents, and Trustees," (1991) 11 Estates & Trusts Journal 10.

TAB 1

Rescue! The Companies' Creditors Arrangement Act

Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.

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THOMSON
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as their reasonable expectations in respect of the directors' conduct may differ for good reason, beyond a subjective view of the matter.[105]

5. Indemnification of Directors during the Workout Process

When a firm is financially distressed, director and officer liability insurance is often difficult or expensive to obtain. This is because often few or no assets are available to indemnify the officers, and insurance companies do not like the risks. As a result, the courts in the initial stay orders frequently order indemnification of directors and officers, so that those who may be key to the workout process will stay during the restructuring period.[106]

The stay of claims against directors during the *CCAA* proceeding allows the parties to consider whether a compromise or arrangement can be made in respect of these claims, as discussed in the next part of this chapter, while encouraging directors, where they are required to assist in devising a workout strategy for the debtor company, to carry on in their oversight capacity. The stay of proceedings against directors does not stay actions against directors on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to a company.[107] Any person who manages or supervises the business and affairs of the company where all the directors have resigned or been removed by shareholders without replacement, is deemed to be a director for purposes of the stay provisions.[108]

In addition to negotiating golden parachutes, there is an increasing tendency for directors to seek large and extensive director and officer (D&O) liability protection. Directors can legitimately ask for protection going forward, as this encourages them to stay during the workout process. However, some directors attempt to get liability

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[105] *Ibid.* at para. 190-192. The Court ordered the trustee to provide to the respondents and the court a list of all Finance II bondholders that fulfilled the criteria of having purchased the bonds prior to September 1, 2004 and continuing to hold them as of the date of the judgment. An order would then issue requiring Calpine to maintain in the control of the affiliate sufficient proceeds from the sale transaction to cover the face value of the bonds, and where there were not sufficient funds, the Court ordered the parent company to place in the affiliate's control an additional amount to cover the value. The order was to further provide that the affiliate would conduct its business in a proper and efficient manner so as to preserve and protect its business and assets.

[106] To the extent that an insurance policy exists to cover directors and officers (D&O) liability, the initial order usually specifically provides that these policies cannot be terminated by the insurer, in addition to ordering a D&O liability indemnification charge. In view of the finality and validity of deeming and termination provisions in civil law, the practice that evolved in Québec is to provide in the initial order that it applies retroactively. The standard order developed between the Québec Bar and the judiciary provides that the initial order applies as and from one minute past midnight on the day before the order is rendered. This ensures that no creditor can terminate a contract (including, for instance, invoking the insolvency to terminate an insurance policy) while the debtor is presenting its application or while the court is deciding whether the relief should be granted, which might render the relief moot.

[107] Section 11.5(2), *CCAA*.

[108] Section 11.5(3), *CCAA*.

TAB 2

BAIRD'S PRACTICAL GUIDE TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

DAVID E. BAIRD Q.C.

LL.B (Osgoode Hall Law School)

CARSWELL®

An interesting experience in the SkyDome file developed when several major trust companies refused to act as the trustee under a directors' trust on the ground that it was outside their normal course of business. As a result, it was necessary to have an individual fill the role of trustee. One of the important issues to be resolved when setting up a directors' trust is to ensure that all persons with claims against the trust are treated fairly and equitably. This may involve a notification to all possible claimants and a claims bar process before there is any distribution out of the trust.

6. DIRECTORS' CHARGE IN CCAA ORDER

A well-established method of protecting directors when CCAA proceedings have been commenced is to create a directors' charge in the initial CCAA order. This order usually provides that the debtor company shall indemnify the officers and directors with respect to any liability that they may incur as a result of the failure of the debtor company to make payments for liabilities for which the directors are personally liable, such as wages and employee deductions. As security for the performance of this indemnity obligation, the order creates a charge (usually in a fixed amount) on the property of the debtor company. The order will also set out where the charge will rank in priority to the other charges on the property of the debtor. Until the CCAA was amended, there was no statutory authority for the granting of the charge and the courts relied on the right to exercise their inherent jurisdiction in order to flesh out the bare bones of an inadequate and incomplete statute in order to give effect to its objects.[26] As a result, there was significant flexibility in the form of directors' charges granted in CCAA proceedings.

An example of a comprehensive directors' charge, which I drafted for the purposes of the Air Canada matter, is set out in paragraphs 51 and 52 of the initial Air Canada order, April 1, 2003 (as amended). (See Appendix E herein.) It provided that the directors and officers of Air Canada were entitled to access the directors' trust and the directors' charge if the insurer under its directors' and officers' liability policy did not acknowledge, within 21 days after the delivery of a notice of claim, that it would provide coverage and indemnify the officer or director against whom the claim was asserted against the entire amount of the claim.

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[26] *Westar Mining* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.).

When this broad form of indemnity was challenged by certain creditors of Air Canada, Farley J. ordered that the directors' charge should only be utilized if all the obligations of the directors that were indemnified by the order were not satisfied in full by payments from the directors' trust or the directors' and officers' liability insurance. He also ruled that any director relying on the directors' charge was required to make a contribution to the debtor company of 5% of any amount of the charge utilized for the protection (indemnification) of that person.[27]

The reference at the end of paragraph 52 of the Air Canada order, which provided that "no insurer shall be entitled to any rights of subrogation in respect of the directors' charge", followed the rationale of the decision of Ground J. in the case of *Re General Publishing Co.*[28]

The recent amendments to the CCAA have now provided statutory authority for the court to grant an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under the CCAA.[29] Also, the authority of the court to grant the directors' charge in priority over the claim of any secured creditor of the company is confirmed.[30]

These new amendments now impose limitations on the granting of the directors' charge. The most important limitation is that the charge only protects directors for liabilities incurred after the commencement of the CCAA proceedings. Also, secured creditors who are likely to be affected by the directors' charge must be given notice of the application by the debtor company to create the charge.[31] The court may not make the order if, in its opinion, the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost[32] and the court shall make an order declaring that the security or charge does not apply in

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[27] *Re Air Canada* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List], Farley J.).

[28] (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J., Ground J.), appeal from decision of Ground J. dismissed (2004), 1 C.B.R. (5th) 202 (Ont. C.A.).

[29] Subsection 11.51(1), CCAA.

[30] Subsection 11.51(2), CCAA.

[31] Subsection 11.51(1), CCAA.

[32] Subsection 11.51(3), CCAA.

respect of a specific obligation or liability incurred by a director or officer if, in the opinion of the court, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.[33]

These restrictions will create serious uncertainty and may delay the granting of directors' charges. It is now incumbent on the company to determine whether it can obtain adequate indemnification insurance for the director or officer at a reasonable cost. What constitutes "adequate" indemnification and "reasonable cost" will be a matter of judgment. The directors will always seek a high amount of protection while the creditors, whose secured claims are being subordinated to the directors' charge, will seek a very limited amount of coverage. In any event, these amendments to the CCAA will have the effect of shining a spotlight on the creation of a directors' charge and may make the creation of such charges more controversial. Except for the Air Canada matter, I do not recall any application where the creation of a directors' and officers' charge has been challenged. Also, even after the charge has been created, the court will have the power to remove the protection for the director or officer if it is of the opinion that the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.[34] This will create another opportunity for a dispute to arise.

7. RELEASE OF OFFICERS AND DIRECTORS UNDER PLAN OF ARRANGEMENT

Most plans of arrangement contain provisions releasing claims against directors of the company that arose before the commencement of proceedings under the CCAA and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.[35] As previously mentioned, such obligations are liabilities for wages, vacation pay and statutory deductions. A provision for the compromise of claims against the directors may not include claims that relate to contractual rights of one or more creditors or are based on allegations of misrepresentations made by directors to creditors

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[33] Subsection 11.51(4), CCAA.

[34] *Ibid.*

[35] Subsection 5.1(1), CCAA.

TAB 3

2009 CarswellOnt 6184, 59 C.B.R. (5th) 72

Canwest Global Communications Corp., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants

Alan Merskey for Special Committee of the Board of Directors

David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders

Edmond Lamek for Asper Family

Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada

Hilary Clarke for Bank of Nova Scotia

Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor

companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 23 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

***Pepall J.*:**

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.* [FN1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty televi-

sion channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*[FN2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31,

2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "prepackaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Pa-

perworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[FN3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[FN4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents

required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re* [FN5]; *Smurfit-Stone Container Canada Inc., Re*[FN6]; and *Calpine Canada Energy Ltd., Re* [FN7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*[FN8] and *Global Light Telecommunications Inc., Re*[FN9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting

the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other

suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with

the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*[FN10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*[FN11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of*

Justice Act provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[FN12]provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor

and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

FN1 R.S.C. 1985, c. C. 36, as amended

FN2 R.S.C. 1985, c.C.44.

FN3 R.S.C. 1985, c. B-3, as amended.

FN4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

FN5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

FN6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

FN7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

FN8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

FN9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

FN10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

FN11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

FN12 [2002] 2 S.C.R. 522 (S.C.C.).

END OF DOCUMENT

TAB 4

2003 CarswellOnt 275, 39 C.B.R. (4th) 216

General Publishing Co., Re

In the Matter of the Bankruptcy of General Publishing Limited et al

Ontario Superior Court of Justice

Ground J.

Heard: October 28, 2002
Judgment: January 22, 2003
Docket: 02-CL-004508

Counsel: *Lisa LaHorey*, *Anthony Cole*, for ACE INA Insurance Co.

John B. Marshall, for Bank of Nova Scotia

Lawrence Theall, for Former Directors

Subject: Corporate and Commercial; Insurance; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Initial Order in Companies' Creditors Arrangement Act proceedings was issued — Bank, which was first secured creditor of company and its subsidiaries, then advanced financing — Insurer held liability insurance policy covering directors' officers of company — Directors' liability policy was renewed and extended — Companies' Creditors Arrangement Act proceedings were terminated and bankruptcy proceedings commenced — Issue arose as to entitlement of insurer to subrogation against directors' charge fund — Insurer was not entitled to subrogation — Purpose of directors' charge, in case of Companies' Creditors Arrangement Act proceedings which have legitimate prospect of restructuring, is to keep directors in place during restructuring period by providing them with additional protection for additional exposure which directors have as result of insolvency of company — No logic in extending benefit of directors' charge to insurer by way of subrogation rights — Insurer continued to be liable for claims made against directors covered by directors' liability policy and continued to have subrogation rights which directors would have against company in event of claims made against directors personally — This situation was not changed as result of institution of Companies' Creditors Arrangement Act proceedings — If claims were made against directors were claims which would have been covered by directors' liability policy in any event, they should not be

claims which could be made against directors' charge fund.

Insurance --- Principles applicable to specific types of insurance — Directors' and officers' liability insurance

Initial Order in Companies' Creditors Arrangement Act proceedings was issued — Bank, which was first secured creditor of company and its subsidiaries, then advanced financing — Insurer held liability insurance policy covering directors' officers of company — Directors' liability policy was renewed and extended — Companies' Creditors Arrangement Act proceedings were terminated and bankruptcy proceedings commenced — Issue arose as to entitlement of insurer to subrogation against directors' charge fund — Insurer was not entitled to subrogation — Purpose of directors' charge, in case of Companies' Creditors Arrangement Act proceedings which have legitimate prospect of restructuring, is to keep directors in place during restructuring period by providing them with additional protection for additional exposure which directors have as result of insolvency of company — No logic in extending benefit of directors' charge to insurer by way of subrogation rights — Insurer continued to be liable for claims made against directors covered by directors' liability policy and continued to have subrogation rights which directors would have against company in event of claims made against directors personally — This situation was not changed as result of institution of Companies' Creditors Arrangement Act proceedings — If claims were made against directors were claims which would have been covered by directors' liability policy in any event, they should not be claims which could be made against directors' charge fund.

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION by insurer regarding its entitlement to subrogation against directors' charge fund.

***Ground J.*:**

1 The order sought by ACE INA Insurance Co., the insurer of the liability insurance policy covering the directors and officers of General Publishing Co. Limited (the "Insurer") seeks to delete from the Initial Order in the General Publishing CCAA proceedings dated April 30, 2002, all references to Directors' Liability Insurance and to subrogation so that it may argue on some future occasion that subrogation rights against the Directors' Charge Fund established by the Initial Order would apply in the event of any payments made by the Insurer under the policy with respect to claims made against the directors. I am not at all certain that this would be the result of the order sought by the Insurer. It appears to me that if the Initial Order was silent as to the directors' insurance and subrogation, the insurance policy would be applicable if claims were made against the directors and, pursuant to the common law of subrogation and the provisions of the policy relating to subrogation, the Insurer would have subrogation rights to the Directors' Charge Fund and the benefit of the superpriority granted to claims against that Fund by virtue of the Initial Order. Accordingly, in my view, the issue of the entitlement of the Insurer to subrogation against the Directors' Charge Fund must be de-

cided on this motion.

2 The Initial Order was issued on April 30, 2002. The decision of this court on the issue of the ownership of accounts receivable was released and the appeal from such order dismissed in late May, 2002. The Bank of Nova Scotia ("BNS"), the first secured creditor of General Publishing and its subsidiaries, then advanced DIP financing. The Directors' Liability Policy was renewed and extended effective July 31, 2002. The CCAA proceedings were terminated August 23, 2002, and the bankruptcy proceedings commenced. The first time that the issue of Directors' Liability Insurance and subrogation was raised by the Insurer was at the time of the distribution motion on October 28, 2002 and, at that time, leave was granted to the Insurer to bring a motion to vary the Initial Order in view of the fact that the Insurer was not given notice of the initial application. The Insurer's motion was brought by notice of motion dated December 17, 2002 and was heard by this court on January 8, 2003.

3 The Bank of Nova Scotia ("BNS") takes the position that the delay by the Insurer in raising the issue of Directors' Liability Insurance and subrogation and the fact that such issue was not raised until after BNS had advanced the DIP financing based upon the terms of the Initial Order are sufficient, in themselves, to dismiss the motion. It is evident from the material before this court that the Insurer was aware of the Initial Order at least by mid-July, 2002. It is inconceivable to me that the Insurer was not aware of the CCAA proceedings long before that time, in view of the substantial publicity that such proceedings received in the media, and could have sought and obtained a copy of the Initial Order. The Insurer certainly did not move expeditiously to vary the Initial Order and, I am not unsympathetic to the position of BNS, that that is reason in and of itself to dismiss the motion. The motion does, however, raise important matters of substance on which there seems to be a paucity of judicial determination or precedent and accordingly, I propose to deal with the motion on its merits.

4 I am also not prepared to dismiss the motion on the basis that the CCAA proceedings have terminated. Obviously, there is still the potential for claims against the directors, the Directors Charge still applies and the issue of subrogation with respect to claims made against the Directors' Charge Fund is an issue which must be determined in spite of the termination of the CCAA proceedings.

5 Counsel for the Insurer made the submission on the hearing of this motion that the Insurer would take the position that any payments received by the Insurer from the Directors' Charge Fund by way of subrogation would not reduce the Fund by the amount of such payment, so that the total protection for the directors would remain at $5,000,000 under the policy and $1,000,000 under the Directors' Charge Fund. I do not understand this submission. It appears to me that any payment out of the Directors' Charge Fund as a result of a subrogated claim by the Insurer would, under the terms of the Initial Order, automatically reduce the Directors' Charge Fund by that amount.

6 With respect to the substance of the motion, the purpose of a Directors' Charge, in the case of CCAA proceedings which have a legitimate prospect of restructuring, is to keep the directors in place during the restructuring period by providing them with additional protection for the additional exposure which directors have as a result of the insolvency of the company.

There seems to me to be no logic in extending the benefit of the Directors' Charge to the Insurer by way of subrogation rights. The Insurer continues to be liable for claims made against the directors covered by the Directors' Liability Policy and continues to have subrogation rights which the directors would have against the company in the event of claims made against the directors personally. This situation is not changed as the result of the institution of CCAA proceedings. If the claims made against the directors are claims which would have been covered by the Directors' Liability Policy in any event, they should not be claims which could be made against the Directors' Charge Fund in that the fund was put in place to give the directors further protection, over and above the protection accorded by the Directors' Liability Policy, as a result of the increased exposure of the directors due to the company's insolvency.

7 What the Insurer is seeking in the order now sought before this Court is an additional benefit which the Insurer would not otherwise have in the event that a claim is paid pursuant to the policy. The subrogation right of the Insurer, in the event of such a payment, would be subrogation to the directors' claims against the company for indemnity and would be simply an unsecured claim in the bankruptcy of the company. The effect of granting subrogation rights to the Insurer to access the Directors' Charge Fund would elevate the Insurer's unsecured claim to a secured claim with priority over the first charge held by BNS. As stated above, I see no logical reason why such additional benefit should be conferred upon the Insurer as a result of the establishment of the Directors' Charge which is instituted for the purpose of keeping the directors in place during the restructuring period and providing additional protection to them. It appears to me that this is particularly true when the Directors' Liability Insurance Policy was extended during the period of the CCAA proceedings, as in the case at bar.

8 In any event, it seems to me that the court, in a CCAA proceeding, should interfere with existing priority rights only to the extent necessary in order for the CCAA proceedings to continue and to provide the company with an opportunity to work out a restructuring or arrangement. There is no necessity to give the Insurer a superpriority right against the Directors' Charge Fund in order to accomplish this purpose.

9 The motion is dismissed.

10 Counsel may make brief written submissions to me as to the costs of this motion on or before February 15, 2003.

Motion dismissed.

END OF DOCUMENT

TAB # 5.

1995 CarswellOnt 2252, 18 C.C.P.B. 198

Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)

In the Matter of the Pension Benefits Act, R.S.O. 1990, c.P. 8 (the "Act")

In the Matter of the Decisions of the Superintendent of Pensions (the "Superintendent") dated May 7, 1993 and June 29, 1994 in respect of the Imperial Oil Limited Retirement Plan (the "IOL Plan") (1988), PN 0347054 and the Imperial Oil Limited Retirement Plan for Former Employees of McColl-Frontenac Inc. (the "MFI Plan"), PN 0344002 (collectively the "Plans")

In the Matter of a request for a Hearing before the Pension Commission of Ontario (the "Commission") in accordance with s. 89(8) of the Act regarding an amendment to s. 4.3 of the Plans

Certain members and former members of the plans represented by Koskie Minsky (the "Entitlement 55 Group") and The Superintendent of Pensions and Imperial Oil Limited

Pension Commission

Gillese, Chair; Beggs, Stephenson, Members

Heard: May 23 and 24 and July 20, 1995
Judgment: August 3, 1995
Docket: XDEC-30

Counsel: *Mr. Mark Zigler* and *Mr. Kevin MacNeil*, for the applicant.

Mr. Shaun Devlin and *Ms. Peggy McCallum*, for the Superintendent.

Mr. J. Brett Ledger and *Mr. Ian J. McSweeney*, for Imperial Oil.

Pensions --- Pensions — Administration of pension plans — Amendment of plan — General

Superintendent registered employer's amendments to employee pension plans — Amendments denied enhanced early retirement annuities to employees who had not reached age 50 at time of termination for efficiency reasons — Group of former employees brought application seeking declaration that amendments void — Application dismissed — Amendments did not violate ss. 14(1) or 22(4) of Pension Benefits Act — Termination was eligibility requirement under s. 14(1)(c) of Act — Section 22(4) of Act did not apply to act of amendment — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 14(1), 14(1)(c), 22(4).

The employer filed proposed amendments to two employee pension plans. The effect of the

proposed amendments was to deny employees enhanced early retirement annuities unless the employees would have been able to retire within five years of termination for efficiency reasons. The Superintendent of Pensions for Ontario registered the amendments to the plans. Six months after the amendments were passed, the employer terminated a large number of employees for efficiency reasons. A number of the employees terminated had 10 or more years of service but had not reached age 50 and were therefore ineligible for the enhanced early retirement annuity under the plans. A group of former employees objected to the registration of the amendments on the basis that the amendments were void. The group brought an application seeking a declaration that the amendments were void and an order that the employer administer the plans according to the terms in place before the amendments were passed.

Held: The application was dismissed.

The amendments did not violate s. 14(1) of the *Pension Benefits Act*. The intent of s. 14 of the Act was to balance the right of employers to amend pension plans against the need to protect employee benefits. Section 14(1)(c) of the Act voided any amendment that purported to reduce the amount of an ancillary benefit for which a participant or former participant had met all eligibility requirements. Early retirement benefits were ancillary benefits within the meaning of that section. Termination for efficiency reasons was an eligibility requirement under a plain reading of s. 14(1)(c) of the Act. There was no difference between "eligibility requirements" and "contingent events" for the purposes of s. 14(1)(c), as both meant an event that must occur in order for a participant to be eligible to receive a benefit.

The employer was not acting in its capacity as administrator of the plans when it passed the amendments and therefore s. 22 of the Act did not apply to the employer's actions. The Act allowed employers to play two distinct roles in respect of pension plans, and it was self-evident that the two roles might come into conflict from time to time. The duties and standards set out in s. 22 of the Act were aimed only at those wearing the mantle of administrator and therefore applied to the employer only when it was acting in its role as administrator. An employer was not an administrator for all purposes once a plan had been established. The amendments did not violate ss. 22(1) or 22(4) of the Act, as neither section applied to the act of amendment.

Statutes considered:

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

s. 8 — considered

s. 14 — referred to

s. 14(1) — considered

s. 14(1)(a) — considered

s. 14(1)(b) — considered

s. 14(1)(c) — considered

s. 19 — considered

s. 22 — referred to

s. 22(1) — considered

s. 22(2) — considered

s. 22(4) — considered

s. 40(1) — considered

s. 41 — referred to

s. 78 — considered

s. 79 — considered

s. 89(8) — pursuant to

APPLICATION by group of former employees for declaration that amendments to pension plans were void.

***The Commission*:**

Nature of the Application

1 The Superintendent registered amendments to the IOL Plan (1988) and the MFI Plan (collectively, the "Plans"). A group of former employees (the "Entitlement 55 Group") objected to the registration of the amendments on the basis that the amendments were void. They sought a hearing before the Commission in respect of the registration of the Amendments by the Superintendent. Specifically, they sought a ruling that the amendments were void and they sought various orders that would have the effect of compelling Imperial Oil Limited ("Imperial Oil") to administer the Plans according to the terms of the Plans in place before the amendments were passed.

2 A preliminary objection was taken to the jurisdiction of the Commission to hear the matter. In a decision rendered on April 28, 1995 [reported at 12 C.C.P.B. 267], the Commission took jurisdiction and gave its reasons. Subsequently, the Commission heard evidence and argument on the main matter. The following are its reasons for decision on the merits.

The Facts

3 In September of 1991, Imperial Oil filed with the Superintendent proposed amendments to s. 4.3 of the Plans, which were to be effective as of August 1, 1991 (the "Amendments"). After requiring Imperial Oil to follow the process set out for adverse amendments under the Act, the Superintendent registered the amendments.

4 Section 4.3 of the Plans, after the Amendments, reads as follows:

> A Member with ten (10) or more years of Service whose employment is terminated by the Company and who is eligible for a termination annuity under s. 4.1. ***and who will be eligible to retire under s. 2.2 within five (5) years of the date of terminating employment,*** may retire under s. 2.2(a) and receive a pension calculated under s. 3A.2 in lieu of a termination annuity under s. 4.1 if the Member's employment is terminated for reasons deemed by the Company to be for maintaining or improving the efficiency of its operations; provided, however, that the date of retirement for the purpose of receiving payment of such pension shall not be effective until the last day of the month in which the Member attains age 55 and further provided that the estimate of the Member's Canada/Quebec Pension Plan retirement benefit and the amount of pension currently being paid under the Old Age Security Act as referred to in s. 3A.1 (a) and (b) shall be as of the month of such Member's termination.
>
> (emphasis added)

5 The Amendments resulted in the addition of the words in bold to s. 4.3 of the Plans.

6 Prior to the Amendments, on a strict reading of s. 4.3, a plan member who had ten or more years of service at the time Imperial Oil terminated his/her employment for efficiency reasons, would have been entitled to an enhanced early retirement annuity. The effect of the Amendments was to deny such employees the enhanced benefits unless the employee would have been able to retire within five years of termination, that is, unless the employee was aged 50 or older at the time he/she was terminated by the company for efficiency reasons.

7 Until 1988, s. 4.3 was a discretionary provision. In 1988, s. 4.3 was amended to remove Imperial Oil's discretion. Between 1988 and the passage of the Amendments, s. 4.3 benefits were granted only to employees who had attained 50 at the time they were terminated for efficiency reasons. Before 1988, 5 employees under the age of 50 who were terminated for efficiency reasons received s. 4.3 benefits.

8 In October of 1990, Imperial Oil offered its employees a voluntary termination package. In August of 1991, as has been noted, the Amendments were passed. In February of 1992, or shortly thereafter, Imperial Oil terminated a large number of employees for efficiency reasons. A number of those terminated employees had 10 years or more of service but, as they had not reached age 50 at the time of termination, they were denied s. 4.3 benefits.

9 Imperial Oil was the administrator of the Plans at all relevant times, including August of 1991 when the Amendments were passed. At the time the Amendments were passed, Imperial Oil was considering "outsourcing" some operations which would have led to some terminations. The evidence was conflicting on what, if any, other involuntary terminations were under consideration by Imperial Oil at that time.

10 Imperial Oil had a power of amendment under the Plans, specifically, under s. 11.1 of the IOL Plan and under Article XII.1 of the MFI plan.

11 Imperial Oil maintained that the Amendments were passed to clarify its practice of only providing s. 4.3 benefits to employees aged 50 and older who were terminated for efficiency reasons. Entitlement 55 Group argued that Imperial Oil passed the Amendments with the knowledge that it intended to reduce the workforce and that the

12 Amendments would affect those employees that lost their jobs and who had 10 years service at the time of termination.

The Issues

13 The essence of this dispute lies in the conflict between the employer's right to amend a pension plan and the employees' expectation that, having met the 10 year service requirement, they could count on s. 4.3 benefits if they were terminated for efficiency reasons.

14 In legal terms, the question is whether the Amendments are void and of no effect. At the hearing, a number of issues were abandoned by the Entitlement 55 Group leaving only the following to be decided.

1. Are the Amendments void pursuant to s. 14(1)(c) of the Act)?

2. Did Imperial Oil contravene s. 22(4) of the Act by virtue of passing the Amendments?

3. If the answer to either issue #1 or #2 is "yes", what orders should the Commission make?

The Relevant Legislation

15 Frequent reference is made to s. 14 and 22 in the balance of our reasons. For ease of reference, the relevant portions of those sections are set now.

Section 14 - Reduction of Benefits

16

14. — (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Section 22 - Registration and Administration

17

22. — (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

. . . . .

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Section 14(1)(c)

18 The intent of s. 14 appears clear; it is to balance the right of employers to amend pension plans against the need to protect employee benefits. The mechanism used to achieve this balance in s.14(1)(a) and (b) is the concept of accrued rights. Thus s. 14(1)(a) precludes amendments which purport to reduce the amount (or commuted value) of accrued pension benefits and s. 14(1)(b) precludes amendments which purport to reduce the amount (or commuted value) of a pension or deferred pension.

19 The parties were agreed on many aspects of the operation of s. 14(1)(c). They agreed that it would operate to void an amendment which purported to reduce the amount of an ancillary benefit for which a member or former member had met all eligibility requirements. They agreed that while there is no definition of ancillary benefits in the Act, s. 40(1) sets out a list of ancillary benefits which includes early retirement benefits in excess of the minimums in s. 41. The parties were agreed, as well, that s. 4.3 of the Plans concern ancillary benefits and that the 10 year service requirement was an eligibility requirement within the meaning of s. 14(1)(c).

20 The point of departure over the operation of s. 14(1)(c) is whether termination by the company for efficiency reasons was an eligibility requirement. The Entitlement 55 Group argued that eligibility and entitlement are two different things and that termination by the company was not an eligibility requirement but rather a contingent event. In other words, eligibility requirements were said to be the conditions an employee must meet in order for entitlement to occur if the contingent event ever occurs. Eligibility requirements, therefore, do not include the occurrence of the contingent event itself. So, it was argued, whereas the 10 year service requirement in s. 4.3 was an eligibility requirement, termination by the company for efficiency reasons was a contingent event related to entitlement, not eligibility. A number of

arguments were made to support the distinction between eligibility requirements and contingencies including the fact that service is within the employee's control but termination is not.

21 Imperial Oil, on the other hand, argued that all requirements that had to be met in order for an employee to receive the benefit were eligibility requirements. Thus, termination by the company for efficiency reasons was an eligibility requirement and, as the employees had not been terminated by Imperial Oil at the time the Amendments were passed, they had not met all of the eligibility requirements necessary to receive s. 4.3 benefits and s. 14(1)(c) did not operate to bar the Amendments.

22 A plain reading of s. 14(1)(c) leads us to conclude that termination for efficiency reasons is an eligibility requirement. The key words in the section are "all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit". In our view, both the 10 year service requirement and termination by the company for efficiency reasons were necessary in order for an employee to "exercise the right to receive payment" and thus both are eligibility requirements. We recognize that the word "eligibility" is not defined in the definition section of the Act, however, it appears to be defined in the section itself as any requirement "necessary to exercise the right to receive payment".

23 We do not accept the characterization that there is a difference between "eligibility requirements" and "contingent events" for the purposes of the section. Both mean an event that must occur in order for a member to be eligible to receive a benefit and the section defines such an event as an eligibility requirement.

24 Had this interpretation of the section rendered it meaningless, we would have had to go further. However, it does not leave the section devoid of meaning. For example, some unreduced early retirement benefits become available at the members option once the member has reached certain age and service requirements. The member may elect not to exercise his or her rights but continue to work. All eligibility requirements having been met, because of the section an employer could not amend the plan so as to take away that employee's right to take early retirement with an unreduced pension. The difference between this type of provision and that in s. 4.3 is that the event triggering payment is the election by the member to retire early. The decision to retire early is not an eligibility requirement but a decision to act upon a right.

25 As, in our view, the words in the section are unambiguous, clear and in harmony with the apparent intent of the section, there is no need to go further and adopt a purposive approach to interpretation.

Subsection 22(4)

26 The Entitlement 55 Group argument in relation to s. 22(4) was stated in the following terms:

> whether Imperial was faced with a conflict of interest as between its role as employer and its role as administrator; and
>
> whether Imperial acted on the conflict of interest, in its capacity as administrator of the

Plans, and to the detriment of the interests of the beneficiaries of the Plans.

27 In the view of the Entitlement 55 Group, in amending s. 4.3 Imperial Oil was acting in both its capacity as employer and its capacity as administrator of the Plans, simultaneously. It recognised that Imperial Oil, as employer, had the authority to amend the pension plan as part of the employment contracts of its employees. However, it maintained that the amendment powers were subject to the fiduciary obligations imposed or created by s. 22(1) of the Act. Subsection 22(1), it was argued, imposed fiduciary obligations that were not limited to matters of fund investments but also involved plan amendments which would utilize fund assets or reduce fund liabilities "for improper purposes". The alleged improper purpose was that the Amendments reduced the potential liabilities of the pension fund in respect of individuals who would otherwise qualify.

28 At the same time, it was argued, Imperial Oil placed itself in a conflict of interest situation which is prohibited by s. 22(4); in its role as employer, it wished to reduce the pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries of the fund who had reached the 10 year service qualification and "qualified" for the s. 4.3 benefits.

29 We do not accept that Imperial Oil was acting in its capacity as administrator when it passed the Amendments and therefore we do not accept that s. 22 applied to its actions. The words "employer" and "administrator" are used throughout the Act. However, there are not used interchangeably. Rather, they are used to describe the two different functions that an employer may serve in respect of a pension plan.

30 The Act recognizes that an employer may wear "two hats" in respect of pension plans. Indeed, s. 8 specifically states that an employer may be an administrator. In that way, it acknowledges that an employer may play two roles and it is self evident that the two roles may come into conflict from time to time.

31 To illustrate how the Act uses the words "administrator" and "employer" differently throughout the Act, consider s.78 and 79 of the Act. Those provisions enable an employer to seek and receive surplus pension funds. Clearly, an administrator would be in a conflict of interest position if it sought the return of surplus funds for an employer. The Act makes it clear that it is the employer who seeks the refund of surplus funds under s. 78 and 79. In s. 19, on the other hand, it is the administrator who is charged with the obligation to ensure that "the pension plan and fund are administered in accordance with the Act and the regulations". There are many, many other instances where the Act shows that the legislature chose between the word "administrator" and "employer". This leads us to the conclusion that, at least in the first instance, when the word "administrator" is used in s. 22, it is used to mean the person or body administering the fund and who stands in a special fiduciary relationship with the plan members courtesy of the fiduciary standard of care set out in s. 22(1).

32 Is there anything in the provisions of s. 22 which would lead us to a contrary view, that is, to the view that the word "administrator" is used in s. 22 simply as a shorthand to cover all those persons and bodies that s. 8 permit to act as administrator? Not in our view. The

section is aimed at setting out the standards, powers and duties, of those who wear the mantle of administrator.

33 We are of the view that an employer plays a role in respect of the pension plan that is distinct from its role as administrator. Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters round the exercise of a power of amendment.

34 The exercise of the power of amendment was an act of Imperial Oil as employer. It breached neither s. 22(1) nor s. 22(4) as neither subsection applied to the act of amendment.

35 Another way of looking at the matter would be to see that the power of amendment contained in the Plans is an express agreement that for the purpose of making amendments, Imperial Oil would be acting in its capacity as employer.

36 Even if Imperial Oil could be seen to be the administrator when passing the Amendments, we do not accept that it infringed the rule against conflicts of interest in s. 22(4). Subsection 22(4) prohibits conflicts "in respect of the pension fund". Throughout the Act, a distinction is drawn between "administration of the plan" and "investment of the fund". Subsection 22(2), for example, refers to both administration of the plan and investment of the fund. Subsection 22(4) uses only the words "in respect of the pension fund". In so doing, it is clear that the prohibition was in respect of matters directly affecting the fund. The Amendments would admittedly have an impact on the fund. However, they were primarily about the administration of the plan and were therefore not governed by the terms of s. 22(4).

Orders

37 In light of our rulings that the amendments violated neither s. 14 nor s. 22, there is no need to consider what orders ought to be made.

Conclusion

38 The application is dismissed.

Application dismissed.

END OF DOCUMENT

TAB # 6.

2005 CarswellQue 13745, 2005 QCCA 304

Assoc. provinciale des retraités d'Hydro-Québec c. Hydro-Québec

Association provinciale des retraités d'Hydro-Québec, Appelante-demanderesse, c. Hydro-Québec, Intimée-défenderesse

Cour d'appel du Québec

Forget J.C.A., Chamberland J.C.A., Dalphond J.C.A.

Heard: 6 avril 2004 - 8 avril 2004
Judgment: 10 mars 2005
Docket: C.A. Qué. Montréal 500-09-012724-027

Counsel: *Me Marcel Rivest, Me Guy Désautels*, pour l'appelante

Me Michel Benoit, Me Josée Dumoulin, pour l'intimée

Subject: Labour and Employment; Public

Jacques Chamberland J.A.; André Forget J.A.; Pierre J. Dalphond J.A.:

[UNOFFICIAL ENGLISH TRANSLATION]

1 *THE COURT*; ruling on the appeal from a judgment rendered on September 5, 2002, by the Superior Court, Judicial District of Montréal (the Honourable Carol Cohen), which dismissed the appellant's class action and ordered reimbursement to the appellant of its disbursements, including expert costs, from the pension fund administered by the respondent;

2 After studying the record, hearing the parties and deliberating;

3 For the reasons of Justice Dalphond hereto attached, with which Justices Chamberland and Forget agree;

4 *DISMISSES* the appeal, without costs.

Pierre J. Dalphond J.A.:

5 When a pension plan is amended to increase its benefits to its active members and the cost of these amendments is financed from the pension fund surplus, can retirees demand an

increase in their defined benefits under the applicable law of contract or trusts? In the case of a significant actuarial surplus, can the employer and the unions representing the vast majority of active members agree on a reduction and then a waiver of contributions without obtaining authorization from the retirees?

6 These are the two main questions, both novel and complex, raised in this appeal.

CONTEXT

7 In 1946, the respondent, then known as the Québec Hydro-Electric Commission, was authorized to create a pension plan for its employees. As no general legislative framework for such plans existed at the time, the only applicable statutory provisions were found in the *Act to establish the Québec Hydro-Electric Commission*, S.Q. 1944, c. 22, and in the *Act to assure pensions to the employees of Hydro-Québec and of Beauharnois Light, Heat & Power Company*, S.Q. 1946, c. 27. Pursuant to these acts, the Commission adopted a by-law creating a pension plan, which subsequently received sanction from the Lieutenant-Governor in Council.

8 Over time, the respondent acquired several private electricity producers. At present it has over 20,000 employees, and its pension fund pays out benefits to approximately 11,000 retirees or other persons entitled to benefits under the plan (hereinafter, retirees).

9 According to actuarial valuations, the pension fund operated at a deficit until 1984. For example, in 1978 the unfunded actuarial liability was $267,842,000; in 1980 that amount was up to $471,018,000. To remedy the deficit, between 1968 and 1985 the respondent paid in over $200,000,000 as amortization amounts in addition to normal actuarial costs (employer and employee contributions).

10 Higher than predicted returns, however, resulted in a pension fund surplus, as concluded by the actuarial valuation of December 31, 1984, in a report dated November 22, 1985. [FN1] In 1986, the respondent and the unions agreed to amend the plan by:

- reducing member and employer contributions;
- adopting the "85 rule" authorizing employees at least 55 years old and with a minimum of 30 years of service to retire without a reduction in annuity;
- establishing a new pension indexation mechanism more generous than the one then in place.

11 These amendments were then adopted in a by-law by the board of directors of Hydro-Québec and subsequently by the Government of Québec, made retroactive to December 26, 1985.

12 The parties do not agree on the cost of these amendments for the pension plan. The appellant, for example, estimates the cost of indexing the pension in favour of the retirees to be $56,000,000, while the respondent assesses the cost at $44,000,000. As for the amendment allowing retirement under the "85 rule", the appellant's experts estimate the cost to be $130,000,000. In any event, the appellant considers these amendments to be fair because they

benefit everyone, and they are not at issue before the Court.

13 Between 1985 and 1996, thousands of Hydro-Québec employees retired, taking advantage of the "85 rule ». Those who are still living form part of the group represented by the appellant in the present case.

14 Agreements with the various unions between 1991 and 1993 led to amendments providing that all pension plan administration and fund management costs were to be borne by the fund as of January 1, 1993. In return, Hydro-Québec provided the members with dental insurance. The retirees objected to this amendment.

15 In 1997, effective as of January 1, 1997, the respondent and the union formalized various amendments agreed upon as part of an effort to reduce labour costs. One amendment changed the "85 rule" to the "80 rule"[FN2] and did away with the minimum age of 55 for retirement. The parties also agreed to reduce employer contributions to equal those of active members. Finally, the employer agreed to maintain certain assessment levels despite the reduction in hours negotiated with the unions. The retirees also objected to these amendments.

16 Between 1997 and 1999, 2000 members retired under the "80 rule". They also form part of the group represented by the appellant.

17 On May 16, 1997, the appellant filed a motion for authorization to institute a class action on behalf of [TRANSLATION] "*all retired members of the Hydro-Québec Pension Plan, their surviving spouses and their beneficiaries, within the meaning of the Supplemental Pensions Act (R.S.Q., c. R-15.1).*"

18 On October 9, 1998, effective as of January 1, 1999, Hydro-Québec's board of directors adopted By-law no. 676 modernizing pension benefits for retirees who were receiving $26,000 and less. The by-law received governmental approval on December 16, 1999. This measure, estimated to cost $25,000,000,[FN3] benefits members of the group represented by the appellant.

19 In May 1999, the respondent and the unions agreed to suspend contributions payable by members and Hydro-Québec for as long as the pension plan capitalization rate remained at 110% (By-law no. 679, approved by the government on June 23, 1999). In addition, so-called bridging measures permitted active members who wished to retire to redeem years and thereby increase their retirement benefits. The cost of these measures has been evaluated at $188,000,000. In this same period, the employer and the unions agreed to extend the "80 rule" until December 31, 2003 (By-laws nos. 679 and 681).[FN4]

20 The class action was authorized on February 16, 1999. It should be noted that 6600 of the 10,000 members of the defined group retired after 1985 under either the "85 rule" or the "80 rule". In short, a majority of the members of this group directly benefited as active members from amendments to the plan that resulted from agreements with their representative unions - agreements they now describe as unfair.

21 The action presented at trial in the fall of 2001 demanded essentially an increase of

$377.5 million for the retirees, payable from the pension fund surplus in existence on December 31, 1999.

22 On September 5, 2002, following a trial lasting 28 days (many of which were devoted to quantifying benefits), the Superior Court handed down a decision dismissing the class action. It should be noted that during the trial the appellant requested leave to amend its written proceedings to add subsidiary conclusions regarding the method to be used to distribute the surplus among the different groups of retirees.

JUDGMENT AT FIRST INSTANCE

23 Justice Cohen surveyed the history of the respondent's retirement plan, describing the various amendments since its establishment in 1946. She then began her analysis by citing the principal decisions on the attribution of pension fund surpluses, in particular *T.S.C.O. of Canada Ltd. v. Châteauneuf*, [1995] R.J.Q. 637 (C.A.) (*Singer*) and *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 (*Air Products*). Relying on Justice Cory's remarks in the latter case, Justice Cohen concluded that while the plan is ongoing, the actuarial surplus of a pension fund exists only on paper, and she dismissed the appellant's claim that the judgment had little impact on the present dispute since it was decided on the basis of the Common law.

24 The trial judge also concluded that *Singer* does not apply to the present case for three reasons: in that case, the pension plan was wound up, the action was launched by all the plan beneficiaries, and the employer was the defendant. In contrast, in the present case, the active members and the employer are not parties to the action. In the trial judge's view, this creates a significant problem since these parties also have an interest in the surplus that may exist upon the winding-up of the plan. Moreover, she considered that the claim, which is described as contractual, is not directed at the proper party since the respondent is named in its capacity as trust administrator, not employer.

25 In addition, the trial judge did not consider that an article appearing in the *Hydro-Presse* in 1985[FN5] constituted a commitment to the retirees, since no evidence was adduced regarding the identity of its author nor of Hydro-Québec's intention to be bound by its content. Citing the remarks of Justice Deschamps in *Singer,* she further concluded that there was no need to refer to decisions addressing the question from the perspective of equity.

26 The judge also accepted the respondent's claim that the appellant cannot obtain the conclusions sought because of section 17 of the *Hydro-Québec Act*, R.S.Q., c. H-5, hereinafter the incorporating Act, which prohibits any extraordinary remedy or injunction against the Crown corporation.

27 Finally, she dismissed the demand to amend the conclusions of the action, holding that it would be contrary to the interests of justice and would constitute a fundamental change to the nature of the action.

GROUNDS OF APPEAL

28 The appellant submits that the Superior Court judge disposed of the action for essen-

tially procedural reasons and did not rule on the merits of the dispute. Stressing the importance of the issues in dispute, the appellant asks the Court to respond to them directly. It then summarizes its grounds of appeal in the following eight points:

> 1) The retirees are entitled to the surplus upon the winding-up of the plan;
>
> 2) Their right to the surplus is equal to that of the active members;
>
> 3) In the period preceding the winding-up of the pension plan (*pendente conditione*), the respondent has the obligation to act as a reasonable person;
>
> 4) The respondent failed to perform the contract binding it to the retirees in good faith;
>
> 5) The trustee of a pension fund may not use the fund surplus for its own benefit nor permit that it be used for the benefit of active employees without ensuring that retirees receive an equitable share;
>
> 6) An amendment to a retirement plan that affects the rights of active members and retirees requires the consent of the latter;
>
> 7) The respondent violated article 1439 C.C.Q. by not obtaining the consent of the retirees;
>
> 8) The appellant has the choice of remedy (article 1590 C.C.Q.) and therefore may force specific performance of the respondent's obligation; in the present case, this would mean a $377.5 million increase to the plan for the retirees on December 31, 1999.

ANALYSIS

I. The applicable legal framework

29 The respondent is a legal person created by the incorporating Act, which sets out the terms of its mandate, objects, powers and immunities, share capital and financing, administration and organization. The Act contains seventeen sections dealing specifically with the retirement plan. The provisions relevant to the present dispute follow:

> **49.** The Company is authorized to establish by by-law a retirement plan for its members appointed after 30 June 1973 and its employees, including benefits in case of disability or death, and to adopt all provisions deemed necessary for such purpose.
>
> It may determine the pension and benefits payable to its employees or to third parties, the terms of payment of the said pensions and benefits, the rate of contribution of the Company and that of its employees and the other conditions of entitlement to such pensions and benefits.
>
> The by-laws may determine

1) that only a member, a beneficiary or the mandatary of either may make an application for communication or correction of information contained in the retirement plan;

2) the mode and frequency of applications for communication and correction of such information;

3) the time allowed the person in charge of access to documents to follow up such an application.

This section applies notwithstanding sections 83, 94 and 98 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).

51. The retirement fund shall be constituted and maintained by the following contributions and amounts:

(a) a contribution by each member and a contribution by his employer;

(b) the assets accumulated under amended by-law number 12 of Hydro-Québec in virtue of the Act to assure pensions to the employees of Hydro-Québec and under this Act;

(c) the retirement fund handed over to the Company by Montreal Trust Company, under paragraph 10 of section 4 of the Act to establish the Québec Hydro-Electric Commission (1944, chapter 22);

(d) any retirement fund which may be handed over to the retirement fund of Hydro-Québec pursuant to an agreement.

Should the fund so constituted be or become insufficient to meet the pensions and benefits provided for, the Company shall make good the deficit by one or more special contributions the terms of which it determines.

53. The administration of the pension plan of the Company shall be entrusted to a committee called the Comité de retraite d'Hydro-Québec.

The composition and powers of such committee shall be determined by by-law.

However, the Company alone shall have, as trustee, the management of the retirement fund.

54. The assets of the retirement fund shall be invested in accordance with the Supplemental Pension Plans Act (chapter R-15.1).

55. Every by-law passed under this division shall be subject to the Supplemental Pension Plans Act (chapter R-15.1) and shall not come into force until approved by the Government.

(Emphasis added)

30 The respondent acknowledges that, pursuant to sections 54 and 55 of the incorporating Act, its retirement plan is subject to the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1, hereinafter the S.P.P.A.

31 In the present case, all pension plan amendments relied upon by the appellant, once negotiated with the affected unions, resulted in amendments to the by-law respecting the pension plan. These amendments were first adopted by the respondent and then approved by the Government of Québec pursuant to the incorporating Act. They were also registered with the Régie des rentes du Québec, pursuant to the S.P.P.A.

32 The S.P.P.A. is a complex piece of legislation containing over 300 provisions. It replaced the *Act respecting supplemental pension plans* (R.S.Q., c. R-17) on January 1, 1990. Like the Ontario act examined by the Supreme Court in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (*Monsanto*), the S.P.P.A. is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Québec and creates "*a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system*" (*Monsanto* at para. 14).

33 In the last few years, the S.P.P.A. has been amended several times in response to disputes regarding pension fund surpluses in the case of winding-up or conversion of plans as well as employer contribution holidays while plans are ongoing. The most significant amendments, adopted in 2000 in the *Act to amend the Supplemental Pension Plans Act*, S.Q. 2000, c. 41, were not applicable at the time of the amendments at the origin of the present class action.

34 The issues raised by the appeal must be resolved in light of the law in force between 1995 and 1999. At that time, the relevant provisions of the S.P.P.A. read as follows:

> 6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.
>
> Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.
>
> 7. A defined contribution pension plan is a plan under which employer contributions and, where applicable, member contributions, or the method used for calculating them, are set in advance and the normal pension payable is based on the amounts credited to the member.
>
> A defined benefit pension plan is a plan under which the normal pension payable is either a set amount, independent of the member's remuneration, or an amount corresponding to a percentage of the member's remuneration.

A defined benefit-defined contribution pension plan is a plan under which employer contributions and, where applicable, member contributions and the normal pension, or the method used for calculating them, are set in advance.

8. A contributory pension plan is a plan to which member contributions are paid by the members.

. . .

19. No amendment to a pension plan may become effective before the date it is registered with the Régie, except in the following cases:

(1) where the object of the amendment is the participation of another employer in a multi-employer plan, in which case the amendment becomes effective on the date determined pursuant to section 13;

(2) where the amendment is to become effective on a given date prior to its registration, in which case the amendment may, provided it is registered, become effective on that date.

20. No amendment to a pension plan which cancels refunds or pension benefits, limits eligibility therefor or reduces the amount or value of the benefits of members or beneficiaries may become effective, if made under a collective agreement or an arbitration award in lieu thereof or rendered compulsory by an order or decree, before the date on which the collective agreement, award or order becomes effective and, in other cases, before the date the notice provided for in section 26 is sent.

However, the limit set under the first paragraph in respect of the effective date of an amendment reducing benefits does not apply

(1) where the amendment is made to allow the plan to remain a registered retirement plan within the meaning of section 1 of the Taxation Act (chapter I-3);

(2) where the affected members or beneficiaries have agreed to the amendment, provided the Régie has authorized the amendment.

If the amendment relates to the normal pension, the method used for calculating the normal pension or any other benefit established on the basis of such pension or method, the amendment may affect only the service that is subsequent to the effective date of the amendment.

21. No amendment to a pension plan may reduce a pension benefit the payment of which began prior to the date on which the amendment became effective

. . .

162. Unless otherwise stipulated, the members of the pension committee are not entitled to any remuneration and the administration costs shall be borne by the pension

fund.

. . .

283. This Act replaces the Act respecting supplemental pension plans (R.S.Q., chapter R-17), except the first paragraph of section 9.1, the first and last paragraphs of section 43.1 and section 43.2[FN6], and except to the extent that it continues to apply to a plan by virtue of section 286 or 316.

. . .

(Emphasis added)

35 Section 52 of the former *General Regulation respecting supplemental pension plans*, R.R.Q. c. R-17, r.1, is also relevant, being applicable in the present case pursuant to the transitional provisions of the S.P.P.A., which read as follows:

52. Any surplus determined by an actuarial valuation may be used to reduce the contributions required under the plan.

Upon application of this surplus, the administrator of a plan shall furnish to the Board the returns mentioned in section 15.

II. Classification of amendments according to beneficiary

36 Amendments to the plan may be grouped into three distinct categories: 1) those that appear[FN7] to benefit the respondent (reduction or suspension of its contributions), 2) those that appear to benefit members (reduction or suspension of their contributions, possibility of early retirement under the "80 rule" instead of the "85 rule"), and 3) those that appear to benefit retirees (increase of benefits paid out). Of course, the appellant objects to only the first two categories of amendment, adding that an adequate increase in pension benefits as of December 31, 1999 would put an end to the dispute. It should be noted that some of the benefits effected by these amendments were financed by the fund surplus, while others resulted in reduced contributions, which might ultimately have had an impact on the surplus.

37 The three categories described in the preceding paragraph give rise to different issues. For example, if the surplus is used for increases benefiting active members only, it could be argued that such use results in inequitable treatment of the retirees who are also beneficiaries of the fund - which is a patrimony by appropriation - particularly with respect to the surplus in the event of winding-up. By contrast, if the existence of a surplus is the very reason the employer is granted a contribution holiday, this measure could be perceived as an improper use of the fund surplus, since the trust patrimony may not be used save for the benefit of the employees (active members and retirees).

38 I begin with a consideration of the legality of the amendments benefiting members and follow with similar reflection regarding those benefiting the employer. In both cases, I explain why, in my view, the consent of the retirees was not required.

III. The pension plan is a component of the members' remuneration

39 Today, the pension plan constitutes a component of an employee's remuneration and conditions of employment (*Cunningham v. Wheeler*, [1994] 1 S.C.R. 359). In *Singer*, Justice LeBel, then with this Court, wrote the following, at 675:

> [TRANSLATION]
>
> However it is created and whatever its terms, a retirement plan represents an element of the employee's working conditions. Whether mandatory or optional, the participation offered constitutes an element of what is given to the employee as consideration for his work. It is to be understood in the context of the employee's work relations.

39 For a similar perspective, see Marcel Rivest and Guy Désautels, "Les exonérations de cotisations patronales dans les régimes de retraite privés après les arrêts *Air Products* et *Singer*" (1997) 57 R. du B. 47 at 83 and 86-89 and the doctrine cited at 87, footnote 84. See also Maxime Nasr, "Les surplus d'actif dans les caisses de retraite" [1997] R.E.J. 29 at 50.

40 Thus, employees may accept a smaller salary increase if it is accompanied by a suspension of retirement plan contributions or agree to forego a salary increase in exchange for the option of retiring five years earlier. They are also free to decide that a higher current salary is preferable to greater certainty concerning their own pension benefits or even to any pension benefits at all.

41 In short, the consideration employees receive for their work comprises not only their salary but other benefits as well, including their retirement plan. Together, these elements form a whole. For the employer, pension plan contributions are calculated into their total labour costs.

42 In a non-unionized workplace, the wording of the plan is usually drawn up by the employer (*Air Products* at 646). What results is a contract (section 6 S.P.P.A.) with each employee, which can generally be characterized as a contract of adhesion (*Singer* at 676).

43 When an employee works in a unionized workplace, where individual rights are superseded by the collective agreement (*Hémond v. Coopérative fédérée du Québec*, [1989] 2 S.C.R. 962 at 975), the content of the contract created when a pension plan is established (section 6 S.P.P.A.) is a matter for collective negotiation between the employer and the union (*Dayco (Canada) Ltd. v. T.C.A.-Canada*, [1993] 2 S.C.R. 230 (*Dayco*); *Monsanto* at para. 20), like the other aspects of a contract of employment.

44 At all relevant times, the great majority of the respondent corporation's employees were unionized: 80% in 1985 and 95% in 1999.[FN8] As a result, for most members, the terms of the pension plan could not be amended without the consent of the affected unions. Accordingly, the excerpts in evidence from the collective agreements in force at the relevant times as well as the letters of amendment show that these amendments were the subject of negotiations between the respondent and the affected unions.

45 Taken together, the provisions pertaining to the retirement plan constitute one of the components of the collective agreement (*Singer* at 675).[FN9] This is recognized in, notably, section 20 of the S.P.P.A., cited above.

46 For non-unionized members, the increases agreed upon with the unions constituted *additional* benefits once the by-law governing the plan was amended in compliance with the formalities set out in the incorporating Act.

47 In summary, the increases in benefits to active members were negotiated with the employer in compliance with the incorporating Act and were subsequently incorporated into the provisions of the retirement plan in compliance with the S.P.P.A. and the incorporating Act. It remains to be seen whether the consent of the retirees was required under the S.P.P.A. or the *Civil Code*.

IV. The pension plan amendments did not require the consent of the retirees

48 I am unable to accept the appellant's claim that under the *Civil Code*, the consent of retirees — as soon as there are any — was required for every amendment to the pension plan because the plan is a contract to which they are parties. In actual fact, since the contracts of employment of former union members — including their pension benefits — are collective in nature, they do not become individual contracts between the former employer and each individual ex-employee upon retirement.

49 Rather, at the moment of retirement, the rights of a unionized member under the collective agreement in force at the time crystallize with respect to that particular member. Thus, the collective agreement and the benefits set out therein, including the retirement plan, continue to apply for the member's lifetime if so agreed, or even after the member's death if the agreement contemplates survivor benefits. In *Dayco*, Justice La Forest stated the following at 274:

> While an employee continues to be a part of the bargaining unit, he or she is of necessity subject to the vicissitudes of the collective bargaining process. However, on retirement a worker withdraws from that relationship, and at that point his or her accrued employment rights crystallize into some form of "vested" retirement right. It is quite possible that this right may only be enforceable through collective action by the union on the retirees' behalf. However, if that is the case, this arises out of structural peculiarities of our labour law system rather than any apparent point of principle.

50 The collective agreement, which continues with respect to the retirees, may be amended only by the parties to it, namely the employer and the union. Furthermore, as the Supreme Court recognized in *Dayco*, a vested pension benefit may not be reduced by amendment once payment of the benefit has begun. This principle is codified in section 21 of the S.P.P.A.

51 By contrast, pension payments may be increased or other temporary or permanent benefits added through amendments agreed upon by the union and the employer. This is noted in *Dayco* at 299:

While the retirees are outside the collective bargaining process, unions can (and frequently do) bargain on behalf of retired workers.

51 In fact, this has occurred on two occasions in the present case: first, in the agreement to amend the plan's indexation mechanism, and second, in the agreement to increase pensions of $26,000 or less.

52 In other words, under current labour laws, an agreement between the ex-employer and the union representing the employee's former unit may increase the benefits provided in the contract of employment of a former unionized member, including those benefits payable upon retirement. Such an increase may not be effected, however, by agreement between the ex-employer and the former unionized member (whether individually or as part of an association with such a purpose).

53 To come into force, these amendments must be sanctioned by the lieutenant governor in council, as required by section 55 of the incorporating Act. This demonstrates the supervisory power of the Government of Québec over its Crown corporations. This sanction does not, however, supplant collective labour relations or collective agreements.

54 As for a former non-unionized active member, the individual contract of employment entered into at hiring (along with its subsequent amendments, if applicable) defines the benefits due upon retirement and continues to apply thereafter. Moreover, under the *Civil Code*, the employee may not claim a benefit after retirement in addition to what is set out in the individual contract. Of course, if the rule governing the pension plan is amended to *increase* payments, the employee could benefit, although the *Civil Code* stipulates that employees may not claim the right to such an increase unless it is so provided in the individual contract. Nor could it be argued that the provisions of the *Civil Code* relating to contracts require the consent of the member to any amendment of the plan affecting any other person, since this would be contrary to the principle of the relativity of contract (art. 1440 C.C.Q.)

55 The S.P.P.A. remains to be discussed. While this act does confer a role on the retirees, it has done so only since 2000 and only in the event of a winding-up, splitting or merging of the plan. In the present case, none of these events have transpired.[FN10]

56 I conclude from the foregoing that the amendments to which the appellant objects do not require the individual or collective consent of the retirees, whether under the S.P.P.A., the *Civil Code*, or according to the general principles of collective labour relations.

V. The retirees' vested rights are protected

57 That the retirees do not have a voice in amendments to the retirement plan save in a few specific situations contemplated in the S.P.P.A. does not mean that their pension and other rights are at the mercy of the relationship between the employer and the active members.

58 As noted in *Dayco*, Canadian case law, like that of the United States, does not permit any amendment to a pension plan that will affect the vested rights of retirees, such as the right to receive the promised pension when they cease being members, whether or not such amend-

ment has been negotiated. In Québec, the S.P.P.A. codifies this principle in section 21, cited above.

59 The Supreme Court adds that the vested rights of retirees who were formerly unionized members are protected by the right of the union to file a grievance in their name (*Dayco* at 270). For the purposes of this appeal, I accept without deciding that these retirees may also sue the employer or the union directly if their vested rights are infringed.[FN11] I also leave aside the fact that the appellant has launched a class action against the employer "in its capacity as retirement fund trustee" and not as ex-employer[FN12] and that it seeks to have the cost of the remedy sought borne by the retirement fund and not by the party whom it argues is at fault.

60 In the present case, the evidence shows that at all relevant times, there was sufficient capital in the fund; indeed, it exceeded 110% of the value of the pension credits of both active members and retirees. Furthermore, at no time has the appellant alleged that the defined benefits agreed to by its members (most of whom were represented by unions) and the respondent had not been paid or could not be paid in the short, medium or long term. In other words, the appellant does not claim that the amendments compromised the vested rights of the retirees to their defined benefits.

61 Rather, the appellant argues that another vested right of the retirees has been infringed, namely, the right to the fund surplus in the event of winding-up. According to the appellant, this right is recognized in case law and the S.P.P.A. as belonging to active members and retirees in proportion to their respective pension credits. In support of its submission, the appellant relies on *Air Products* and *Singer*, as well as *Eljer Manufacturing Canada Inc. v. Syndicat national des salariés des Outils Simonds*, (1995) 68 Q.C.A. 105, J.E. 95-568 (C.A.), *Pierre Moreault ltée v. Sauvé*, cited above, section 38 of the *Supplemental Pension Plans Act*, R.S.Q. c. R-17, and section 288 of the S.P.P.A., R.S.Q. c. R-15.1. It also argues that this right means that in the event of amendments to the plan that reduce the surplus, equity and good faith in the performance of contracts dictate that the retirees must receive an equivalent benefit or one that is fair in the circumstances.

62 In other words, the right to the surplus in the event of winding-up would not prohibit the use of the surplus for improving the plan during its lifetime, provided the improvements benefit the retirees as much as the active members.

63 In answer, counsel for the respondent argues that section 288.1 of the S.P.P.A., as amended in 2000, repealed the entitlement of the plan's beneficiaries to surplus ownership in the event of winding-up, replacing it with an arbitration mechanism that can be set in motion only in cases of winding-up and that may result in the payment of the surplus to the employer if this is found to be the most equitable solution in light of all the circumstances of the life of the pension plan.

64 I cannot subscribe to this position. First, the legislative provision adopted in 2000 is not retroactive. Second, an examination of the background to the adoption of section 288.1 as well as its contents reveals the legislator's recognition that, in principle, the surplus belongs to

the plan's beneficiaries (both active members and retirees) by virtue of a presumption to this effect.[FN13] The legislator has also conferred upon the arbitrator the power, in the absence of an agreement, to take particular circumstances into account that could justify rebutting the presumption and paying the surplus, in full or in part, to the employer. We may imagine a case where, a few years before the end of the plan, an employer covers an unfunded actuarial liability which, it is discovered upon winding-up, was overestimated. In such a case, the employer's payment would create a surplus. The presumption could therefore be rebutted and the arbitrator could order repayment of the surplus to the employer.

65 In my view, the amendments to section 288.1 S.P.P.A. have added an extra step to the entitlement to the surplus, that is, an agreement between the employer and the beneficiaries on the sharing of the surplus or, in the absence of such an agreement, an arbitral award.

66 After an analysis of the case law and the history of amendments to the S.P.P.A., and considering that at no time has the Hydro-Québec retirement plan contained a provision specifically governing the allocation of the surplus upon winding-up, I am of the view that the retirees and the active members still have a *conditional* entitlement to the surplus in the event of winding-up once they have acquired pension credits.

67 This entitlement is conditional and uncertain, since Québec law now requires four future and uncertain events to transpire:

1) the winding-up of the plan;[FN14]

2) the existence of a surplus after all pension credits are guaranteed or funded;

3) the ownership of pension credits at the time of winding-up;

4) an agreement on the sharing of the surplus or, in the absence of such agreement, an arbitral award ordering payment.

68 In short, the entitlement of the current retirees to the surplus at the time of winding-up of the plan still exists, but is aleatory with respect to its amount.

69 Commenting on the aleatory aspect of this entitlement, Justice Cory writes the following in *Air Products* at 654:

> Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of

accrued benefits.

(Emphasis added)

70 Because it is aleatory, this entitlement cannot be seen to be affected by present amendments. In effect, if the winding-up were not to occur for twenty-five or thirty years, when all those who had received benefits agreed to in 1995, 1996 or 1997 were retired and most of the current retirees were deceased, the use of the surplus would cause injury to no one, since the persons receiving nothing upon wind-up would be those who had benefited twenty-five or thirty years earlier from increases they had agreed to through their union.

71 Similarly, if the winding-up were to occur in ten years, but before then the fund fell into deficit by an amount greater than the value of the contested uses, which would require active members and the respondent (or at least the latter: see section 51 *in fine* of the incorporating Act) to remedy it, the increases would probably have no discernable effect on the surplus at the time of winding-up.

72 Despite its aleatory nature, this conditional entitlement authorizes the unions, non-unionized employees and in some cases retirees (in the event of inaction on the part of their former negotiators) to be granted interim measures to protect them from any attempted *illegal* appropriation of a part or all of the surplus.

73 Thus, I believe it is possible that the amendments dealing with the use of the surplus for the sole benefit of active members and the employer when the winding-up of the plan is imminent could justify an injunction in favour of the retirees in order to maintain the status quo and prevent the fund administrator from following through with the amendments. Similarly, in the case of an illegal use of the surplus, a repayment to the fund may be ordered: *Markle v. Toronto (City of)* (2003), 223 D.L.R. (4th) (Ont. C.A.). This is not the case in the present instance, however, nor is it the remedy sought.

VI. Absence of a right to an increase

74 Given its conditional and uncertain nature, the entitlement to the surplus does not give the retirees the right during the life of the plan to demand an anticipated distribution of a surplus that exists at any given moment in the absence of winding-up (*Singer* at 700). This principle was clearly stated in *Air Products* at 654:

> . . . The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan.
>
> (Emphasis added)

75 It therefore follows that during the life of the plan the retirees cannot claim an entitle-

ment to an increase in pension benefits because of the existence of a surplus. For a right to demand a part of the surplus to exist, winding-up must take place, either in full or, if the applicable act so provides, in part.[FN15] This is not the case here.

76 Furthermore, I note that the appellant does not claim that it is illegal to use the surplus for the purpose of benefiting active members.

77 In fact, to claim the contrary would lead to drastic results. If it were illegal, the respondent could not consent to significant salary increases for active members in negotiations with the unions representing 95% of its employees if it did not ensure that such raises, which normally result in increases to retirement benefits for employees who retire in the coming years, had no effect on the surplus to be paid members in the event of winding-up. In fact, the recipients of the raises, whether active or retired, would be entitled to receive a greater part of the surplus in the event of winding-up than they would if they had not received a raise. For my part, I cannot see how it could be claimed that in such a case, the employer is prohibited from granting raises without the consent of the retirees.

78 As for the amendments allowing early retirement without penalty, it is easy to see how this represents an additional burden on the retirement fund and causes a proportionate reduction to the surplus. In the event of a subsequent winding-up, it is very possible that the surplus available for allocation would be reduced. That being said, from a legal standpoint, the situation does not appear any different from the case where the part of the surplus to be paid to retirees is reduced by a substantial salary increase for the active members.

79 The same is true when, instead of granting a significant salary increase, the employer and the affected unions agree to amend the plan to grant contribution holidays to the members. In other words, it matters not whether the amount of the surplus is affected by salary increases or contribution holidays.

80 In sum, the entitlement to the surplus in the event of winding-up will not prevent amendments to an ongoing plan that may have an impact on the surplus or on its distribution in the event of winding-up. Indeed, the appellant, *which seeks in its action to ameliorate benefits for the retirees and not to cancel improvements for active members*, acknowledges this. Nor will the courts recognize a right of veto over this type of amendment on the part of retirees, since this would upset collective labour relations. Such a change, if desirable, is a matter for the legislature.

81 As previously noted, it is recognized in the case law that the union and the employer may agree upon an improvement to the provisions applicable to retirees. In my view, these improvements, just like those benefiting active members, may be financed by the retirement fund surplus. This would not constitute an anticipated distribution of surplus, but rather an improvement to the benefits agreed upon by the employer and the unions when the retirees were active plan members and members of the bargaining units, benefits that crystallized upon retirement.

82 This being the case, did the respondent, as trustee, have an obligation to ensure that the amendments to the plan also benefited the retirees, as the appellant maintains? In other

words, even if it was not necessary to consult the retirees, and even if they have no vested right to an increase in their pension benefits, does the law of trusts oblige the trustee to refuse to follow through with amendments to the plan unless they confer upon the retirees benefits comparable to those the members obtained through negotiation?

VII. The scope of Hydro-Québec's fiduciary obligation

83 The appellant maintains that the amendments are unfair because they create a benefit of $1,180,000,000 for the active members and only $25,000,000[FN16] for the retirees, although they are funded by the same surplus that will belong to both the active members and the retirees in the event of winding-up. The appellant therefore argues that the respondent, in its capacity as trustee, has breached its obligation under article 1317 C.C.Q. to act impartially with regard to all beneficiaries of the plan. It adds that the most appropriate remedy to compensate for this breach is the increase sought in retirement benefits for group members ($377.5 million).

84 The incorporating Act provides for the creation of a retirement fund (section 51) into which the contributions of the respondent and members are to be paid. Investment income and other earnings are also included, as well as special contributions to amortize any actuarial deficit.

85 Pursuant to section 6, paragraph 2 of the S.P.P.A., this fund constitutes a trust patrimony distinct from that of the employer. No provision to the contrary is found in the incorporating Act.

86 Under the incorporating Act, however, the authority of the Comité de retraite[FN17] extends only to the administration of the plan; management of the fund is left to the respondent. The incorporating Act specifies that Hydro-Québec acts as trustee (section 53).

87 In light of these provisions, I have no hesitation in concluding that the retirement fund is a trust established by law (Jacques Beaulne, *Droit des fiducies*, La Collection Bleu (Montreal: Wilson & Lafleur, 1998) at 82-83), constituted for the purpose of the pension plan and governed by the provisions of the plan (found in the by-law on the pension plan) and the applicable legislation, including the S.P.P.A. and the incorporating Act and, as suppletive law, the provisions of the *Civil Code of Québec* on trusts and the administration of the property of others.[FN18]

88 It should be noted that not all of Hydro-Québec's actions should be evaluated according to the standard of fiduciary duty. In reality the respondent wears a number of different hats and changes them to suit the circumstances. Accordingly, when sitting around the negotiating table with the unions representing 95% of its employees, it acts in its capacity as employer, not as trustee of the fund. It is in this capacity that it negotiated the amendments to the plan that the appellant finds unfair.

89 In the negotiation process, the respondent was not required to ensure that the amendments were equitable with respect to the retirees nor to propose increases in their benefits. Such a requirement would amount to imposing a kind of duty represent the retirees. Moreover,

if such a duty did exist, why would it be limited solely to the retirees' interest in the trust? How could one account for unionized employees being represented by a union until the day of retirement and then being represented by their ex-employer the following day? Since the union that represented employees as active members may file a grievance to ensure retirees' rights are respected (*Dayco*), would it not be more logical to impose this duty of representation on the union?

90 Indeed, if an obligation to act as a trustee exists with respect to former members of the bargaining unit, logically this duty must be incumbent upon the union and not the ex-employer. This is pointed out by the Supreme Court in *Dayco* at 304-305:

> Finally, there is a possibility that the relationship between retired members of a bargaining unit and the bargaining agent for that unit is fiduciary in nature. If a union failed to consider the interests of retirees during collective bargaining, or refused to process a grievance on behalf of those retirees, such conduct might form the basis of a claim for breach of fiduciary duty.

90 This principle is repeated in *Tremblay v. Syndicat des employés et employées professionnels-les et de bureau, section locale 57*, [2002] 2 S.C.R. 627.

91 To conclude this section, it seems useful to note that, although the respondent was acting as trustee with respect to the retirees while negotiating the pension plan amendments, it was still required to respect the law. More particularly, it was required to refrain from following through with an amendment that would impinge on the vested rights of the retirees and violate the S.P.P.A. or that would permit actions contrary to the *Civil Code* provisions concerning the administration of the property of another. This is not the case here, however. The respondent may not be faulted in its capacity as trustee.

VIII. The respondent's contribution holidays

92 Since the 1980s, a great deal of ink has been spilled on the subject of employer contribution holidays.

93 The Supreme Court addressed the subject for the first time in *Air Products* in 1994. Justice Cory, commenting on the trust created for the benefit of the employees of Catalytic, writes the following at 654-655:

> The former Catalytic employees successfully argued before the chambers judge that to permit a contribution holiday is to permit an encroachment upon the trust fund of which they are the beneficiaries. I do not agree. As noted earlier, the trust property usually consists of all the monies contributed to the pension fund. To permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

> Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.
>
> Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.
>
> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus.

94 In other words, when the applicable statute permits the surplus to be entered into the calculation of the amount of the employer contributions, the law of trusts does not prohibit a contribution holiday since it does not constitute an encroachment on the trust fund. Although the Supreme Court's approach has been criticized (Eileen E. Gillese, "Contribution Holidays" (1995) 15 E. & T.J. 136 at 142-147), it is still the current state of the law (*Buschau et al. v. Rogers Communication Inc. et al.* (2004), 236 D.L.R. (4th) 18 at para. 57-58 (B.C.C.A.), leave to appeal to Supreme Court of Canada granted). In addition, in *Air Products* the Supreme Court declared that the employer's right may be explicit or implicit in the plan and is not dependent on the entitlement to receive part or all of the surplus upon winding-up.

95 In Québec at the time of the pension plan amendments at issue (between 1995 and 1999), the S.P.P.A. and section 52 of the *General Regulation respecting supplemental pension plans*, cited above, provided that any surplus determined though actuarial valuation could be used to reduce contributions required under the plan, that is, from employers or, if applicable, employees (M. Rivest and G. Désautels, cited above).

96 Québec doctrine and case law reveals, however, that after *Singer* and before the 2000 amendments to the S.P.P.A., a controversy existed regarding the conditions an employer must fulfil in order to take a valid contribution holiday. According to some, the right could be exercised unilaterally if it were permitted explicitly or implicitly by the plan. Others, however, saw the entitlement as contingent on the employer's right to a part or all of the surplus and, in

the absence of such a right, on the consent of the beneficiaries[FN19] (see in particular M. Benoit, "Mise à jour concernant les surplus des régimes complémentaires de retraite" in *Association de planification fiscale et financière: Congrès 2000* (Montréal: A.P.F.F., 2000) at 47:1 to 47:26).

97 In the present case, the plan did not prohibit contribution reductions or holidays. Furthermore, it is not necessary to decide whether it permitted them implicitly and, if so, whether that would have been sufficient, since the reductions and holidays were negotiated with the unions and the formalities prescribed for their incorporation into the plan were followed. In other words, the amendments to the plan explicitly authorizing these reductions and holidays were assented to by the unionized beneficiaries (members and retirees); as for non-unionized employees, the modifications were integrated into their conditions of employment when the amending by-law was adopted by the government.

98 As for the *Civil Code* provisions on trusts and the administration of the property of another, it is my view that, in light of the principles set out in *Air Products*, they do not prevent the amendments from being given full effect. Thus, while it is true that the retirement fund has constituted a trust patrimony since June 1, 1994, a contribution holiday does not constitute an appropriation of the fund or an encroachment on its capital. In other words, the trust capital remains intact; the contribution holiday merely reduces the growth of the capital held in trust.

99 In such a case the legality of the reductions and holidays cannot be questioned.[FN20] I would also note that the appellant does not claim that the amendments to the respondent's immediate benefits (employer reductions and contribution holidays) are invalid or illegal under the S.P.P.A. or the incorporating Act, nor that they constitute an illegal appropriation because they allow the employer to benefit from a part of the fund, which is a patrimony by appropriation. Nor does it demand the cancellation and reimbursement of the corresponding amounts.

100 In passing, I would also point out that, through amendments to the S.P.P.A. that came into force on January 1, 2001, the Québec legislator now explicitly recognizes the validity of amendments negotiated with unionized members that permit the actuarial surplus to be used for an employer's contribution holiday while the plan is ongoing (sections 146.1 to 146.9 S.P.P.A.). Though this does not modify the entitlement to the surplus on winding-up, it may affect the amount. The legislator thus codifies the distinction drawn by Justice Cory between the right to the surplus and contribution holidays.

101 I would add that, although these provisions require the consent of each certified association representing active members as well as the consent of any party with which the employer is bound by a written contract (other than the pension plan) relating to the use of the surplus before winding-up, the consent of the retirees or of a group like the appellant is not required under the S.P.P.A. in such cases.

102 In short, nothing in the S.P.P.A. (as in force at the relevant times), in the *Civil Code* nor in the terms of the government-approved plan required the consent of the retirees. In light of this, I am of the view that it is not the role of the courts to impose such a condition for the

period preceding 2001. Moreover, such a step would make it necessary for this Court to set out a complex procedure for soliciting consent. The Court would thus be taking over the role of legislator in an area where the Supreme Court has affirmed that the law must strike a delicate balance between employer and employee interests in a way that promotes private pension plans (*Monsanto* at paras. 24 and 38). Prudence dictates that the establishment of such a procedure be left to elected representatives.

103 Before concluding, I believe it is useful to note that the amendment of administration and pension fund management costs that became effective on January 1, 1993 was in compliance with section 162 S.P.P.A. and that, for the reasons set forth above, it did not require the consent of the retirees.

CONCLUSION

104 In summary, it is my view that the amendments improving the conditions for retirement eligibility of active members or lowering their contributions to the retirement fund neither infringed upon the vested rights of the retirees nor required their consent. As for the amendments authorizing contribution holidays for the employer, they are valid because they were agreed upon by the respondent and the unions, then filed with the Régie des rentes and incorporated by the government into the plan through amendments to the by-law.

105 Consequently, I would dismiss the appeal, without costs given the novelty of the issues raised.

Solicitors of record:

Rivest, Schmidt, pour l'appelante

Osler, Hoskin & Harcourt, pour l'intimée

FN1 Only defined benefit plans like the one offered by the respondent may accumulate surpluses. This occurs when actuarial assets exceed actuarial liabilities.

FN2 Under this rule, members whose combined age and years of participation totalled 80 points may take immediate retirement without penalty.

FN3 Factum of the appellant at 6775-6776.

FN4 This temporary measure had come to an end by the time the appeal was heard.

FN5 This article reported that experts consulted by Hydro-Québec were of the opinion that the surplus of the basic regime into which the employees and employer were paying belonged to the employers and the beneficiaries of the annuities. It also states that the employer may not touch this surplus even if it assumes all the deficits of the plan.

FN6 Section 43.1 read as follows:

43.1 From 15 November 1988, no part of the assets of the retirement fund of the plan may be

paid to the employer. Such prohibition shall not prevent the allocation of the whole or part of the balance of assets remaining in the retirement fund, determined on the date of an actuarial valuation of the plan, to the payment of the employer's contributions; however, in any event where the Act would increase the members' pension credits, any employer whose contributions would have been thus paid shall be required to pay into the retirement fund such amounts as are necessary to finance the increase, up to the amount of contributions paid.

(Emphasis added)

FN7 I use the term "appear" because analysis may reveal that a contribution holiday permitted the employer to grant the members larger salary raises; similarly, the modernization of the retirement guidelines may have made it possible for the employer to convince members to accept a lower salary.

FN8 Consequently, most of the members of the appellant were, the day before they retired, unionized members.

FN9 See also *Pierre Moreault ltée v. Sauvé*, [1997] R.J.Q. 44 at 46-47.

FN10 Aware of this state of affairs, the appellant and other parties have pressured members of the National Assembly for changes to the S.P.P.A. One M.N.A. has tabled a bill that is now pending: Bill 195, *An act to amend the Supplementary Pension Plans Act*, 37th Legislature, 1st session.

FN11 In *Dayco,* the following is stated at 282: "the sole difference is remedial in nature. In the United States the term 'vested retirement benefits' connotes a right that is enforceable at the instance of an individual retiree, without resort to assistance form his or her former bargaining agent. Such enforceability may not be available in Canada, although I find it unnecessary to decide that point in this appeal." In certain situations, however, the door appears to remain open: "But in another case it seems to me that such a remedial vacuum, arising because the retirees are not party to the arbitration procedures guaranteed by the Act [the Ontario *Rights of Labour Act*], may possibly be justification for allowing a court to proceed."

FN12 Unlike the trail judge and the respondent, I do not detect a serious obstacle in the fact that the appellant named the respondent "in its capacity as trustee" in its proceedings at Superior Court. What further arguments could counsel for Hydro-Québec have made if these words had not been used to name the respondent?

FN13 This presumption is repeated in sections 230.1, 230.1.1, and 230.3 S.P.P.A.

FN14 The appellant has not alleged that a winding-up, either partial or total, has been carried out.

FN15 *Monsanto*, *supra.*

FN16 The appellant does not take into account the amendment improving the indexation adopted in 1985, nor the fact that the majority of the members of the group have benefited from the amendments as active members.

FN17 Its composition and powers are governed by section 53 of the incorporating Act, not by the S.P.P.A.

FN18 This implies that the respondent must, among other things, respect the even hand rule codified in article 1317 C.C.Q. when, in its administration of the fund, it makes decisions that could have different impacts on some beneficiaries of the plan.

FN19 An amendment of consent is valid according to *Singer*, *Simonds* and *Moreau*.

FN20 In *Monsanto* (at para. 46) the Supreme Court reaffirms the principle that the employer may take a contribution holiday while the plan is ongoing and the plan permits the holiday.

END OF DOCUMENT

TAB # 7.

ESSENTIALS OF
CANADIAN LAW

PENSION LAW

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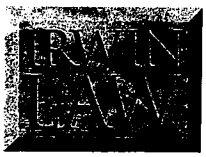

B. DUTY AND STANDARD OF CARE

The broad range of an administrator's functions in connection with a pension plan and pension fund situates it in a sobering position with respect to its potential for liability to plan beneficiaries—liability both under the *PBA* and for damages in civil actions. This section describes the general duties of pension plan administrators and their agents and advisors and the standards of care expected of them.

1) Introduction

a) Statutory duty of care

Because the plan administrator is the ultimate authority accountable for the administration and investment of the pension plan and fund, the administrator owes its constituency a "special" duty of care as a fiduciary in connection with its statutory functions.[77]

An administrator is responsible for administering the pension plan and investing its assets using "all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess."[78] In addition, an administrator must administer and invest the pension fund in a manner "that a person of ordinary prudence would exercise in dealing with the property of another person."[79] A similar standard of care is prescribed in other jurisdictions.[80] When exercising its duty to administer and invest the pension fund, the plan administrator's principal regard must be for the purpose of preserving the fund, which is to ensure that the interests of employees and pensioners are protected. As stated by one court:

> The purpose of the [*PBA*] in preserving the fund is only in the context of addressing the interests of members and former members of the pension plan. ... The preservation of the fund is an objective of the [*PBA*] only to the extent of ensuring that the interests of members and former members are met. Preservation of the fund in order to

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77 *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 at para. 31 (PCO) [*Imperial Oil*]; FSCO Policy A300-100 at 10 (May 1990).

78 *PBA*, s. 22(2).

79 *Ibid.*, s. 22(1).

80 See federal (*PBSA*, ss. 8(3)–(5)), Alberta (*AEPPA*, s. 13(5)), British Columbia (*BCPBSA*, ss. 8(5) and (6)), Manitoba (*MPBA*, ss. 28.1(2)–(4)), New Brunswick (*NBPBA*, ss. 17(1) & (2)), Newfoundland and Labrador (*NLPBA*, s. 14(1)), Nova Scotia (*NSPBA*, ss. 29(1) & (2)), Quebec (*QSPPA*, ss. 150–151), Saskatchewan (*SPBA*, s. 11(2)).

> ensure a surplus to any beneficiary of the remainder, after the needs of members and former members are met, is secondary.[81]

While the distinction may be a fine one, the duties of care owed by an administrator under the *PBA* are "statutory obligations" that are enforceable by the Superintendent and are "independent of causes of action in tort, fiduciary or trust law."[82] The relevance of the distinction between the extent of an administrator's so-called "statutory" and "common law" fiduciary duties goes more to the remedy and the forum in which a person alleging a breach of the duty seeks to obtain the remedy, than it does to the qualitative content of the duty.[83]

b) Common law duty of care

Independent of its statutory obligations, a pension plan administrator is a fiduciary at common law vis-à-vis the beneficiaries of the pension fund and, as such, can be liable for damages, restitution or other equitable relief for a breach thereof. A person owes another a fiduciary duty at common law where there is evidence of a dependency relationship in which that person is reasonably reposed with trust and confidence by the other to act in his or her best interests.[84] It is "virtually self evident" that a pension plan administrator meets these criteria in light of the administrator's statutory obligations and the fact that plan beneficiaries are always dependent on the administrator to manage the plan and pro-

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81 *Hawker Siddeley Canada Inc. v. Nova Scotia (Superintendent of Pensions)* (1993), 108 D.L.R. (4th) 95 at 130 (N.S.S.C.), aff'd (1994), 113 D.L.R. (4th) 424 (N.S.C.A.) [*Hawker Siddeley*].

82 *Communications, Energy and Paperworkers Union of Canada v. Superintendent of Pensions and CWA/ITU Pension Plan (Canada) Board of Trustees* (7 June 1999), PCO Index No. XDEC-45 (PCO). Qualitatively, the "distinction drawn is probably unimportant in respect of administrators ... because, it is clear that in placing such responsibility upon the administrator, the Act is treating the administrator as a fiduciary:" Eileen E. Gillese, "The Fiduciary Liability of the Employer as Pension Plan Administrator" (Paper presented at Pension and Other Benefit Funds, Who is the Fiduciary?, Toronto, The Canadian Institute, 18 November 1996) 1 at 11.

83 The question remains open to what extent the Superintendent has jurisdiction to find that an administrator complied with the provisions of the *PBA*, in the face of evidence establishing a breach of the administrator's common law fiduciary duties to the plan and its members: *Communications, Energy and Paperworkers Union of Canada v. Superintendent of Pensions and CWA/ITU Pension Plan (Canada) Board of Trustees*, *ibid.*

84 *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 412–13.

tect the fund.[85] In short, a pension plan administrator "owes a duty of care to members of the pension plan."[86]

But regardless of the source of the duty, what is clear is that an administrator must comply with both the statutory and common law standards.

c) To whom the duty is owed

There is little doubt that an administrator stands in a fiduciary relationship to persons entitled to pension benefits and other money payable under the pension plan, including employees, pensioners and other former members, and, where applicable, their spouses, former spouses, estates, and beneficiaries. As stated by the Ontario Court of Appeal, "pension plans are for the benefit of the employees, not the companies which create them."[87] This backdrop provides the context of to whom an administrator owes duties under a pension plan:

> The sole duty of the Board of Trustees was their fiduciary duty to consider the welfare of the employees. The decisions are uniform that the duties of trustees of employee trust funds are owed to employee beneficiaries of the trusts, not to the parties to the collective bargaining agreements creating or sustaining them.[88]

There is an emerging viewpoint that an administrator, in limited circumstances, owes duties to a pension plan sponsor, such as an employer or trade union, or both, for example, where the sponsor can be identified as a "beneficiary" to the surplus in plan upon its termination.[89] In a MEPP or JSPP, there is a separation in the legal identity be-

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85 Gillese, above note 82. See also *Bratkowski v. Ontario Teachers' Pension Plan Board* (1997), 16 C.C.P.B. 182 at para. 65 (Gen. Div.).

86 *Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 48 C.C.P.B. 214 at paras. 63–69 (Ont. C.A.) [*Hembruff*].

87 *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (C.A.).

88 *Sinai Hospital of Baltimore Inc. v. National Benefit Fund for Hospital & Health Care Employees*, 697 F.2d 562 at 567 (4th Cir. 1982); *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 at 407 (Ont. Gen. Div.), aff'd (1994), 110 D.L.R. (4th) 609 (Ont. C.A.) [*Bathgate*]; *HEPP*, above note 37 at para. 104.

89 Where an employer is a beneficiary of a surplus on plan termination, the administrator may owe duties to the employer, provided those duties do not interfere with the legal entitlements of employees. See, for example, *MicMac Agencies Ltd. (Receiver of) v. Prudential Assurance Co.* (1987), 82 N.S.R. (2d) 193 (S.C.), where the insurance company that administered an employer sponsored pension plan was found to be liable to the receiver of the employer (in its capacity as plan sponsor) for damages arising from the insurance company having used overly-conservative actuarial assumptions in the calculation of employee pension benefits on plan termination

tween the administrator and the sponsors. Since the relationship is at arm's length, the administrator's obligations to the sponsors are easier to circumscribe; they would ordinarily be set out in the trust agreement, the pension plan or another legal instrument between the parties and would also be governed by the duty to act impartially. Similarly, in Quebec, a legal separation between sponsor and administrator is a requirement of the pension legislation.

In Ontario and other jurisdictions that permit an employer to administer single-employer plans, the duties of the administrator vis-à-vis the employer may be perceived to conflict with its obligations to act in the best interests of the employees and, accordingly, the scope of an administrator's obligations to an employer continues to be debated.

2) Content of the Duty

a) Introduction

The common law standards of care imposed upon fiduciaries is the highest standard known at law and is reserved for trustees and those who act in capacities that are equivalent to that of a trustee.[90] While the statutory duties imposed on pension plan administrators are modelled on the common law standard, they are not identical. At common law, a fiduciary's conduct is measured by reference to what a person of "ordinary prudence" would do when managing his or her own property.[91] This is what has become known as the "prudent person" test. Under the *PBA*, an administrator, in exercising care, diligence, and skill, must act as a person of ordinary prudence would "in dealing with the property of another person."[92] In other words, the administrator may not take the same risks as it invests the pension fund, for example, that it might take when investing its own assets.

As a result, it is generally recognized that the fiduciary standards imposed upon pension plan administrators are higher than those required of trustees at common law because it is assumed that a person of ordinary prudence would be more diligent when dealing with the property of another than they would be in dealing with their own property.[93]

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which resulted in larger pension liabilities and thus in a smaller surplus being available to be paid to the receiver after the discharge of all employee pensions.

90 *Collins v. Pension Commission of Ontario* (1986), 31 D.L.R. (4th) 86 at 98 (Ont. Div. Ct.).

91 *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302 at 315.

92 *PBA*, s. 22(1).

93 See Patricia J. Myhal, "Doing One's Duty: Pension Plan Administrators, Agents and Trustees," (1991) 11 E. & T.J. 10 at 11; Dona L. Campbell, "Investment

b) Relevant knowledge and skill

Coincidental to, and further illustrative of, the high prudent-person standard imposed on administrators under the *PBA* is the duty to use "all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess."[94] Pension plan administrators and their agents and employees[95] are deemed to possess "specialized" and "expert" knowledge and skill, which must be exercised when discharging their statutory functions and common law duties.[96] Accordingly, a prudent administrator will provide its employees, agents, and, if the administrator is a board of trustees,[97] its board members, "with appropriate training and ongoing education, as required."[98] Continuing education and training is especially important in jointly-governed pension plans where the composition of the board often includes lay persons and the governance regime is more closely bound up in the collective bargaining process.

Moreover, the *PBA* modifies the traditional common law rule concerning the level of skill and knowledge expected of a so-called "professional" trustee who has particular expertise. That rule held a professional trustee to same standard as a lay trustee.[99] Because the statutory standard insists on a level of skill that a person "ought to possess" by reason of the administrator's "profession, business or calling," it becomes unnecessary to debate the scope of the common law rule as it applies to pension plan administrators.

The duty of knowledge and skill extends not only to the investment of the pension fund, but to all aspects of pension plan administration, including communications with employees and beneficiaries, the inter-

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Responsibility of Benefit Fund Trustees" (1993) 12 E. & T.J. 309 at 311–12; It should also be noted that some provincial *Trustee Acts* also impose this higher standard on trustees, whereas other Acts impose the common law standard.

94 *PBA*, s. 22(2).

95 *Ibid.*, ss. 22(5) and (8).

96 *Deraps v. Labourers' Pension Fund of Central and Eastern Canada* (1999), 179 D.L.R. (4th) 168 at 184 (Ont. C.A.) [*Deraps*].

97 Under *PBA*, s. 22(3), s. 22(2) applies to both single-employer and jointly governed pension plan administrators.

98 Canadian Association of Pension Supervisory Authorities (CAPSA), *CAPSA Pension Plan Governance Guidelines* (Toronto: CAPSA, 2003) Principle 5: Knowledge and skills at 7.

99 See *Fales et al. v. Canada Permanent Trust Co.*, above note 91. See also *Metropolitan Toronto Pension Plan v. Aetna Life Assurance Co. of Canada* (1992), 98 D.L.R. (4th) 582 at 597 (Ont. Ct. Gen. Div.) [*Aetna*]; *Froese v. Montreal Trust Co. of Canada* (1996), 137 D.L.R. (4th) 725 (B.C.C.A.) [*Froese*].

pretation of plan documentation, the calculation and payment of pension benefits, regulatory filings, and dealings with the Superintendent.[100]

c) Loyalty and good faith

Another common law feature of a fiduciary relationship that applies in pension plan administration is the duty of loyalty and good faith, that is, to act solely in the best interests of the beneficiaries: "A fiduciary is subject to a strict ethic to provide, among other things, the utmost good faith and loyalty to those to whom he acts in the capacity of fiduciary."[101] In the oft-quoted passage of Megarry V.C. in *Cowan v. Scargill*:[102]

> The duty of the trustees toward their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first.[103]

An administrator has a duty not to act in bad faith toward the employees in the pension plan.[104] While the court's comments in *Cowan v. Scargill* were made in the context of prudence in pension fund investment, the duty of loyalty and good faith extends to other aspects of plan administration where the board has discretionary powers of decision.[105]

The duty of loyalty applies to members of jointly-administered boards of trustees as well as to administrators established by statute. The scope of the duty of loyalty in connection with single-employer administrators and the extent the duty forms part of the statutory standard remains unresolved. While the terms "loyalty" and "best interests" do not appear in the *PBA*, clearly, on the investment side, most appear to be in agreement that the duty of loyalty is implicitly wrapped into the statutory obligations to exercise "care, diligence and skill," "ordinary prudence" and "all relevant knowledge" in the "administration and investment of the pension fund."[106] In areas such as plan inter-

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100 Compare the language of *PBA*, s. 22(1) with s. 22(2). The former provision appears to apply solely to an administrator's duties in connection with the "pension fund" whereas the latter provision applies to both the "pension plan" and the "pension fund."

101 *Moffat v. Wetstein* (1996), 135 D.L.R. (4th) 298 (Ont. Ct. Gen. Div.).

102 (1984), [1985] 1 Ch. D. 270, [1984] 2 All E.R. 750.

103 *Ibid.* at 287 (Ch. D.).

104 *Hembruff*, above note 86 at para. 116 (C.A.).

105 See *Bathgate*, above note 88; *Boe v. Alexander* (1987), 41 D.L.R. (4th) 520 (B.C.C.A.); and *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 458 v. White Farm Manufacturing Canada Ltd.* (1992), 8 O.R. (3d) 606 (Gen. Div.).

106 *PBA*, ss. 22(1) & (2).

pretation and determinations respecting entitlement to benefits, few would argue that a single-employer administrator is not subject to the duty of loyalty and good faith,[107] especially where there is an element of discretion to be exercised by the employer.[108]

To what extent does the administrator of a single-employer plan owe an obligation to the employees—either under the statute or at common law—to recover an optimum financial benefit in all aspects of the pension plan's administration, outside of simply investment-related activity? This can be illustrated by the discussion on the duty to avoid conflicts of interest, which is closely related to the duty of loyalty, in the next section.

d) No conflict of interest

At common law, a fiduciary has an absolute duty to avoid any conflict of interest, regardless of whether the conflict is actual or perceived:

> Subsumed in the fiduciary's duties of good faith and loyalty is the duty to avoid a conflict of interest. The fiduciary must not only avoid a direct conflict of interest but must also avoid the appearance of a possible or potential conflict. The fiduciary is barred from dividing loyalties between competing interests, including self-interest.[109]

This was also the reasoning of the court in *Cowan v. Scargill*, where the union trustees appointed to the administration board of the pension plan were deemed to be acting in a conflict of interest for not taking off their union "hats" when evaluating the plan's investment policy.

The *PBA* similarly prohibits an administrator, as a general rule, from "knowingly" permitting its interests to conflict with its duties and powers "in respect of the pension fund,"[110] or receiving any benefit other than pension benefits, a refund of contributions, and reasonable fees and expenses related to the administration of the plan "permitted by the common law or provided for in the pension plan."[111] Other provinces' pension standards legislation also contain conflict of interest provisions applicable to the plan administrator.[112]

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107 See, for example, *Yates v. Air Canada* (2004), 40 C.C.P.B. 121 at paras. 93–108 (B.C.S.C.), where the court applied the duty of loyalty and good faith to a single-employer administrator in connection with its adjudication of a dispute between competing plan beneficiaries to survivor benefit offered under the plan.

108 See Chapter 5, section D(6)(e).

109 *Moffat v. Wetstein*, above note 101.

110 *PBA*, s. 22(4).

111 *Ibid.*, s. 22(9).

112 See federal (*PBSA*, ss. 8(6)–(11)), Alberta (*AEPPA*, Reg,. s. 54(1)), British Columbia (*BCPBSA*, ss. 8(9) & (10)), Manitoba (*MPBA*, ss. 28.1(1) and (9)), New

The *PBA* contains limited exemptions to the conflict-of-interest prohibition where a pension plan is jointly governed. The statutory prohibition does not apply to an administrator in circumstances where it enters into a transaction permitted under the plan documentation "related to the administration of the pension plan or pension fund" that is in the "interests" and "protective of the rights" of employees, "disclosed" to the membership prior to entering into it, and confers no "direct or indirect personal benefit" upon the administrator or any individual member of its board.[113] In addition, where the pension plan is a MEPP, the *PBA* deems a transaction not to be a conflict of interest where the administrator exercises a right under the pension plan documentation to enter into a transaction with one or more of the pension plan sponsors to purchase or lease office space for legal, accounting or "other services," or purchase materials and equipment "necessary" for the administration and operation of the pension plan, provided that the compensation paid is "reasonable in the circumstances."[114]

A plan administrator may find itself in a perceived conflict of interest where it is also the employer under the pension plan and it is perceived to prefer its own interests over that of the employees. To what extent does the *PBA*'s conflict-of-interest prohibition apply in the case of employer-sponsored plans? The federal *Pension Benefits Standards Act* (*PBSA*) provision prohibiting conflicts of interest by administrators has an express term providing that if there is a material conflict of interest between the role of an employer that is an administrator and its role "in any other capacity," the administrator "shall act in the best interests of the members of the pension plan."[115]

Does a single-employer administrator violate the statutory conflict-of-interest prohibition solely by reason of the fact that it is both the employer and the administrator? It appears not. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*,[116] a group of employees (the "Entitlement 55 Group") objected to their employer's amendment to the pension plan that made the eligibility requirements to receive an early retirement pension more difficult to obtain. The employees argued the amendment was void on the basis that the employer was simultaneous-

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Brunswick (*NBPBA*, ss. 17(3) and 19), Newfoundland and Labrador (*NLPBA*, ss. 17(1)–(3)), Nova Scotia (*NSPBA*, ss. 29(3) & (7)), Quebec (*QSPPA*, ss. 158–159).

113 *PBA*, Reg., s. 49(2).

114 *Ibid.*, s. 49(1).

115 Federal (*PBSA*, s. 8(10)). See also Maurice C. Cullity, "Personal liability of trustees and rights of indemnification" (1996) 16 E. & T.J. 115 at 126. See also Gillese, above note 82.

116 *Imperial Oil*, above note 77.

ly acting in its capacity as employer and its capacity as plan administrator. The employees argued that the employer was acting with an improper purpose in that the amendment had the effect of reducing the potential liabilities of the pension fund in respect of the employees who would otherwise qualify and thereby, increasing the amount of surplus available in the plan for the employer to use to reduce its annual service costs. The Pension Commission of Ontario (PCO) rejected this theory and, in accepting the amendment for registration, affirmed what has since been referred to as the "two hats" principle of employer-sponsored administration:

> The Act recognizes that an employer may wear "two hats" in respect of pension plans. Indeed, section 8 specifically states that an employer may be an administrator. In that way, it acknowledges that an employer may play two roles and it is self evident that the two roles may come into conflict from time to time.
>
> ... This leads us to the conclusion that, at least in the first instance, when the word "administrator" is used in section 22, it is used to mean the person or body administering the fund and who stands in a special fiduciary relationship with the plan members courtesy of the fiduciary standard of care set out in subsection 22(1) ...
>
> We are of the view that an employer plays a role in respect of the pension plan that is distinct from its role as administrator. Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees.[117]

Imperial Oil is an important case because it recognizes that structural conflicts of interest are explicit in the *PBA* and must be tolerated. This is especially true given that pension plans are so often administered by a single employer. Under the "two hats" principle, when an employer acts in a capacity *qua* administrator, the employer is subject to the statutory and common law fiduciary standards imposed on plan administrators. However, when an employer acts *qua* employer, it likely does not owe employees a statutory duty of care.[118]

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117 *Ibid.* at paras. 30-33.

118 See also *Attard v. Maple Leaf Foods Inc.* (2002), 32 C.C.P.B. 221 at para. 12 (S.C.J.).

An employer must be very careful "not [to] adopt an adversarial approach" vis-à-vis its employees when it is engaged in administrative functions under the plan or the *PBA*, notwithstanding that it may be involved in a legitimate pension dispute with its employees in its capacity as employer.[119] In *Hawker Siddeley Canada Inc. v. Nova Scotia (Attorney General)*,[120] the Nova Scotia Supreme Court upheld a decision of the Nova Scotia Superintendent of Pensions to refuse to approve a wind up report filed by a pension plan administrator that was also the employer, on the basis that the administrator selected a wind up date for the pension plan that excluded a large number of former employees from being eligible to receive statutory early retirement grow-in benefits conferred under the Nova Scotia *PBA*.[121] The court observed that the actions of the administrator had the effect of maximizing the amount of the surplus that would remain after all benefits, including grow-in benefits, were eventually paid. The court also observed that the administrator intended to claim that surplus for itself in a separate court action sometime after the wind up application had been concluded. The court identified the administrator's conflict of interest and its consequences:

> An obvious conflict of interest is foreseeable. In the known circumstances, the administrator may be acting contrary to its statutory duty to avoid conflicts of interest and also contrary to its common law fiduciary duties. One wonders whether it should have initiated the present application or should have resigned from its administration of the pension plan and fund before doing so. I find it incomprehensible that it did not resign before initiating this application. If the administrator does not resign prior to claiming the surplus, its claim should not be heard or should be refused out of hand.[122]

Similarly, in *Sherwood Communications*, the PCO chastised an administrator for bringing an application to withdraw surplus from the pension plan for the benefit of the employer, stating:

> We are also troubled by the fact that the application is brought by the Applicant who is the administrator of the Plan. As administrator, the Applicant is a fiduciary. Is it acceptable for a fiduciary to make this argument which clearly is to the detriment of the plan members?[123]

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119 *Sutherland v. Hudson's Bay Co.* (2005), 74 O.R. (3d) 608 at para. 51 (S.C.J.).

120 (1991), 103 N.S.R. (2d) 388 (T.D.), aff'd (1994), 2 C.C.P.B. 168 (N.S.C.A.).

121 See Chapter 9, section C(3)(f).

122 Above note 120 at 413–14 (T.D.).

123 *Sherwood Communications Group Ltd. Pension Plan, Re* (1994), 7 C.C.P.B. 111 at para. 22 (PCO).

The Nova Scotia court's decision, in *Hawker Siddeley*, and the PCO's decision, in *Sherwood Communications*, may appear at first glance to conflict with the reasoning in *Imperial Oil*;[124] but a second reading suggests it is possible to reconcile these cases. In *Hawker Siddeley*, the employer was acting in its capacity as administrator when it filed the wind up report, because that is a statutory function imposed on administrators.[125] Accordingly, to the extent the administrator has any discretion under the pension plan to select the wind up date,[126] it must do so with due regard to its statutory standard of care.[127] Similarly, in *Sherwood Communications*, it was the plan administrator that purported to file the application for surplus withdrawal. Under the *PBA*, however, it is the

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124 This was argued by one author, see Anthony J. Devir, "Fiduciary Obligations and Surplus Issues in Pension Plans: The Employers' Perspective" (1999) 18 E.T.P.J. 317 at 319.

125 A substantially similar provision is set out in the Ontario *PBA*: s. 70(1), "The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report ... "

126 This would depend on the individual circumstances of the pension plan documentation and wind up process. While many pension plans reserve the power to wind up the plan to the employer, in the event the resolution winding up the plan is silent with respect to the wind up date and, correspondingly, does not direct the administrator to administer the wind up in accordance with a fixed wind-up date selected by the employer, the administrator must select its own wind up date.

127 In *Hawker Siddeley*, above note 81, the administrator appeared to have little discretion in selecting the wind up date. In the circumstances of this particular case, the court perceived the employer's actions in selecting the wind up date as high-handedness (i.e., it had the result of inflating the surplus at the expense of the employees). In light of the remedial purpose of the *PBA*'s grow-in provisions to protect the employees, the court was concerned over the acquiescence of the administrator in respect of the employer's direction which should have led it to either resign as administrator, which the court recommended, or alternatively, and less drastically, to seek the advice and directions of the court or the Superintendent over the extent of its obligation *qua* administrator in these circumstances. The Nova Scotia Court of Appeal appeared to agree as it distinguished the nature of the proceedings before it with another option that was available to the employer, in its capacity as administrator (at 442 (N.S.C.A.)):

> [Hawker Siddeley] is not in the position of an administrator seeking the interpretation of a provision in the plan, nor does it equate to that of an executor asking the court for the interpretation of a provision in a last will and testament and, thereafter, the direction of the court for the course the executor or trustee should follow. Instead, Hawker Siddeley's attack relates to the authority of the superintendent and the manner by which he conducted himself. Hawker Siddeley has every right to do this, but when it does, in the circumstances underlying this proceeding, the matter is brought to the court more on its own behalf than on any other.

employer that should be seeking consent for a withdrawal of surplus, not the administrator. This feature of the *PBA* was even acknowledged by the PCO in *Imperial Oil*:

> To illustrate how the Act uses the words "administrator" and "employer" differently throughout the Act, consider ... [t]hose provisions [that] enable an employer to seek and receive surplus pension funds. Clearly, an administrator would be in a conflict of interest position if it sought the return of surplus funds for an employer. The Act makes it clear that it is the employer who seeks the refund of surplus funds ... [128]

Pension law permits an administrator, in many cases, to insulate itself against a conflict of interest by simply setting aside personal views and not acting upon them. In other cases, however, an administrator may have reasonable doubts regarding the scope of its fiduciary obligations with respect to implementing a plan amendment, wind up or other activity, and in such event it should seek legal advice or bring an application for advice and directions to the superior court.[129]

e) Impartiality and even-handedness

The duty of even-handedness is a trust law concept that requires trustees to hold an impartial balance among beneficiaries. This includes not giving preferential treatment to any one beneficiary or class of beneficiaries except to the extent authorized in the trust documentation:

> It is I think a primary principle, which need not be laboured by me, that one of the trustees' first duties was to hold the balance evenly between the beneficiaries and various groups of beneficiaries and to try to interpret the document and carry out its provisions in the spirit and letter in which it was expressed. They were not, nor are they now, entitled to favour one group of beneficiaries in any way as against another. They were obliged to treat all beneficiaries with fairness and impartiality, always attempting to carry out the expressed intention of the settlor.[130]

The even-handedness rule has been considered and applied in a number of pension cases, including in the context of employer-sponsored plans,[131]

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128 *Imperial Oil*, above note 77 at para. 31.

129 See Chapter 6, section B(3)(d).

130 *Boe v. Alexander*, above note 105 at 527. See also *HEPP*, above note 37.

131 *Yates v. Air Canada*, above note 107 at paras. 103–4 (S.C.); *Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co.* (1994), 121 D.L.R. (4th) 162 at 180 (Ont. Ct. Gen. Div.) [*Anova*]; *C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd.* (2001), 198 D.L.R. (4th) 504 (B.C.C.A.).

MEPPs,[132] and plans administered by a third party on plan wind up.[133] Nevertheless, the rule is complicated to apply in the area of pensions, and the nature and scope of the duty depends generally on whether the question concerns a matter of plan administration and interpretation, statutory compliance under the *PBA*, or a discretionary matter of plan design.

On questions of pure plan administration, there is little doubt that the duty of even-handedness applies to the administrator's functions and forms part of the statutory standard of care. An administrator must interpret and apply the plan text and trust documentation reasonably, in a fashion consistent with the settlors' intentions in establishing the plan, and in such a manner that competing interests are balanced fairly and equitably.[134]

Where a choice exists between two or more competing interpretations of the plan documentation, the administrator is required to prefer the one that is most fair and even-handed to the employees as a whole. Where two or more potential beneficiaries compete for the same benefit, the administrator must be as fair as possible between them in exercising its discretion and powers under the plan and act in good faith, honestly, prudently, impartially, and reasonably, based upon all the relevant facts before it, not taking into account matters it should not take into account, nor taking into account something else that it should take into account.[135] A clause in a pension plan text protecting the exercise of an administrator's discretion will not preclude judicial review of that decision where the administrator has failed to hold the balance evenly between beneficiaries or has acted in a manner prejudicial to the interest of a beneficiary, has acted dishonestly, has failed to exercise the level of prudence to be expected from a reasonable administrator, or has failed to exercise its discretion at all.[136]

Is there more depth to the duty of even-handedness in MEPPs, jointly-trusteed plans such as JSPPs or other plans administered by an

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132 *Bathgate*, above note 88 at 624–25 (Ont. C.A.); *Cowan v. Scargill*, above note 102 at 760–63 (All E.R.); *HEPP*, above note 37.

133 *Royal Trust Corp. of Canada v. Arthur Andersen Inc. (re Westar Mining Retirement Plan)* (1994), 4 C.C.P.B. 199 (B.C.S.C.); *Froese*, above note 99.

134 See generally *Huang v. Telus Corp. Pension Plan* (2005), 44 C.C.P.B. 100 at paras. 88–98 (Alta. Q.B.) and the cases cited therein.

135 See generally *Yates v. Air Canada*, above note 107 at paras. 101–108.

136 *Electrical Industry of Ottawa Pension Plan v. Cybulski*, (2001), 30 C.C.P.B. 95 at para. 21 (Ont. S.C.J.) [*Cybulski*]. See also *Potash Corp. of Saskatchewan Inc. v. Crown Investments Corp. of Saskatchewan* (2003), 36 C.C.P.B. 272 at paras. 121–127 (Sask. Q.B.).

arm's-length body? Where the trust agreement or other document constituting the administrator accords no discretion or role to play in the area of plan design and benefit conferral, it is difficult to envision how the administrator could be liable to the employees for a decision of the sponsor. But what about where the administrator is given discretionary authority to amend the pension plan or otherwise confer benefits under the plan, for example, to raise benefit levels, give *ad hoc* inflation adjustments, offer early retirement windows, or confer other benefit enhancements? There is authority to the effect an administrator has a duty to act even-handedly where it has the discretion to confer benefits or exercise a power of plan design,[137] but to discharge its duty the administrator need not ensure that all employees are treated "equally." Provided that the administrator turns its mind to the interests of all employees and pensioners when it makes the decision to make and implement a benefit enhancement amendment and has otherwise acted reasonably, benefits can be conferred on some employees to the exclusion of others.[138] The same principle applies to discharge a pension trustee or administrator in the obverse situation, that is, where a benefit reduction must be made in order to maintain the plan's solvency status.[139]

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137 *Williams v. College Pension Board of Trustees* (2005), 254 D.L.R. (4th) 536 at paras. 28–41 and 65 (B.C.S.C.); *Ruddell v. B.C. Rail Ltd.* (2005), 48 C.C.P.B. 94 (B.C.S.C.); *Rivett v. Hospitals of Ontario Pension Plan* (1995), 9 C.C.P.B. 284 at para. 28 (Gen. Div.).

138 See *Edge v. Pensions Ombudsman*, [1999] 4 All E.R. 546 at 559–60 (C.A.) where the English Court of Appeal (Civil) determined that the trustees discharged their duty of even-handedness by considering the interests of the dissenting employees who did not benefit from the benefit enhancement and contribution reduction, at the time the decision was made. See also D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 788. Further, see the unresolved litigation described in *Turner v. Telecommunications Workers Pension Plan* (2001), 197 D.L.R. (4th) 533 at 540 (B.C.C.A.), where the British Columbia Court of Appeal observed that a representative action on behalf of a group of employees against their board of trustees for excluding them from a benefit enhancement did "not appear to be frivolous."

139 In *Neville v. Wynne* (2005), 46 C.C.P.B. 80 (B.C.S.C.), an action for breach of trust and fiduciary duty by a non-retired member of a union-sponsored plan against the board of trustees that administered the plan was dismissed. The plan faced a shortfall and the trustees' only options were to reduce benefits or wind up the plan. In deciding to reduce benefits, the trustees reduced benefits for all beneficiaries, but allocated more of the reduction to the non-retired members than the retired members. The trustees determined that this was a fair allocation of the burden of the investment risk since pensions-in-pay were not indexed for inflation under the plan terms and non-retired members still had the right to accumulate additional pension benefits as they continued to work.

Notwithstanding the statutory and common law standards of care, the *PBA* imposes a duty of even-handedness on a plan administrator in specified circumstances. In particular, an administrator is required to ensure that benefits be reduced and paid out "proportionately" in circumstances where an employee has terminated plan membership at a time when the plan is in a state of deficit[140] and, further, where a pension plan has been fully or partially wound-up in a deficit and where the employer is not required or is unable to fund the deficit.[141]

The scope of the duty of even-handedness in the context of pension plan design and administration is still in a phase of evolution and will undoubtedly be subject to further development, particularly as it may apply or may not apply to employers that administer an employer-sponsored plan.

f) Inform and disclose

The *PBA* prescribes a host of specific disclosure requirements for a plan administrator vis-à-vis employees and the regulator. In addition to these specific requirements, a plan administrator's general communication obligations are subject to the rule of law that makes it a fiduciary's responsibility to disclose material information sufficient to permit a beneficiary to make a fully informed decision. This is a both common law duty and part of the statutory duty of care imposed upon administrators in the *PBA*.[142]

In the context of pension administration, the duty to inform is usually applied as part of the law of negligent misrepresentation, the principle being that "the failure to divulge material information may be just as misleading as a positive misstatement."[143]

For an administrator to discharge this duty, a communication from the administrator must be truthful and accurate at the time it was made. In *Beaudry v. B.C. Hydro and Power Authority*,[144] the court dismissed an employee's action against his administrator for damages for negligent

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The court held that the trustees' decision was not one which "no reasonable body of trustees properly directing themselves could reasonably have reached."

140 *PBA*, ss. 42(2), (7), and (8) and *PBA*, Reg., ss. 19(2), (4)–(6), and (9).

141 *PBA*, s. 77 and *PBA*, Reg., s. 29(9) and 30(2)(e). See also *Royal Trust Corp of Canada v. Arthur Andersen Inc.*, above note 133.

142 *C.U.P.E., Local 185 v. Etobicoke (City)* (1998), 17 C.C.P.B. 278 at para. 4 (Div. Ct.), leave to appeal dismissed, [1998] O.J. No. 3943 (C.A.); *Deraps*, above note 96 at 183–84; *Aetna*, above note 99 at 597–600.

143 *Deraps*, *ibid.* at 184; *Spinks v. Canada* (1996), 134 D.L.R. (4th) 223 at 230 (Fed. C.A.).

144 [1992] B.C.J. No. 67 (S.C.).

misrepresentation and breach of the duty to inform in connection with answers given to the employee when he elected to retire early. At the time, there was no enhanced early retirement program in effect, nor was one contemplated. Subsequently, the plan was amended to confer an early retirement subsidy, but the plaintiff was not eligible because he had already retired. When dismissing the claim, the court observed that the answers given to the plaintiff were truthful at the time and, absent other surrounding circumstances for either party to conclude otherwise, "there is no continuing duty to up-date or modify the answer when a possibility arises that the answer may no longer be true."[145]

3) Discharge and Mitigation

a) Statutory discharge

The *PBA* contains a number of so-called "discharge" provisions that would appear to lessen a plan administrator's risk of liability in specified circumstances. These provisions in the *PBA* are limited to situations where the administrator pays or transfers pension benefits in accordance with the information or directions in its possession.[146] So, for example, where an employee terminating plan membership elects to purchase an annuity or transfer his pension entitlement to a locked-in retirement savings vehicle, the administrator is discharged on transferring the benefit in accordance with the election of the employee and, upon doing so, the employee has no continuing interest in the assets

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145 Similar reasoning was applied by the Ontario Court of Appeal in the case of *Hembruff*, above note 86. In this case, the Court of Appeal dismissed the claims of certain employees in connection with benefit enhancements that were being considered by the employer, but were not yet adopted into the pension plan at the time they terminated employment and plan membership. The Court of Appeal held there was no disclosure obligation on the plan administrator in respect of the plan amendments that were under consideration; the information concerning the possible future nature of the plan's terms was neither highly relevant, nor material and, accordingly, the administrator did not breach its duty of care owed to the employees at large.

146 An administrator is discharged on making payment or transfer of an employee's commuted value on termination of plan membership in accordance with the direction of the employee, provided the payment or transfer complies with the *PBA* and regulations: *PBA*, s. 42(11); in the absence of actual notice to the contrary, the administrator is discharged on making payment of a pre-retirement death benefit in accordance with information provided by the person entitled to the benefit: ss. 48(9) & (10); if payment of a pension or a deferred pension is divided between spouses by a domestic contract or an order, the administrator is discharged on making payment in accordance with the domestic contract or order: s. 51(3).

TAB # 8.

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

and

Her Majesty The Queen *Respondent*;

and

The National Indian Brotherhood *Intervener.*

File No.: 17507.

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

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

An Indian Band surrendered valuable surplus reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown, however, were much less favourable than those approved by the Band at the surrender meeting. The surrender document did not refer to the lease or disclose the terms approved by the Band. The Indian Affairs Branch officials did not return to the Band for its approval of the revised terms. Indeed, they withheld pertinent information from both the Band and an appraiser assessing the adequacy of the proposed rent. The trial judge found the Crown in breach of trust in entering the lease and awarded damages as of the date of the trial on the basis of the loss of income which might reasonably have been anticipated from other possible uses of the land. The Federal Court of Appeal set aside that judgment and dismissed a cross-appeal seeking more damages.

* The Chief Justice took no part in the judgment.

Delbert Guerin, Joseph Becker, Eddie Campbell, Marg Charles, Gertrude Guerin et Gail Sparrow, en leur nom personnel et au nom de tous les autres membres de la bande indienne Musqueam *Appelants*;

et

Sa Majesté La Reine *Intimée*;

et

The National Indian Brotherhood *Intervenante.*

N° du greffe: 17507.

1983: 13, 14 juin; 1984: 1er novembre.

Présents: Le juge en chef Laskin* et les juges Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Indiens — Terres d'une réserve — Cession — Bail conclu au nom de la bande par Sa Majesté — Conditions du bail conclu très différentes de celles approuvées à l'assemblée de la cession — Y a-t-il eu manquement à des obligations de fiduciaire ou manquement à des obligations de mandataire? — Loi sur les Indiens, S.R.C. 1952, chap. 149, art. 18(1) — Trustee Act, R.S.B.C. 1960, chap. 390, art. 98 (maintenant R.S.B.C. 1979, chap. 414.)

Une bande indienne a cédé des surplus de terre de grande valeur à Sa Majesté pour que celle-ci les loue à un club de golf. Cependant, les conditions du bail consenti par Sa Majesté étaient beaucoup moins favorables que celles approuvées par la bande à l'assemblée de la cession. L'acte de cession ne mentionne ni le bail ni les conditions approuvées par la bande. Les fonctionnaires de la direction des Affaires indiennes ne sont pas retournés devant la bande pour qu'elle approuve les nouvelles conditions. En fait, ils ont caché des renseignements utiles à la bande et à un évaluateur chargé de déterminer si le loyer proposé était adéquat. Le juge de première instance a conclu que Sa Majesté avait manqué à ses obligations de fiduciaire en signant le bail et il a accordé des dommages-intérêts calculés à la date du procès en fonction de la perte du revenu qu'on aurait pu raisonnablement s'attendre à tirer d'autres utilisations possibles des terres. La Cour d'appel fédérale a infirmé ce jugement et rejeté l'appel incident visant à faire augmenter le montant des dommages-intérêts.

* Le Juge en chef n'a pas pris part au jugement.

Held: The appeal should be allowed.

Per Dickson, Beetz, Chouinard and Lamer JJ.: The Indians' interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision. The nature of the Indians' interest is best characterized by its inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered.

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

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

Arrêt: Le pourvoi est accueilli.

Les juges Dickson, Beetz, Chouinard et Lamer: Le droit que les Indiens ont sur leurs terres est un droit, en *common law*, qui existait déjà et qui n'a été créé ni par la Proclamation royale de 1763, ni par le par 18(1) de la *Loi sur les Indiens*, ni par aucune autre disposition législative ou ordonnance du pouvoir exécutif. Le droit des Indiens se distingue surtout par son inaliénabilité et par le fait que Sa Majesté est tenue d'administrer les terres pour le compte des Indiens lorsqu'il y a eu cession de ce droit.

La nature du titre des Indiens et les modalités prévues par la Loi relativement à l'aliénation de leurs terres imposent à Sa Majesté une obligation d'*equity*, exécutoire en justice, d'utiliser ces terres au profit des Indiens. Des lois fédérales successives dont l'actuelle *Loi sur les Indiens* prévoient l'inaliénabilité générale des terres des réserves indiennes, sauf dans le cas d'une cession à Sa Majesté. L'exigence d'une cession vise à interposer Sa Majesté entre les Indiens et tout acheteur ou locataire éventuel de leurs terres, de manière à empêcher que les Indiens se fassent exploiter. En confirmant au par. 18(1) de la *Loi sur les Indiens* la responsabilité historique qui incombe à Sa Majesté de protéger les droits des Indiens dans les opérations avec des tiers, le Parlement a conféré à Sa Majesté le pouvoir discrétionnaire de décider elle-même ce qui est vraiment le plus avantageux pour les Indiens. Lorsqu'une loi, un contrat ou peut-être un engagement unilatéral impose à une partie l'obligation d'agir au profit d'une autre partie et que cette obligation est assortie d'un pouvoir discrétionnaire, la partie investie de ce pouvoir devient un fiduciaire. L'*equity* vient alors exercer un contrôle sur ce rapport en imposant à la partie en question l'obligation de satisfaire aux normes strictes de conduite auxquelles le fiduciaire est tenu de se conformer.

Le paragraphe 18(1) de la *Loi sur les Indiens* confère à Sa Majesté un large pouvoir discrétionnaire relativement aux terres cédées. En la présente espèce, l'acte de cession confirme l'existence de ce pouvoir discrétionnaire dans la clause qui prévoit la cession des terres à Sa Majesté. Lorsque, comme c'est le cas en l'espèce, une bande indienne cède son droit à Sa Majesté, cela fait naître une obligation de fiduciaire qui impose des limites à la manière dont Sa Majesté peut exercer son pouvoir discrétionnaire en utilisant les terres pour le compte des Indiens. Les mandataires de Sa Majesté ont promis à la bande de louer les terres en cause à certaines conditions précises et, après la cession, ils ont conclu un bail dont les conditions étaient différentes et beaucoup moins avantageuses. L'acte de cession n'autorisait pas Sa Majesté à ignorer les conditions verbales qui, selon ce

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

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

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

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

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

que la bande avait cru comprendre, seraient incluses dans le bail. Après que les mandataires de Sa Majesté eurent amené la bande à céder ses terres en lui laissant entendre qu'elles seraient louées à certaines conditions, il serait déraisonnable de permettre à Sa Majesté d'ignorer tout simplement ces conditions. L'*equity* ne sanctionnera pas une conduite peu scrupuleuse de la part d'un fiduciaire qui doit faire preuve d'une loyauté absolue envers son commettant. En signant, sans consultation, un bail beaucoup moins avantageux que celui promis, Sa Majesté a manqué à son obligation de fiduciaire envers la bande et elle doit donc réparer la perte subie par suite de ce manquement. Le montant des dommages-intérêts doit être déterminé par analogie avec les principes du droit des fiducies. Le juge de première instance a pris en considération tous les éléments de preuve pertinents et son jugement n'est entaché d'aucune erreur de principe: le montant des dommages-intérêts qu'il a fixé doit donc être adopté.

L'action de la bande n'est pas prescrite en vertu de la *Statute of Limitations*, R.S.B.C. 1960, chap. 370, et il n'y a pas lieu de la rejeter en vertu de la doctrine d'*equity* du manque de diligence.

Les juges Ritchie, McIntyre et Wilson: Sa Majesté a manqué à ses obligations de fiduciaire en s'empressant de signer un bail à des conditions inacceptables pour son *cestui que trust*. Sa Majesté a une obligation de fiduciaire, et non une simple obligation politique, envers la bande à cause du contrôle qu'elle exerce sur l'utilisation qui peut être faite des terres des réserves. Le pouvoir discrétionnaire que possède Sa Majesté de décider de ces utilisations se limite à celles qui sont « ... au profit de la bande». Bien que le par. 18(1) reconnaisse cette obligation, celle-ci existe indépendamment de ce paragraphe. Même si la nature limitée du titre indien fait que Sa Majesté n'est pas fiduciaire des terres mêmes en vertu du par. 18(1), cela n'a pas pour effet d'écarter l'obligation de fiduciaire qu'elle a envers la bande relativement à l'utilisation de ces terres. Cette obligation de fiduciaire s'est cristallisée, par suite de la cession, en une fiducie explicite visant les terres pour les fins spécifiées.

Même si l'acte de cession était muet quant aux conditions du bail, Sa Majesté était parfaitement au courant de ces conditions et elle ne pouvait se réfugier derrière le texte de son propre document.

Même s'il y a eu dissimulation de renseignements par le personnel des Affaires indiennes, qui dans les circonstances équivaut à une fraude d'*equity*, elle ne peut, en l'absence de malhonnêteté ou de turpitude morale, donner lieu à une action pour tromperie en *common law* ni justifier une réclamation de dommages-intérêts punitifs. Elle empêche cependant Sa Majesté d'être exonérée

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

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

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

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

du manquement à ses obligations de fiduciaire en application de l'art. 98 de la *Trustee Act*.

La perte de la possibilité d'aménager les terres pendant une longue période doit être compensée selon sa valeur à la date du procès même si la valeur marchande a pu augmenter depuis la date du manquement. En *equity*, il faut présumer que la bande aurait voulu aménager ses terres de la façon la plus avantageuse possible pendant la période visée par le bail non autorisé. La question des dommages-intérêts a été abordée, à juste titre, en fonction de la perte de la possibilité de procéder à un aménagement résidentiel et, en l'absence d'une erreur de principe, cette Cour ne doit pas modifier le montant des dommages-intérêts. Il n'y a pas de raison de modifier la décision de refuser des intérêts avant jugement et d'adjuger des intérêts après jugement au taux légal.

Le juge Estey: Le mandataire sert essentiellement d'intermédiaire entre deux autres parties. En l'espèce, il y avait un mandat prescrit par le Parlement et tous les actes du mandataire (savoir Sa Majesté) devaient servir uniquement les intérêts de la population autochtone dont les droits font seuls l'objet des dispositions protectrices de la Loi. Le fait que la Loi désigne le mandataire et le mandant ne diminue ni la capacité du mandataire d'agir en cette qualité ni le droit du mandant d'exiger que le mandataire rende compte de l'exécution du mandat. En fait, les droits du mandant sont même mieux garantis qu'ils ne le seraient en l'absence d'un mandat prescrit par la Loi, car même si la Loi limite le choix du mandataire, elle n'offre à ce dernier aucune protection contre les conséquences juridiques d'une violation des obligations découlant du mandat. Ce n'est pas parce qu'on impute le droit d'action des demandeurs à une violation des obligations du mandataire qu'il y a lieu de modifier le montant des dommages-intérêts accordés par le juge de première instance.

Jurisprudence: arrêt suivi: *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; arrêts examinés: *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Johnson v. M'Intosh*, 8 Wheaton 543 (1823); distinction faite avec les arrêts: *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619; *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129; *Civilian War Claimants Association, Ltd. v. The King*, [1932] A.C. 14; *Hereford Railway Co. v. The Queen* (1894), 24 R.C.S. 1; arrêts mentionnés: *Smith c. La Reine*, [1983] 1 R.C.S. 554; *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227; *Lever Finance Ltd. v. Westminster (City) London*

Force Association, [1958] 1 W.L.R. 563; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *Toronto-Dominion Bank v. Uhren* (1960), 32 W.W.R. 61; *Bartlett v. Barclays Bank Trust Co. (No. 2)*, [1980] 2 All E.R. 92; *McNeil v. Fultz* (1906), 38 S.C.R. 198; *Penvidic Contracting Co. v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267; *Worcester v. State of Georgia*, 6 Peters 515 (1832); *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399; *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401; *Attorney-General for Canada v. Giroux* (1916), 53 S.C.R. 172; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *Western International Contractors Ltd. v. Sarcee Developments Ltd.*, [1979] 3 W.W.R. 631; *Miller v. The King*, [1950] S.C.R. 168; *Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385; *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. 216; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; *In Re West of England and South Wales District Branch, ex parte Dale & Co.* (1879), 11 Ch. D. 772; *Ontario Mining Co. v. Seybold*, [1903] A.C. 73, affirming (1899), 31 O.R. 386; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *Surrey (Corporation of) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380; *The King v. McMaster*, [1926] Ex. C.R. 68, referred to.

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

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

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

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

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

WILSON J.—The appellant, Delbert Guerin, is the Chief of the Musqueam Indian Band, the members of which are descended from the original inhabitants of Greater Vancouver. The other appellants are Band Councillors. In 1955 there were 235 members in the Band and they lived on a

Borough Council, [1971] 1 Q.B. 222; *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563; *Fales c. Canada Permanent Trust Co.*, [1977] 2 R.C.S. 302; *Toronto-Dominion Bank v. Uhren* (1960), 32 W.W.R. 61; *Bartlett v. Barclays Bank Trust Co. (No. 2)*, [1980] 2 All E.R. 92; *McNeil v. Fultz* (1906), 38 R.C.S. 198; *Penvidic Contracting Co. c. International Nickel Co. of Canada*, [1976] 1 R.C.S. 267; *Worcester v. State of Georgia*, 6 Peters 515 (1832); *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399; *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401; *Attorney-General for Canada v. Giroux* (1916), 53 R.C.S. 172; *Cardinal c. Procureur général de l'Alberta*, [1974] R.C.S. 695; *Western International Contractors Ltd. v. Sarcee Developments Ltd.*, [1979] 3 W.W.R. 631; *Miller v. The King*, [1950] R.C.S. 168; *Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385; *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. 216; *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436; *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; *In Re West of England and South Wales District Branch, ex parte Dale & Co.* (1879), 11 Ch. D. 772; *Ontario Mining Co. v. Seybold*, [1903] A.C. 73, confirmant (1899), 31 O.R. 386; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] R.C.S. 211; *Surrey (Corporation of) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380; *The King v. McMaster*, [1926] R.C. de l'É. 68.

POURVOI contre un arrêt de la Cour d'appel fédérale (1982), 143 D.L.R. (3d) 416, qui a accueilli l'appel et rejeté l'appel incident interjetés relativement à un jugement du juge Collier. Pourvoi accueilli.

M. R. V. Storrow, J. I. Reynolds et *L. F. Harvey*, pour les appelants.

W. I. C. Binnie, c.r., M. R. Taylor et *M. Freeman*, pour l'intimée.

B. A. Crane, c.r., W. Badcock et *A. C. Pape*, pour l'intervenante.

Version française des motifs des juges Ritchie, McIntyre et Wilson rendus par

LE JUGE WILSON—L'appelant Delbert Guerin est le chef de la bande indienne Musqueam, dont les membres sont les descendants des premiers occupants du Vancouver métropolitain. Les autres appelants sont les conseillers de la bande. En 1955, la bande comptait 235 membres qui vivaient sur

reserve located within the charter area of the City of Vancouver which contained approximately 416.53 acres of very valuable land.

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

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

1. Section 18(1) of the *Indian Act*, R.S.C. 1952, c. 149, imposes a trust or, at a minimum, fiduciary duties on the Crown with respect to reserve lands held by it for the use and benefit of Indian Bands. This trust or those fiduciary duties are not merely political in nature but are enforceable in the courts like any other trust or fiduciary duty.

2. The Federal Court of Appeal should not have allowed the Crown to put forward the concept of "political trust" as a defence to the Band's claim since, as the learned trial judge pointed out, it was not specifically pleaded as required by Rule 409 of the Federal Court Rules.

3. The leased lands were surrendered by the Band to the Crown in trust for lease to the Golf Club on very specific terms and those terms were not

une réserve située dans les limites de la ville de Vancouver et ayant une superficie d'environ 416,53 acres de terre de très grande valeur.

L'objet du litige est un bail portant sur 162 acres de terre de la réserve, conclu le 22 janvier 1958 au nom de la bande par la direction des Affaires indiennes du gouvernement fédéral avec le Shaughnessy Heights Golf Club, en qualité de locataire. Le juge de première instance a conclu que Sa Majesté a manqué à ses obligations de fiduciaire en concluant ce bail et a accordé à la bande 10 millions de dollars de dommages-intérêts [[1982] 2 C.F. 385]. Sa Majesté a interjeté appel à la Cour d'appel fédérale pour faire infirmer la décision de première instance et la bande a interjeté un appel incident pour faire augmenter le montant des dommages-intérêts. Dans un arrêt unanime [(1982), 143 D.L.R. (3d) 416], la cour d'appel a accueilli l'appel de Sa Majesté et rejeté l'appel incident. La bande a demandé et obtenu l'autorisation de se pourvoir en cette Cour.

Il y a quatre motifs principaux pour lesquels, selon les appelants, la cour d'appel aurait dû confirmer les conclusions du juge de première instance quant à la responsabilité. Je les énonce en paraphrasant le mémoire des appelants de la façon suivante:

[TRADUCTION] 1. Le paragraphe 18(1) de la *Loi sur les Indiens*, S.R.C. 1952, chap. 149, crée une fiducie ou, à tout le moins, impose des obligations de fiduciaire à Sa Majesté à l'égard des terres des réserves qu'elle détient à l'usage et au profit des bandes indiennes. Cette fiducie ou ces obligations de fiduciaire ne sont pas de nature purement politique, mais sont exécutoires en justice comme toute autre fiducie ou obligation de fiduciaire.

2. La Cour d'appel fédérale n'aurait pas dû permettre à Sa Majesté d'opposer à la réclamation de la bande le concept de «fiducie politique» à titre de moyen de défense, puisque, comme l'a souligné le savant juge de première instance, cela n'a pas été expressément plaidé comme l'exige l'art. 409 des Règles de la Cour fédérale.

3. Les biens-fonds loués ont été cédés par la bande à Sa Majesté en fiducie pour qu'elle les loue au club de golf à des conditions très précises et ces

obtained. The terms which were obtained were much less favourable to the Band and the Band would not have surrendered the land for lease on those terms.

4. The Crown, by misrepresenting the terms it could and would obtain on the lease, induced the Band to surrender its land and thereby committed the tort of deceit.

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

1. The Facts

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

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

conditions n'ont pas été respectées. Les conditions stipulées sont beaucoup moins favorables à la bande et celle-ci n'aurait pas cédé les biens-fonds pour les louer à ces conditions.

4. En faisant des déclarations inexactes quant aux conditions qu'elle pouvait obtenir pour le bail, Sa Majesté a amené la bande à céder ses terres et a de ce fait commis un délit de tromperie.

Dans toutes les affaires fondées sur le manquement aux obligations de fiduciaire, les faits sont extrêmement importants et ils ne le sont pas moins en l'espèce. Nous avons cependant l'avantage de disposer des conclusions très détaillées et très complètes du savant juge de première instance et, même si les avocats des deux parties ont puisé ici et là dans la transcription de la preuve des éléments qui étayaient leurs diverses propositions, j'ai jugé préférable de me limiter strictement aux conclusions du juge de première instance.

1. Les faits

Il ne peut y avoir de doute que, dès le milieu des années 50, la direction des Affaires indiennes savait très bien que la réserve des appelants avait une très grande valeur à cause de sa situation. En effet, des offres de location ou d'achat de grandes étendues de terrain de la réserve avaient déjà été faites. C'est ce que nous apprend le rapport fait le 11 octobre 1955 à M. Arneil, le commissaire des Indiens pour la Colombie-Britannique, par M. Anfield qui, à l'époque, était responsable de l'agence de Vancouver. Ces deux hommes sont décédés depuis, et c'est malheureux puisque M. Anfield a joué un rôle de premier plan dans la négociation du bail contesté. Dans un rapport subséquent adressé à M. Arneil, M. Anfield propose de procéder à une étude détaillée des terrains de la réserve requis par la bande afin de déterminer s'il y a surplus et, dans l'affirmative, d'utiliser ces surplus de terre de façon profitable pour la bande. Il propose de faire procéder non seulement à une évaluation des terres, mais à une étude de planification foncière visant un plein aménagement qui procurera des revenus à long terme à la bande. Il poursuit:

[TRADUCTION] Il semble que ce qu'il faut surtout ici, ce sont les services d'un expert en planification foncière courageux, visionnaire et prenant à coeur tant l'avenir

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.

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

About this time the Shaughnessy Heights Golf Club was looking for a new site. Its lease from the Canadian Pacific Railway was due to expire in 1960 and the club had been told that it would not be renewed. The club turned its attention therefore to the Musqueam Reserve. At the same time an active interest in the reserve was being displayed by a representative of a prominent Vancouver real estate firm on behalf of a developer client interested in a long-term lease. Although his contact had been directly with the Indian Affairs Branch in Ottawa, Messrs. Arneil and Anfield were both aware of it. Indeed, when he suggested to them that he meet with the Chief and Councillors of the Band to try to work out some arrangement, he was told by Mr. Anfield not to do so but to deal only through Indian Affairs personnel. That he followed this advice is made clear from the evidence of the Band members who testified. They were told of no interest in their land other than that expressed by the golf club.

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

des indiens Musqueam que le revenu que pourraient générer les terrains dont les Indiens n'ont pas besoin. Il est essentiel que tout nouveau village soit un village modèle. Le personnel actuel ou futur de l'agence n'est pas à même de gérer un projet semblable; il importe de faire au plus tôt des plans on ne peut plus pratiques pour réaliser la volonté expresse des indiens Musqueam, faire le meilleur usage et le meilleur aménagement possible, à leur profit, de ce qui constitue sans doute les 400 acres ayant, potentiellement, la plus grande valeur dans le grand Vancouver d'aujourd'hui.

M. Anfield parle ensuite d'un «autre «British Properties» en puissance» et propose d'informer toutes les parties intéressées par ces terres que celles dont la bande n'a pas besoin pour son propre usage, seront offertes au public après avoir été délimitées et cédées.

Vers la même époque, le Shaughnessy Heights Golf Club était à la recherche d'un nouveau site. Le bail que lui avait consenti le Canadien Pacifique arrivait à échéance en 1960 et le club avait été informé qu'il ne serait pas reconduit. Le club s'est donc intéressé à la réserve Musqueam. À la même époque, un représentant d'une importante société immobilière de Vancouver s'intéressait activement à la réserve, pour le compte d'un client promoteur intéressé à conclure un bail à long terme. Même s'il s'était adressé directement à la direction des Affaires indiennes à Ottawa, MM. Arneil et Anfield étaient au courant de ses démarches. En fait, lorsqu'il a proposé de rencontrer le chef et les conseillers de la bande pour tenter de négocier un arrangement quelconque, M. Anfield lui a dit de ne pas le faire et de traiter uniquement avec le personnel des Affaires indiennes. Les témoignages des membres de la bande indiquent nettement qu'il a suivi ce conseil. On ne leur a fait part d'aucun intérêt pour leurs terres autre que celui manifesté par le club de golf.

Le savant juge de première instance a abordé explicitement la question de la crédibilité des membres de la bande parce qu'il était parfaitement conscient du fait que M. Arneil et M. Anfield n'étaient plus là pour témoigner, étant tous deux décédés. Il a conclu que les membres de la bande étaient des «témoins honnêtes et francs» et a accepté leur témoignage.

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

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

La bande a accepté de louer ses terres en surplus et a autorisé une évaluation foncière payée à même ses fonds. En réalité, l'évaluation a été faite par M. Howell de l'administration de la Loi sur les terres destinées aux anciens combattants. Même s'il était un évaluateur compétent, il n'était pas expert en aménagement des terres. Pour fins d'évaluation, il a divisé la réserve en quatre secteurs dont le premier englobait les 162 acres loués au club de golf. Ce secteur avait une superficie de 220 acres que M. Howell a classée [TRADUCTION] «superficie résidentielle, première classe» et évaluée à 5 500 $ l'acre, soit un total de 1 209 120 $. Quant aux trois autres secteurs qui étaient tous constitués de basses terres, il les a évalués à 625 $ l'acre. La bande n'a pas reçu copie de son rapport et même MM. Arneil et Anfield ont eu de la difficulté à s'en procurer des copies. Ils étaient très impatients de se procurer le rapport parce qu'ils envisageaient de louer 150 acres au club de golf pour [TRADUCTION] «un prix, disons, de 20 000 $ à 25 000 $ par année». La preuve documentaire soumise en première instance démontre que des rencontres et des discussions ont eu lieu entre M. Anfield et le président du club de golf en 1956 et au début de 1957. Il y a lieu de souligner que M. Anfield avait dit au président du club de golf qu'on procédait à l'évaluation et qu'ils avaient, par la suite, examiné ensemble le rapport de M. Howell. Le club de golf avait bien sûr été prévenu que toute offre de sa part devrait être soumise à l'approbation de la bande.

Le 7 avril 1957, le Conseil de la bande s'est réuni sous la présidence de M. Anfield. Le juge de première instance a constaté que l'offre faite par le club de golf a été communiquée au chef et aux conseillers dans ses grandes lignes seulement. On leur a dit que le bail porterait sur environ 160 acres, qu'il serait signé pour une durée initiale de quinze ans et que le club de golf pourrait choisir de le reconduire pour d'autres périodes de quinze ans [TRADUCTION] «aux conditions qui seront convenues». En réalité, le loyer proposé par le club de golf était de 25 000 $ par année pour les quinze premières années et le loyer de chaque reconduction successive de quinze ans serait fixé de gré à gré ou, à défaut d'accord, par arbitrage. Toutefois, aux termes de l'offre, le loyer des périodes de

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

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

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

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

reconduction était assujetti à une majoration maximale de 15 pour 100 du loyer initial établi à 25 000 $.

Le savant juge de première instance a conclu qu'en apprenant que le loyer serait de 25 000 $, M. Bethune, surintendant des Réserves et des Fidéicommis, à Ottawa, a douté du bien-fondé de ce montant et il a suggéré à M. Arneil de demander à M. Howell, l'évaluateur, ce que devraient normalement rapporter les 160 acres de terrain. Malheureusement, on n'a pas communiqué à M. Howell tous les faits. On ne lui a pas fait part de la limite de 15 pour 100 sur les augmentations de loyer. On ne lui a pas dit que le club de golf aurait le droit d'enlever toutes les améliorations à la fin du bail, quoiqu'on lui ait dit que le club projetait d'investir jusqu'à un million de dollars en bâtiments et améliorations sur les biens-fonds loués. M. Howell a donc recommandé d'accepter l'offre du club de golf en déclarant: [TRADUCTION] «Ces améliorations reviendront à la Bande à la fin du bail» et [TRADUCTION] «le Ministère sera dans une position beaucoup plus favorable pour négocier une hausse de loyer dans quinze ans, lorsque le club aura investi dans la propriété un capital considérable dont il devra assurer la protection.» Dans son témoignage au cours du procès, M. Howell a affirmé qu'il n'aurait pas recommandé d'accepter l'offre du club de golf s'il avait su que les améliorations ne reviendraient pas à la bande et que, pour les périodes de reconduction, l'augmentation de loyer était limitée à 15 pour 100.

La lettre de M. Howell a été envoyée à Ottawa avec une demande de préparer les actes de cession qui seraient soumis à la bande, ce qui a été fait. Il est intéressant de souligner cependant que, dans la lettre accompagnant les actes de cession demandés, M. Bethune a indiqué à M. Arneil qu'il aimerait que la limite de 15 pour 100 sur les augmentations de loyer soit supprimée et que le loyer relatif aux périodes de reconduction soit fixé de gré à gré ou par arbitrage.

Il y a eu réunion du Conseil de la bande le 25 juillet 1957, présidée de nouveau par M. Anfield. On y a encore discuté du projet de location au club de golf et deux conseillers ont exprimé l'avis que la période de reconduction devrait être de dix ans

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

Mr. Anfield expressed the view that the $44,000 figure was unreasonable and suggested $29,000 to which the Councillors agreed on the understanding that the first lease period would be for ten years and subsequent rental negotiations would take place every five years. Mr. Grant testified that Mr. Anfield advised the Council to go ahead with the lease at the $29,000 figure and in ten years demand a healthy increase from the golf club. Mr. Grant also testified that the Council objected to any ceiling on future rental and Mr. Anfield said that he would convey their concern to the Department of Indian Affairs. On that basis the Council, according to Mr. Grant, reluctantly accepted the $29,000 figure.

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

(a) Before the Band members voted, those present assumed or understood the golf club lease would be,

plutôt que de quinze ans. C'est à cette réunion qu'a été adoptée la résolution visant la tenue d'une assemblée générale des membres de la bande pour délibérer et voter sur la cession des 162 acres de terrain à Sa Majesté pour fins de location. L'assemblée de la bande a été tenue le 6 octobre 1957, mais avant cette assemblée une autre réunion des conseillers avait eu lieu le 27 septembre 1957. MM. Harrison et Jackson du Shaughnessy Golf Club étaient présents à cette réunion, de même que M. Anfield qui, entre-temps, avait été promu au poste de commissaire adjoint des Indiens pour la Colombie-Britannique, et un certain M. Grant décrit comme [TRADUCTION] «responsable de l'agence de Vancouver». En présence des représentants du club de golf, le chef Sparrow a soulevé la question du loyer annuel de 25 000 $ et demandé un loyer de l'ordre de 44 000 $ à 44 500 $ par année. Les représentants du club de golf se sont opposés à cela et on leur a demandé de quitter la salle pendant que le Conseil de la bande et le personnel des Affaires indiennes tenaient une discussion privée.

M. Anfield a exprimé l'avis que le montant de 44 000 $ était déraisonnable et il a proposé celui de 29 000 $ que les conseillers ont accepté à la condition que le premier terme du bail soit de dix ans et que le loyer soit renégocié tous les cinq ans. M. Grant a témoigné que M. Anfield a recommandé au Conseil de conclure le bail au montant de 29 000 $ et d'exiger, dans dix ans, du club de golf une augmentation substantielle. M. Grant a aussi témoigné que le Conseil s'est opposé à tout plafonnement du loyer futur et M. Anfield a dit qu'il transmettrait les préoccupations du Conseil au ministère des Affaires indiennes. Dans ces conditions, le Conseil a, selon M. Grant, accepté à contrecoeur le chiffre de 29 000 $.

Le chef Sparrow, les conseillers et les membres étaient présents à l'assemblée de la bande tenue le 6 octobre 1957 («l'assemblée de la cession»); M. Anfield présidait comme à l'habitude. Le savant juge de première instance a tiré des conclusions précises sur ce qui s'est produit à l'assemblée, dont voici le texte tiré de ses motifs:

a) Avant que les membres de la bande ne votent, ceux qui étaient présents ont présumé ou cru comprendre

aside from the first term, for 10-year periods, not 15 years.

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

(c) The meeting was not told the golf club proposed it should have the right, at any time during the lease and for a period of up to 6 months after termination, to remove any buildings or structures, and any course improvements and facilities.

(d) The meeting was not told that future rent on renewal periods was to be determined as if the land were still in an uncleared and unimproved condition and used as a golf club.

(e) The meeting was not told that the golf club would have the right at the end of each 15-year period to terminate the lease on six-month's prior notice.

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

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

TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.

AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.

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

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

que le bail du club de golf serait, le premier terme excepté, d'une durée de 10 ans, non de 15.

b) Avant que les membres de la bande ne votent, ceux qui étaient présents ont présumé ou cru comprendre qu'il n'y aurait aucun plafonnement à 15 % des hausses de loyer.

c) Il n'a pas été divulgué à l'assemblée que le club de golf proposait d'avoir le droit, à tout moment au cours du bail et, après son terme, pendant six autres mois, d'enlever tout bâtiment ou structure et toute amélioration et installation y érigés.

d) Il n'a pas été divulgué à l'assemblée que le loyer futur des périodes de reconduction serait fixé comme si le terrain n'avait été ni défriché ni amélioré et servait comme club de golf.

e) Il n'a pas été divulgué à l'assemblée que le club de golf aurait le droit, à la fin de chaque période de 15 ans, de mettre fin au bail moyennant un préavis de six mois.

Ni la condition en d) ni celle en e) ne se trouvaient dans l'offre initiale du club de golf et elles sont apparues pour la première fois dans le projet de bail rédigé après l'assemblée de la cession. Elles n'ont jamais été soumises au Conseil de la bande ou à la bande elle-même pour obtenir ses commentaires ou son approbation. La bande a voté presque à l'unanimité en faveur de la cession.

Par l'acte de cession, le chef et les conseillers de la bande, agissant pour le compte de celle-ci, ont cédé 162 acres de terrain à Sa Majesté:

[TRADUCTION] CÉDÉ ledit bien-fonds à Sa Majesté la Reine, ses hoirs et successeurs, définitivement, en fiducie, pour location à celui ou à ceux, et aux conditions, que le gouvernement du Canada jugera les plus favorables à notre bien-être et à celui de notre peuple.

ET à la condition supplémentaire que tous les loyers perçus pour cette location soient versés à notre crédit dans notre compte en fidéicommis à Ottawa.

ET NOUS, lesdits chef et conseillers de ladite bande indienne Musqueam, au nom de notre peuple et en notre nom propre, par la présente, avalisons et donnons notre agrément, et promettons d'avaliser et de consentir, à tout ce que ledit gouvernement pourra faire, ou verra à faire faire, licitement, au sujet de ladite location.

On remarquera qu'il n'est fait mention nulle part, dans l'acte de cession, du projet de location au club de golf. La position de Sa Majesté au procès était

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

After the surrender there was considerable correspondence between Mr. Anfield and personnel in the Indian Affairs Branch in Ottawa particularly over the more controversial provisions of the lease but none of this correspondence was communicated to the Band Council nor were they given a copy of the draft lease which would have drawn these controversial provisions to their attention. The trial judge states at p. 409:

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

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

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

> 1. The term is for 75 years, unless sooner terminated.
>
> 2. The rent for the first 15 years is $29,000 per annum.
>
> 3. For the 4 succeeding 15-year periods, annual rent is to be determined by mutual agreement, or failing such agreement, by arbitration
>
> ... such rent to be equal to the fair rent for the demised premises as if the same were still in an uncleared and unimproved condition as at the date of each respective determination and considering the restricted use to which the Lessee may put the demised premises under the terms of this lease ....

qu'une fois les actes de cession signés, elle pouvait louer à ceux et aux conditions qu'elle jugeait convenables.

Après la cession, il y a eu échange considérable de correspondance entre M. Anfield et le personnel de la direction des Affaires indiennes à Ottawa, au sujet notamment des dispositions les plus controversées du bail, mais le Conseil de la bande ne s'est vu remettre aucune de ces lettre ni aucune copie du projet de bail qui leur aurait permis de prendre connaissance de ces dispositions controversées. Le juge de première instance affirme, à la p. 409:

> À dire vrai, les membres de la bande, hormis l'historique des tractations et l'information limitée fournie lors de l'assemblée de la cession, n'ont jamais été consultés.
>
> C'était pourtant leur terrain. C'était leur investissement et leur revenu; leur avenir.

Le savant juge de première instance a considéré comme avéré que le chef, les conseillers et les membres de la bande ont été complètement écartés de toute autre discussion ou négociation qui a eu lieu entre le personnel des Affaires indiennes, les dirigeants du club de golf et leurs avocats respectifs au sujet des conditions du bail. Selon le juge de première instance, cela s'explique, sans toutefois se justifier, par la possibilité que les fonctionnaires des Affaires indiennes aient alors adopté une attitude plutôt paternaliste envers les Indiens qu'ils considéraient comme les pupilles de Sa Majesté.

J'aborderai maintenant les conditions essentielles du bail signé le 22 janvier 1958, telles qu'énoncées par le savant juge de première instance, à la p. 412:

> 1. La durée du bail est de 75 ans sauf résiliation antérieure.
>
> 2. Le loyer pour les premiers 15 ans est de 29 000 $ l'an.
>
> 3. Pour les 4 reconductions suivantes de 15 ans, le loyer annuel devra être fixé par accord mutuel ou, à défaut, par arbitrage
>
> [TRADUCTION] ... ce loyer devant être égal au juste loyer des lieux fournis s'ils étaient toujours non défrichés et non améliorés à la date de chaque fixation respective du loyer et en considérant que l'usage que le locataire peut en faire selon le bail est restreint ...

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

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

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

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

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

2. Section 18 of the *Indian Act*

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

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

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

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

4. La hausse maximale du loyer pour les seconds 15 ans (du 1er janvier 1973 au 1er janvier 1988), est limitée à 15% de 29 000 $, soit 4 350 $ l'an.

5. Le club de golf peut résilier le bail au terme de toute période de 15 ans en donnant un préavis de 6 mois.

6. Le club de golf peut, à tout moment en cours de bail, et jusqu'à 6 mois après l'arrivée de son terme, enlever tout bâtiment ou autre structure et toute amélioration et installation.

M. Grant a témoigné que les conditions du bail finalement conclu ne ressemblaient que fort peu à ce qui avait été débattu et approuvé à l'assemblée de la cession et le savant juge de première instance s'est dit d'accord avec lui. Il a conclu que si la bande avait connu les conditions réelles du bail, elle n'aurait jamais cédé ses terres.

Voilà pour les faits constatés par le savant juge de première instance. Quel recours en droit, s'il en est, la bande a-t-elle dans ces circonstances?

2. L'article 18 de la *Loi sur les Indiens*

Les appelants soutiennent que la Cour d'appel fédérale a commis une erreur en ne concluant pas que l'art. 18 de la *Loi sur les Indiens* impose à Sa Majesté une obligation de fiduciaire exécutoire en justice. L'article est ainsi conçu:

18. (1) Sauf les dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; et, sauf la présente loi et les stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

Après avoir conclu que, d'après la jurisprudence, rien en principe n'empêche Sa Majesté d'avoir le statut de fiduciaire en *equity*, le juge Le Dain a conclu néanmoins que l'art. 18 n'a pas cet effet. Il impose simplement à Sa Majesté une obligation gouvernementale de nature administrative. C'est une obligation de droit public plutôt qu'une obligation de droit privé. L'article 18 ne peut donc servir de fondement à une action pour manquement aux obligations de fiduciaire.

Bien que je sois aussi d'avis que l'art. 18 n'impose pas en soi à Sa Majesté une obligation de fiduciaire à l'égard des réserves indiennes, je crois

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

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

qu'il reconnaît l'existence d'une telle obligation. L'obligation a sa source dans le titre aborigène des Indiens du Canada analysé dans l'arrêt *Calder c. Procureur général de la Colombie-Britannique,* [1973] R.C.S. 313. Dans cet arrêt, la Cour n'a pas estimé nécessaire de définir la nature précise du titre des Indiens parce que la question en cause était de savoir s'il était éteint ou non. Cependant, dans l'arrêt *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, lord Watson, s'exprimant au nom du Conseil privé, avait affirmé à la p. 54, que [TRADUCTION] «les Indiens [ont] un droit personnel, de la nature d'un usufruit.» Cette description du droit des Indiens sur les terres des réserves a été approuvée tout récemment par cette Cour dans l'arrêt *Smith c. La Reine,* [1983] 1 R.C.S. 554. Il faut observer qu'aucune question constitutionnelle du genre de celles qui se sont posées dans les arrêts *St. Catherine's* et *Smith* ne se pose en l'espèce puisque le titre de propriété sur les terres des réserves indiennes de la Colombie-Britannique a été cédé à Sa Majesté du chef du Canada en 1938: voir les arrêtés en conseil de la Colombie-Britannique nos 208 et 1036, adoptés en application de l'art. 13 des Conditions de l'union de 1870.

Je crois qu'en disposant que les réserves seront détenues par Sa Majesté à l'usage et au profit des bandes pour lesquelles elles sont mises de côté, l'art. 18 fait plus que donner une directive administrative à Sa Majesté. Je crois qu'il s'agit de la reconnaissance d'une réalité historique, savoir que les Indiens ont un droit de bénéficiaire sur leurs réserves et qu'il incombe à Sa Majesté de protéger ce droit et de s'assurer que les fins auxquelles les terres des réserves sont utilisées ne portent pas atteinte à ce droit. Cela ne signifie pas que, soit historiquement soit en vertu de l'art. 18, Sa Majesté détient les terres en fiducie pour les bandes. Les bandes n'ont pas la propriété absolue des terres; leur droit est limité. C'est cependant un droit auquel Sa Majesté ne peut porter atteinte ou qu'elle ne peut diminuer par l'utilisation des terres à des fins incompatibles avec le titre indien, à moins évidemment que les Indiens y consentent. Je crois que, dans ce sens, Sa Majesté a une obligation de fiduciaire envers les bandes indiennes relativement à l'utilisation qui peut être faite des

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

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

With respect, while I agree with the learned justice that s. 18 does not go so far as to create a trust of reserve lands for the reasons I have given, it does not in my opinion exclude the equitable jurisdiction of the courts. The discretion conferred on the Governor in Council is not an unfettered one to decide the use to which reserve lands may be put. It is to decide whether any use to which they are proposed to be put is "for the use and benefit of the band". This discretionary power must be exercised on proper principles and not in an arbitrary fashion. It is not, in my opinion, open to the Governor in Council to determine that a use of the land which defeats Indian title and affords the Band nothing in return is a "purpose" which could be "for the use and benefit of the band". To

terres des réserves, et que l'art. 18 constitue une reconnaissance légale de cette obligation. Par conséquent, je suis d'avis que, bien que Sa Majesté ne détienne pas les terres des réserves en fiducie pour les bandes en vertu de l'art. 18 de la Loi, parce que les droits des bandes sont limités par la nature du titre indien, elle les détient sous réserve de l'obligation qui incombe au fiduciaire de protéger et préserver les droits des bandes contre l'extinction ou l'empiétement.

L'intimée soutient cependant que si le par. 18(1) de la *Loi sur les Indiens* impose une obligation quelconque à Sa Majesté, c'est une obligation purement politique dont les tribunaux d'*equity* ne peuvent forcer l'exécution. L'article 18, selon elle, engendre [TRADUCTION] «une fiducie au sens large» qui est analysée dans les arrêts *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619 (H.L.), et *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 (Ch.) Le juge Le Dain, qui a rendu les motifs de jugement de la Cour d'appel fédérale, a adopté cette solution. Il a exprimé, à la p. 467, l'avis que ces causes indiquent que «dans un contexte de droit public, ni l'emploi de l'expression «en fiducie», ni la saisine d'un bien devant être employé de quelque manière au profit d'un tiers ne permettent de conclure à l'intention claire de créer une fiducie au sens strict». Il a conclu que le pouvoir discrétionnaire que le par. 18(1) accorde à Sa Majesté manifeste l'intention d'exclure la compétence en *equity* des tribunaux.

Avec égards, bien que je partage l'avis du savant juge que l'art. 18 ne va pas jusqu'à créer une fiducie à l'égard des terres des réserves pour les motifs que j'ai exposés, il n'écarte pas, à mon avis, la compétence en *equity* des tribunaux. Le pouvoir discrétionnaire accordé au gouverneur en conseil n'est pas un pouvoir illimité de déterminer l'utilisation qui peut être faite des terres des réserves. Il s'agit du pouvoir de décider si une utilisation quelconque qu'on propose d'en faire se trouve «à l'usage et au profit de la bande». Ce pouvoir discrétionnaire doit être exercé selon des principes appropriés et non d'une manière arbitraire. Il n'appartient pas, à mon avis, au gouverneur en conseil de décider qu'une utilisation des terres qui va à l'encontre du titre indien et n'apporte rien à la

so interpret the concluding part of s. 18 is to deprive the opening part of any substance.

Moreover, I do not think we are dealing with a purely public law context here. Mr. Justice Le Dain agrees that a Band has a beneficial interest in its reserve. I believe it is clear from s. 18 that that interest is to be respected and this is enough to make the so-called "political trust" cases inapplicable.

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

bande en retour est un «objet» qui se trouve «à l'usage et au profit de la bande». Interpréter ainsi la fin de l'art. 18 équivaut à faire perdre tout son sens à la première partie de cet article.

De plus, je ne crois pas que nous soyons ici dans un contexte de droit purement public. Le juge Le Dain reconnaît qu'une bande a un droit de bénéficiaire sur sa réserve. Je crois qu'il est clair, d'après l'art. 18, que ce droit doit être respecté et que cela suffit à rendre inapplicables les affaires dites de «fiducie politique».

Dans l'arrêt *Kinloch* précité, où le lord chancelier Selborne a pour la première fois avancé l'idée de fiducie politique, il s'agissait de savoir si un brevet royal, qui «accordait» un butin de guerre au secrétaire d'État pour l'Inde intimé «en fiducie» pour les officiers et les hommes de certaines unités, créait une fiducie exécutoire en justice. La cour a décidé que ce n'était pas le cas, la portée du brevet étant de faire du secrétaire d'État un mandataire de Sa Majesté pour la distribution du butin plutôt qu'un fiduciaire. Dans l'affaire *Civilian War Claimants Association, Ltd. v. The King*, [1932] A.C. 14, les demandeurs, à titre de cessionnaires de demandeurs civils qui avaient subi des pertes causées par les Allemands pendant la Première Guerre mondiale, ont prétendu notamment que les sommes reçues de l'Allemagne par Sa Majesté à titre de dommages de guerre en exécution du Traité étaient détenues en fiducie pour les demandeurs. La Chambre des lords a rejeté leur demande. Dans l'arrêt *Hereford Railway Co. v. The Queen* (1894), 24 R.C.S. 1, on a décidé que les sommes qui, selon la compagnie de chemins de fer demanderesse, lui avaient été attribuées par la législature à titre de subvention n'étaient pas assujetties à une fiducie exécutoire en justice. Dans toutes ces affaires, les sommes en cause appartenaient à Sa Majesté (ou, du moins, comme dans l'affaire *Kinloch* précitée, étaient en la possession de Sa Majesté) et aucun de ceux qui les réclamaient à titre de bénéficiaire ne pouvait démontrer l'existence d'un droit au partage de ces sommes, qui serait indépendante du traité, de la loi ou d'un autre acte juridique qui engendrerait une fiducie exécutoire.

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

Dans l'affaire *Tito v. Waddell (No. 2)*, précitée, les habitants de l'île Banaba prétendaient que certaines redevances payables au commissaire du gouvernement local en raison de l'exploitation minière de leurs terres donnaient naissance à des fiducies en leur faveur. En rejetant leurs demandes pour un certain nombre de motifs différents, le vice-chancelier Megarry a conclu, aux pp. 225 et 226, qu'il n'y avait pas de rapport suffisant entre les biens-fonds visés par l'exploitation minière et les redevances pour pouvoir déduire qu'on a voulu soumettre celles-ci à une fiducie au sens strict. Les redevances appartenaient exclusivement à Sa Majesté et le fait que les terres appartenaient aux habitants de Banaba ne leur conférait pas de droit sur les redevances. Je crois qu'il est implicite, dans les motifs du vice-chancelier Megarry, que si les habitants de Banaba avaient pu démontrer l'existence d'un droit sur les redevances elles-mêmes, l'argumentation en faveur d'une fiducie aurait été plus convaincante.

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

Il me semble que la jurisprudence relative à la «fiducie politique» se distingue nettement de l'espèce parce que le titre indien existe tout à fait indépendamment du par. 18(1) de la *Loi sur les Indiens*. Il serait contraire au texte précis cette disposition de considérer que Sa Majesté peut, à son gré, mettre fin à ce droit sans que la bande ne dispose d'aucun recours.

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

Je poursuis l'analyse de l'art. 18. Il me semble tout à fait clair d'après le texte de l'article que le pouvoir du gouverneur en conseil de déterminer, de bonne foi, si l'objet pour lequel on se propose d'utiliser des terres d'une réserve se trouve à l'usage et au profit de la bande est assujetti aux «stipulations de tout traité ou cession». J'estime que cela signifie que si une bande cède son droit de bénéficiaire sur les terres d'une réserve pour une fin précise, alors le pouvoir que possède le gouverneur en conseil, en vertu de l'article, de décider si l'objet se trouve à l'usage et au profit de la bande est écarté. La bande a elle-même acquiescé à l'objet et Sa Majesté peut invoquer cet acquiescement. Il sera nécessaire d'analyser cela plus en détail relativement à la cession qui a effectivement eu lieu en espèce.

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

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

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

4. The Surrender

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

3. L'omission d'invoquer la «fiducie politique» comme moyen de défense

Le deuxième moyen d'appel proposé par les appelants concerne le fait que la notion de «fiducie politique» que la Cour d'appel fédérale a acceptée comme moyen de défense et qui a servi de fondement à son arrêt, n'a pas été expressément plaidée comme l'exige l'article 409 des Règles de la Cour fédérale.

Je n'ai pas besoin de m'étendre longuement sur ce moyen puisque je crois que l'affaire doit être tranchée en fonction des questions de fond plutôt que des questions de procédure. Toutefois, j'accepte la prétention des appelants que les tactiques auxquelles a eu recours Sa Majesté à cet égard laissent beaucoup à désirer. Il est tout à fait évident que, lorsque le juge de première instance a indiqué qu'il était prêt à permettre une modification au cours du procès, mais a ordonné un interrogatoire préalable sur le sujet, Sa Majesté a renoncé à ce moyen de défense au procès même et par des déclarations ministérielles extrajudiciaires. Elle a néanmoins persisté et a demandé et obtenu l'autorisation de soulever ce moyen de défense en Cour d'appel fédérale. Même si, comme la Cour d'appel l'a souligné, ce moyen de défense est strictement juridique et que l'absence d'interrogatoire préalable n'a probablement causé aucun préjudice à la bande, à mon avis le comportement de Sa Majesté ne constitue pas un exemple du haut degré de professionnalisme auquel nous nous attendons d'ordinaire dans les débats judiciaires.

4. La cession

J'ai déjà mentionné le texte de l'art. 18 et plus particulièrement le fait que l'obligation de fiduciaire de Sa Majesté qui en découle est assujettie aux «stipulations de tout[e] . . . cession». Les conséquences de cette situation doivent être examinées en fonction de la conclusion du savant juge de première instance portant que la bande a cédé 162 acres de terrain à Sa Majesté pour qu'elle les loue au club de golf à des conditions précises qui n'ont pas été respectées. Le juge de première instance a conclu que la cession elle-même a créé un rapport fiduciaire entre Sa Majesté et la bande. L'objet de la fiducie n'était pas le droit de bénéficiaire de la

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

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

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

I return to s. 18. What effect does the surrender of the 162 acres to the Crown in trust for lease on

bande sur le bien-fonds, mais le bien-fonds lui-même. Avant la cession, Sa Majesté détenait le titre de propriété sur les terres assujetties au titre indien. Lorsque la bande a cédé les terres à Sa Majesté, le droit de la bande s'est fondu dans la propriété absolue. Sa Majesté détenait alors les terres, libres du titre indien, mais elle était tenue en vertu de la fiducie de les louer au club de golf aux conditions approuvées par la bande à son assemblée du 6 octobre 1957. Sa Majesté a manqué à son obligation de fiduciaire lorsqu'elle a loué le bien-fonds au club à des conditions beaucoup moins favorables à la bande.

On a soutenu pour le compte de Sa Majesté que, même si la cession créait une fiducie entre Sa Majesté et la bande, les conditions de la fiducie devraient se trouver dans l'acte de cession et cet acte de cession est muet quant au locataire et aux conditions du bail. En fait, il confère expressément au gouvernement un pouvoir discrétionnaire absolu quant au locataire et aux conditions du bail et il comporte une ratification par la bande de tout bail que le gouvernement pourrait conclure.

Je ne puis accepter la prétention de Sa Majesté. Celle-ci savait très bien que les conditions du bail étaient importantes pour la bande. En réalité, le juge de première instance a conclu que la bande n'aurait pas cédé les terres pour les louer aux conditions négociées par Sa Majesté. Il sied mal à Sa Majesté, par conséquent, d'obtenir de la bande la cession de ses droits en vue d'un bail à des conditions approuvées par le vote de ses membres à une assemblée spécialement convoquée à cette fin, pour ensuite prétendre avoir un pouvoir discrétionnaire prépondérant d'ignorer ces conditions: voir *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227; *Lever Finance Ltd. v. Westminster (City) London Borough Council*, [1971] 1 Q.B. 222 (C.A.) C'est tourner la participation de la bande en dérision. Sa Majesté savait très bien que le bail qu'elle a consenti au club de golf n'était pas celui pour lequel la bande avait cédé ses droits. L'*equity* ne permet pas à Sa Majesté, dans ces circonstances, de se réfugier derrière le texte de son propre document.

Revenons à l'art. 18. Quel effet la cession de 162 acres de terrain à Sa Majesté en fiducie pour

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

location à des conditions précises a-t-elle sur l'obligation de fiduciaire qui incombe à Sa Majesté en vertu de cet article? Il me semble que l'art. 18 n'empêche pas de conclure que Sa Majesté est devenue fiduciaire à part entière par suite de la cession. La cession l'emporte sur l'obligation imposée par l'art. 18, mais, en l'espèce, il n'y a pas d'incompatibilité entre elles. Plus exactement, l'obligation de fiduciaire qui existait généralement en vertu de l'article de détenir les terres d'une réserve pour l'usage et le bénéfice de la bande s'est cristallisée, par suite de la cession, en une fiducie explicite visant des terres précises pour une fin précise.

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

La création d'une fiducie ne relève pas de la magie. Il y a fiducie, si je comprends bien, chaque fois qu'une personne est obligée, en *equity*, de détenir un bien dont elle assume la garde au profit de tiers (les bénéficiaires) de façon que les avantages tirés du bien échoient non pas au fiduciaire, mais aux bénéficiaires. À mon avis, dans les circonstances de l'espèce telles que constatées par le savant juge de première instance, Sa Majesté était tenue, en *equity*, dès la cession de détenir en fiducie les terres cédées aux fins du bail que les membres de la bande avaient approuvé comme étant à leur avantage. Sa Majesté n'avait plus le loisir de décider qu'un bail à d'autres conditions ferait l'affaire. Elle avait les mains liées.

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

Qu'aurait alors dû faire Sa Majesté lorsque le club de golf a refusé de signer le bail aux conditions approuvées? Il me semble qu'elle aurait dû retourner devant la bande et lui faire part de ce refus. Il ne lui était certainement pas loisible, à ce moment, de consentir un bail moins avantageux parce que le gouverneur en conseil estimait qu'il était à l'avantage de la bande. La cession a écarté le pouvoir discrétionnaire du gouverneur en conseil à cet égard. Je crois que le savant juge de première instance a eu raison de conclure que Sa Majesté a manqué à ses obligations de fiduciaire en s'empressant de signer un bail à des conditions que, selon lui, son *cestui que trust* ne pouvait absolument pas accepter.

5. The Claim in Deceit

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

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

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

6. The Measure of Damages

I come now to one of the most difficult issues on the appeal, namely the principles applicable to determine the measure of damages. No assistance

5. La réclamation pour tromperie

Les appelants fondent leur réclamation contre Sa Majesté autant sur la tromperie que sur la fiducie. Ils n'ont pas eu gain de cause sur cet aspect de leur réclamation en première instance, mais ils l'ont invoqué de nouveau en cette Cour. Bien que le savant juge de première instance ait conclu que la conduite des fonctionnaires des Affaires indiennes équivalait à une fraude d'*equity*, elle ne pouvait donner lieu à une action pour tromperie en *common law*. Il a conclu qu'il n'y avait eu aucune malhonnêteté ou turpitude morale de la part de MM. Anfield, Arneil et des autres. Leur omission de retourner devant la bande et de lui faire part qu'il était impossible d'obtenir les conditions qu'elle avait approuvées, leur signature du bail à des conditions moins favorables et leur omission de révéler à la bande la nature de ces conditions découlaient toutes, selon le juge, de leur attitude paternaliste envers la bande plutôt que d'une intention de tromper les Indiens ou de leur causer un préjudice.

Néanmoins, il y a eu dissimulation équivalant à une fraude d'*equity*. C'était [TRADUCTION] «une conduite qui, compte tenu de la relation spéciale qui existe entre les parties concernées, est fort peu scrupuleuse de la part de l'une envers l'autre» (*Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, le maître des rôles, lord Evershed, à la p. 573). La constatation de la fraude d'*equity* a eu pour effet d'empêcher Sa Majesté d'être exonérée du manquement à ses obligations de fiduciaire en application de l'art. 98 de la *Trustee Act*, R.S.B.C. 1960, chap. 390, maintenant R.S.B.C. 1979, chap. 414. Un fiduciaire ne peut être dégagé de responsabilité pour manquement à ses obligations de fiduciaire en vertu de cet article à moins d'avoir agi «de façon honnête et raisonnable».

Les conclusions du juge de première instance sur cet aspect de la réclamation de la bande sont, je crois, suffisantes pour statuer sur ce moyen d'appel.

6. Le montant des dommages-intérêts

J'arrive maintenant à l'une des questions les plus épineuses du pourvoi, celle des principes applicables à la détermination du montant des dommages-

is to be derived on this issue from the Federal Court of Appeal which exonerated the Crown from any liability. I turn therefore to the approach taken by the learned trial judge.

The trial judge, at p. 430, stated as general principles that the measure of damages is "the actual loss which the acts or omissions have caused to the trust estate": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, *per* Dickson J. at p. 320, and that the beneficiary is "entitled to be placed in the same position so far as possible as if there had been no breach of trust": *Toronto-Dominion Bank v. Uhren* (1960), 32 W.W.R. 61 (Sask. C.A.), *per* Gordon J.A. at p. 66; Culliton J.A. at p. 73. The learned trial judge then considered whether the proper measure of damages might not be the difference in value between a lease on the terms approved by the Band and the lease which was in fact obtained from the golf club. He discarded this measure on the basis that the evidence of the witnesses for the golf club satisfied him that the club would never have entered into a lease on the terms approved by the Band. It was his conclusion that the difference in the value of the two leases could not be used as the proper measure in face of the evidence of the golf club witnesses that caused the learned trial judge to consider other approaches based on other uses of the land. Was he correct in this?

Viewed from one perspective it may be said that he was wrong. The Band authorized and was prepared to accept a lease of a certain value and received a lease of lesser value. *Prima facie* then, its loss was the difference between the two. On the other hand, how can it be said that the breach of trust cost the Band a lease which the club would never have entered into? The problem here seems to be one of causation. The breach of trust undoubtedly cost the Band something because they are fixed with a lease which is worth substantially less than the one they surrendered their land to receive. But against what is their loss to be mea-

intérêts. La Cour d'appel fédérale ne nous est d'aucun secours à cet égard puisqu'elle a dégagé Sa Majesté de toute responsabilité. J'analyserai donc le point de vue adopté par le savant juge de première instance.

Le juge de première instance a énoncé comme principes généraux, à la p. 430, que le montant des dommages-intérêts correspond à «la perte réelle que les actes ou omissions ont fait subir» au patrimoine confié en fiducie: *Fales c. Canada Permanent Trust Co.*, [1977] 2 R.C.S. 302, le juge Dickson à la p. 320, et que les bénéficiaires ont le [TRADUCTION] «droit d'être replacés dans la même situation, autant que faire se peut, que s'il n'y avait pas eu manquement à la fiducie»: *Toronto-Dominion Bank v. Uhren* (1960), 32 W.W.R. 61 (C.A. Sask.), le juge Gordon à la p. 66; le juge Culliton à la p. 73. Le savant juge de première instance s'est ensuite demandé si le montant approprié des dommages-intérêts ne devrait pas être la différence de valeur entre un bail conclu aux conditions approuvées par la bande et le bail effectivement conclu avec le club de golf. Il a écarté cette méthode d'évaluation parce que les dépositions des témoins cités pour le compte du club de golf l'ont convaincu que celui-ci n'aurait jamais signé le bail aux conditions approuvées par la bande. Il a conclu que la différence de valeur entre les deux baux ne pouvait servir de méthode d'évaluation, vu les dépositions des témoins du club de golf qui l'ont amené à étudier d'autres solutions fondées sur d'autres utilisations des terres. A-t-il eu raison de le faire?

Dans un certain sens, on peut dire qu'il a eu tort. La bande a autorisé un bail d'une certaine valeur qu'elle était prête à accepter, mais elle a obtenu un bail d'une valeur moindre. Alors, à première vue, la perte qu'elle a subie est la différence entre les deux. D'autre part, comment peut-on dire que le manquement aux obligations de fiduciaire a occasionné à la bande la perte d'un bail auquel le club n'aurait jamais consenti? Le problème en l'espèce semble en être un de causalité. Le manquement aux obligations de fiduciaire a certainement entraîné une perte pour la bande parce qu'elle est coincée avec un bail qui vaut beaucoup moins que

sured if not against the value of the lease they expected to get?

The learned trial judge reviewed the evidence adduced by experts as to what would have been a fair return from a golf club lease over the period from 1958 to the date of trial based on the capital value attributed to the land over that period by these experts. This method of assessment made it clear that the golf club lease actually entered into did not yield a fair return. The learned trial judge, however, rejected the concept that the Band's loss was the difference in value between a "fair and reasonable" lease and the actual lease. He said, at p. 435:

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

In other words, just as he had found that the lease the Band wanted would not have been entered into and therefore the value of that lease could not be used in assessing the Band's damages, he likewise found that no golf club lease would have been entered into, presumably on the basis that a so-called "fair" lease could not have been obtained. The value of the land in 1957 and 1958 and its increase in value subsequently made use as a golf course uneconomic.

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

celui pour lequel elle a cédé ses terres. Mais en fonction de quoi faut-il évaluer sa perte si ce n'est en fonction de la valeur du bail qu'elle s'attendait d'obtenir?

Le savant juge de première instance a étudié les témoignages présentés par des experts sur ce qui aurait constitué un rendement raisonnable d'un bail de club de golf depuis 1958 jusqu'à la date du procès, en fonction de la valeur en capital que ces experts ont attribuée aux terres pour cette période. Cette méthode d'évaluation révèle clairement que le bail du club de golf réellement intervenu n'a pas produit un rendement raisonnable. Le savant juge de première instance a toutefois rejeté l'idée que la perte subie par la bande équivalait à la différence de valeur entre un bail «juste et raisonnable» et le bail réellement consenti. Il a affirmé, à la p. 435:

> Malheureusement, il ne s'agit pas de savoir si le bail du club de golf en vigueur est raisonnable ou non, mais bien de connaître l'ampleur de la perte subie, compte tenu que le bail du club de golf n'aurait probablement pas été conclu. J'ai résumé la preuve administrée à ce sujet de la valeur uniquement pour illustrer, entre autres choses, la hausse considérable du prix des terrains, celui en cause comme les autres, depuis 1957 et 1958. [C'est moi qui souligne.]

En d'autres termes, tout comme il a conclu que le bail que la bande souhaitait obtenir n'aurait pas été conclu et qu'en conséquence sa valeur ne pouvait servir à évaluer les dommages subis par la bande, il a également conclu que le bail du club de golf n'aurait pas été conclu, probablement en raison de l'impossibilité d'obtenir un bail soi-disant «raisonnable». La valeur du bien-fonds en 1957 et 1958 et l'augmentation de sa valeur par la suite en ont rendu l'utilisation comme terrain de golf peu rentable.

Le juge de première instance a donc considéré d'autres utilisations possibles et conclu, d'après la preuve, que les 162 acres de terrain auraient pu, à un moment donné, être avantageusement mis sur le marché, lotis et loués pour quatre-vingt-dix-neuf ans d'avance, à des fins d'aménagement résidentiel. Il a toutefois conclu qu'un tel aménagement ne se serait réalisé que quelques années après la conclusion du bail avec le club de golf. Il aurait fallu du temps pour procéder à la planification,

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

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

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

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

aux appels d'offres et aux négociations. De plus l'aménagement aurait pu démarrer lentement. Toutefois, compte tenu des témoignages qui lui ont été soumis relativement aux tendances économiques, commerciales et démographiques, aux valeurs immobilières, à la demande de logements et à la rareté des terrains pendant la période de 1958 à 1973, il a conclu que le secteur aurait probablement été sur la voie du lotissement complet, pour location résidentielle à long terme, entre 1968 et 1971. Il a souligné, au passage, que ce genre d'aménagement a eu lieu dans d'autres parties de la réserve et il a dûment pris en considération le fait que la présence du terrain de golf a probablement concouru à ces aménagements.

Après avoir pris en considération le fait que ce genre d'aménagement aurait pu avoir lieu sur les 162 acres de terrain et après avoir comparé le rendement anticipé d'un tel aménagement avec le rendement du bail du club de golf, le savant juge de première instance est alors arrivé à une évaluation globale de 10 millions de dollars. Il a reconnu qu'on ne pouvait étayer ce chiffre de façon mathématique, mais il a affirmé, à la p. 441, que c'était «une réaction éduquée, fondée sur la preuve administrée, les opinions fournies, les moyens soulevés et, finalement, mes conclusions quant aux faits». Il a toutefois énoncé les divers facteurs et éventualités dont il avait tenu compte pour arriver à son évaluation. Il n'a attribué aucun pourcentage à ces éventualités.

Après avoir rejeté la valeur d'un bail de club de golf (soit celui que la bande avait autorisé ou celui qu'on peut objectivement qualifier de «raisonnable») comme norme servant à établir l'étendue de la perte de la bande, le juge de première instance a, me semble-t-il, déterminé la valeur, à la date du procès, de l'occasion ratée par la bande d'aménager les terres à des fins résidentielles et évalué les dommages subis par la bande en fonction de la différence entre ce chiffre et la valeur du bail consenti au club de golf. Est-ce une façon appropriée d'aborder l'indemnisation pour manquement aux obligations de fiduciaire?

Sa Majesté prétend que non. Elle souligne que la bande était prête à s'accommoder d'un bail de club de golf et que le bail qu'elle a obtenu était le

club lease available in 1958. The Band therefore suffered no loss. It seems to me, however, that this completely overlooks the terms of the trust and the failure of the Crown to return to the Band and tell them that those terms were not available. At that point the Band might well have abandoned the idea of a golf club lease entirely and canvassed other options. I do not think that that reality can be ignored. What the Crown did, therefore, was to commit the Band to an unauthorized long-term lease which deprived it of the opportunity to use the land for any other purpose. I do not think it is open to the Crown to say: "You wanted a golf club lease and you got one: your only loss arises from the fact that you didn't get as good a one as you wanted".

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

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

meilleur bail de club de golf qu'elle pouvait obtenir en 1958. La bande n'a donc subi aucune perte. Il me semble cependant que cela revient à ignorer complètement les conditions de la fiducie et l'omission de Sa Majesté de retourner devant la bande pour l'informer que ces conditions étaient impossibles à obtenir. À ce moment, la bande aurait bien pu abandonner complètement l'idée d'un bail de club de golf et examiner d'autres possibilités. Je ne crois pas qu'on puisse ne pas tenir compte de cette réalité. Sa Majesté a donc lié la bande par un bail à long terme auquel cette dernière n'a pas consenti et qui lui a enlevé la possibilité d'utiliser les terres à d'autres fins. Je ne crois pas qu'il est loisible à Sa Majesté de dire: «Vous vous vouliez un bail de club de golf, vous en avez un: la seule perte que vous subissez tient au fait que vous n'en avez pas obtenu un aussi avantageux que celui que vous vouliez».

La situation en *common law* quant aux dommages-intérêts à accorder pour un manquement aux obligations de fiduciaire et, plus particulièrement, la différence entre les principes applicables en droit des fiducies et ceux applicables en matière délictuelle et contractuelle sont bien résumées dans les extraits suivants des motifs rendus par le juge Street dans la décision australienne *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, aux pp. 404 à 406:

> [TRADUCTION] L'obligation d'un fiduciaire en défaut consiste essentiellement à effectuer une restitution au patrimoine. L'obligation est de nature personnelle et son étendue n'est pas limitée par les principes de *common law* applicables aux dommages indirects.
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> . . .
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> L'arrêt *Caffrey* v. *Darby* (1801) 6 Ves. Jun. 488; 31 E.R. 1159, est compatible avec la proposition portant que s'il y a eu manquement, alors le fiduciaire est tenu de remettre le patrimoine administré dans l'état où il aurait été en l'absence de manquement. Les considérations de causalité et de prévisibilité n'entrent pas aisément en ligne de compte.
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> . . .
>
> Les principes compris dans cette façon de voir ne semblent pas soulever la question de savoir si la perte a été causée par le manquement ou si elle en découle. Il semblerait plutôt qu'il faille, dans chaque cas, déterminer si la perte se serait produite s'il n'y avait pas eu de manquement.
>
> . . .

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

Les décisions que j'ai mentionnées démontrent que l'obligation de restituer, que les tribunaux d'*equity* ont depuis le tout début imposée aux fiduciaires en défaut et aux autres fiduciaires, est une obligation de nature plus absolue que l'obligation de *common law* de payer des dommages-intérêts pour un délit ou une inexécution de contrat. Pour ce motif fondamental, je considère qu'on peut faire la distinction avec les principes énoncés dans l'arrêt *Tomkinson* [*Tomkinson* v. *First Pennsylvania Banking and Trust Co.*, [1961] A.C. 1007]. De plus la distinction entre les dommages-intérêts de *common law* et le redressement imposé aux fiduciaires en défaut ressort très nettement de la forme de redressement accordée en *equity* pour les manquements aux obligations de fiduciaire. La forme de redressement est formulée en termes suffisants pour exiger du fiduciaire en défaut qu'il restitue au patrimoine administré les biens dont il l'a privé. Les augmentations de la valeur marchande depuis le moment du manquement jusqu'à la date de la restitution sont à la charge du fiduciaire; en *common law*, l'effet de telles augmentations serait exclu du calcul des dommages-intérêts, mais en *equity* le fiduciaire en défaut doit compenser la perte en restituant au patrimoine les biens dont il l'a privé même si leur valeur marchande peut avoir augmenté dans l'intervalle. L'obligation de restituer au patrimoine les biens dont il l'a privé sous-entend nécessairement que, si une indemnité pécuniaire doit être versée au lieu de restituer des biens, cette indemnité doit être évaluée en fonction de la valeur des biens au moment de la restitution et non au moment de leur perte. En ce sens, l'obligation est permanente et, d'ordinaire, si pour une raison quelconque les biens ne sont pas restitués en nature, leur évaluation se fait en fonction du moment où la restitution doit être effectuée et pas avant.

The reasoning which the House of Lords adopted in *Tomkinson's* case proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach. [Emphasis added.]

Le raisonnement adopté par la Chambre des lords dans l'arrêt *Tomkinson* tient pour acquis qu'en *common law*, ordinairement, ni les fluctuations subséquentes des taux de change ni celles de la valeur marchande n'influent sur les dommages-intérêts. Ce raisonnement ne s'applique pas à une réclamation contre un fiduciaire en défaut parce que son obligation a toujours été considérée comme équivalant à l'obligation de restituer en nature; une telle obligation doit nécessairement s'évaluer en fonction des fluctuations du marché depuis le manquement aux obligations de fiduciaire; et à mon sens, elle doit nécessairement être modifiée par les fluctuations de monnaie depuis le manquement aux obligations de fiduciaire, s'il y a lieu. [C'est moi qui souligne.]

This statement of the law has been cited with approval in *Underhill's Law of Trusts and Trus-*

Cet énoncé de la règle applicable a été cité et approuvé dans *Underhill's Law of Trusts and*

tees (13th ed. 1979), at pp. 702-03, and was also recently adopted by Brightman L.J. in *Bartlett v. Barclays Bank Trust Co. (No. 2)*, [1980] 2 All E.R. 92 (Ch.), at p. 93: see also Waters, *Law of Trusts in Canada* (1974), at pp. 843-45.

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

Trustees (13e éd. 1979), aux pp. 702 et 703, et il a aussi été adopté récemment par le lord juge Brightman dans l'arrêt *Bartlett v. Barclays Bank Trust Co. (No. 2)*, [1980] 2 All E.R. 92 (Ch.), à la p. 93: voir également Waters, *Law of Trusts in Canada* (1974), aux pp. 843 à 845.

En l'espèce, la bande a cédé les terres à Sa Majesté pour qu'elle les loue à des conditions précises. Le juge de première instance a conclu qu'en réalité un tel bail était impossible à obtenir. Sa Majesté aurait dû, à ce moment-là, retourner devant la bande, la consulter et obtenir d'autres directives. Plutôt que de le faire, elle est allée de l'avant et a loué les terres à des conditions non autorisées. À mon avis, elle a, de ce fait, manqué à ses obligations de fiduciaire et les dommages-intérêts doivent être évalués en fonction des principes énoncés par le juge Street. La perte de possibilité d'aménager les terres pendant une période allant jusqu'à soixante-quinze ans doit être compensée selon sa valeur à la date du procès même si la valeur marchande a pu augmenter depuis la date du manquement. Les bénéficiaires profitent d'une telle augmentation. Je considère non fondé l'argument de Sa Majesté selon lequel [TRADUCTION] «si un fiduciaire a l'obligation de céder des terres par bail ou autrement, la date à considérer pour évaluer l'indemnisation d'un manquement à cette obligation est celle où la cession aurait dû avoir lieu et non celle du procès ou du jugement». Puisque le bail autorisé par la bande était impossible à obtenir, le manquement de Sa Majesté à ses obligations en l'espèce n'est pas de ne pas avoir loué les terres, mais de les avoir louées alors qu'elle ne pouvait pas le faire aux conditions approuvées par la bande. La bande a ainsi été privée de ses terres et de toute utilisation qu'elle aurait pu vouloir en faire. Tout comme il faut présumer qu'un bénéficiaire aurait voulu vendre ses valeurs mobilières au meilleur prix possible pendant la période où le fiduciaire les détenait illégitimement (voir *McNeil v. Fultz* (1906), 38 R.C.S. 198), de même il faut présumer que la bande aurait voulu aménager ses terres de la façon la plus avantageuse possible pendant la période visée par le bail non autorisé. À cet égard aussi, les principes applicables à la détermination des dommages-intérêts pour le manquement à des obligations de fiduciaire

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

I cannot find that the learned trial judge committed any error in principle in approaching the damage issue on the basis of a lost opportunity for residential development. It was urged upon us by counsel for the Band that the $10 million figure was inordinately low because the learned trial judge took into consideration the contingency that the golf club would decide to exercise its right to terminate the lease which it could do at any time. Counsel for the Band submitted that there was no evidence to suggest that the golf club would terminate the lease before the year 2033 and that indeed there was evidence to the contrary. The golf club had only recently expended $750,000 on capital improvements. There was no other land available in Vancouver to which the golf club could move. Even if there were, relocation would require the golf club to spend substantial amounts of money in creating a new golf course quite apart from the cost of acquisition of the land.

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

doivent être différenciés de ceux applicables à la détermination des dommages-intérêts pour l'inexécution d'un contrat. En droit des contrats, la bande aurait dû prouver qu'elle aurait aménagé les terres; en *equity*, il y a présomption qu'elle l'aurait fait: voir Waters, *Law of Trusts in Canada*, à la p. 845.

Je ne puis conclure que le savant juge de première instance a commis une erreur de principe quelconque en abordant la question des dommages-intérêts en fonction de la perte de la possibilité de procéder à un aménagement résidentiel. Les avocats de la bande ont insisté devant nous sur le fait que le chiffre de 10 millions de dollars était excessivement bas parce que le savant juge de première instance a tenu compte de la possibilité que le club de golf décide d'exercer son droit de résilier le bail, ce qu'il pouvait faire n'importe quand. Les avocats de la bande ont soutenu qu'aucun élément de preuve ne laissait supposer que le club de golf résilierait le bail avant l'an 2033 et qu'en réalité des éléments de preuve indiquaient le contraire. Ce n'est que récemment que le club de golf a dépensé 750 000 $ pour des améliorations au bien-fonds. Il n'y avait pas d'autres terrains disponibles dans Vancouver où le club de golf pourrait s'installer. Même s'il y en avait, le club de golf devrait dépenser des sommes importantes pour aménager ailleurs un nouveau parcours, sans compter le coût d'acquisition des terrains.

Quoi qu'il en soit, je ne crois pas qu'il appartienne à cette Cour de modifier le montant des dommages-intérêts accordés par le juge de première instance si on n'a pas démontré l'existence d'une erreur de principe dans leur évaluation. Le juge de première instance pouvait considérer la résiliation du bail par le club comme une éventualité militant en faveur d'une diminution des dommages-intérêts de la bande et il n'appartient pas à cette Cour de substituer la valeur qu'elle aurait attribuée à cette éventualité à celle qu'il lui a accordée. En conséquence, je suis d'avis de ne pas modifier le montant des dommages-intérêts. La tâche du juge de première instance n'était pas facile, mais je crois qu'il a «agi de son mieux»: (voir *Penvidic Contracting Co. c. International Nickel Co. of Canada*, [1976] 1 R.C.S. 267, aux pp. 279 et 280).

7. Punitive Damages, Interest and Costs

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

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

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

Disposition

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

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

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

7. Dommages-intérêts punitifs, intérêts et dépens

La Cour a informé l'avocat de Sa Majesté à l'audition du pourvoi qu'il n'était pas nécessaire de l'entendre à propos des dommages-intérêts punitifs. Cette réclamation est rejetée pour les mêmes motifs qu'est rejetée la réclamation de dommages-intérêts pour tromperie.

Je suis d'avis de ne pas modifier le refus du juge de première instance d'adjuger des intérêts avant jugement. L'adjudication est faite pour un manquement aux obligations de fiduciaire et non pour un délit civil. Le paragraphe 3(1) de la *Loi sur la responsabilité de la Couronne*, S.R.C. 1970, chap. C-38, ne s'applique donc pas. De plus, les dommages ont été évalués en fonction de la date du procès et ont pris la forme d'une somme globale.

Le juge de première instance n'a pas commis d'erreur en adjugeant des intérêts après jugement au taux légal. Je suis d'avis de ne pas toucher aux dépens fixés par le juge dans l'exercice de son pouvoir discrétionnaire.

Conclusion

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel fédérale et de rétablir la décision du savant juge de première instance. Je suis d'avis d'adjuger aux appelants leurs dépens tant en cette Cour qu'en Cour d'appel fédérale.

Version française du jugement des juges Dickson, Beetz, Chouinard et Lamer rendu par

LE JUGE DICKSON—La question en litige est de savoir si les appelants, le chef et les conseillers de la bande indienne Musqueam, en leur nom personnel et au nom de tous les autres membres de la bande, peuvent obtenir de Sa Majesté du chef du Canada des dommages-intérêts concernant la location à un club de golf de terres situées dans la réserve indienne Musqueam. Le juge Collier de la Division de première instance de la Cour fédérale a déclaré que Sa Majesté avait manqué à ses obligations de fiduciaire et a accordé des dommages-intérêts de 10 millions de dollars. La Cour d'appel fédérale a accueilli l'appel interjeté par Sa Majesté, infirmé la décision de la Division de première instance et rejeté l'action.

I General

Before adverting to the facts, reference should be made to several of the relevant sections of the *Indian Act*, R.S.C. 1952, c. 149, as amended. Section 18(1) provides in part that reserves shall be held by Her Majesty for the use of the respective Indian Bands for which they were set apart. Generally, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the Band for whose use and benefit in common the reserve was set apart (s. 37). A surrender may be absolute or qualified, conditional or unconditional (s. 38(2)). To be valid, a surrender must be made to Her Majesty, assented to by a majority of the electors of the Band, and accepted by the Governor in Council (s. 39(1)).

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

II The Facts

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

I Considérations d'ordre général

Avant d'aborder les faits, mentionnons quelques articles pertinents de la *Loi sur les Indiens*, S.R.C. 1952, chap. 149, et ses modifications. Le paragraphe 18(1) dispose notamment que Sa Majesté détient des réserves à l'usage des bandes indiennes respectives pour lesquelles elles ont été mises de côté. De manière générale, les terres d'une réserve ne doivent être vendues, aliénées ou louées, ou il ne doit en être autrement disposé, que si elles ont été cédées à Sa Majesté par la bande à l'usage et au profit communs de laquelle la réserve a été mise de côté (art. 37). Une cession peut être absolue ou restreinte, conditionnelle ou sans condition (par. 38(2)). Pour être valide, une cession doit être faite à Sa Majesté, sanctionnée par une majorité des électeurs de la bande et acceptée par le gouverneur en conseil (par. 39(1)).

On allègue essentiellement en l'espèce que Sa Majesté a manqué à ses obligations de fiduciaire en louant au Shaughnessy Heights Golf Club de Vancouver environ 162 acres de terre de la réserve. La bande fait valoir qu'un certain nombre de conditions du bail sont différentes de celles qui lui ont été révélées avant le vote sur la cession et que certaines ne lui ont même pas été divulguées. De plus, la bande reproche à Sa Majesté de ne pas avoir fait preuve de la diligence et de la prudence requises d'un fiduciaire.

II Les faits

Sa Majesté ne conteste pas les conclusions de fait du juge de première instance. Elle prétend simplement que ces faits n'établissent pas une cause d'action. Le résumé des faits qui suit s'inspire directement des motifs du jugement de première instance. En 1955, la réserve indienne Musqueam (n° 2) avait une superficie de 416,53 acres situés dans les limites de la ville de Vancouver. La direction des Affaires indiennes reconnaissait la valeur de la réserve; elle estimait en fait qu'il s'agissait des [TRADUCTION] «400 acres ayant, potentiellement, la plus grande valeur dans le grand Vancouver d'aujourd'hui». En 1956, le Shaughnessy Heights Golf Club était intéressé à

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

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

1. The club was to have the right to construct on the leased area a golf course and country club and such other buildings and facilities as it considered appropriate for its membership.

2. The initial term of the lease was to be for fifteen years commencing May 1, 1957, with the club to have options to extend the term for four successive periods of fifteen years each, giving a maximum term of seventy-five years.

3. The rental for the first fifteen year term was to be $25,000 per annum.

4. The rental for each successive fifteen year period was to be determined by mutual agreement between the Department and the club and failing agreement, by arbitration, but the rental for any of the fifteen year renewal periods was in no event to be increased or decreased by over that payable for the preceding fifteen year period by more than 15% of the initial rent.

5. At any time during the term of the lease, and for a period of up to six months after termination, the club was to have the right to remove any buildings and other structures it had constructed or placed upon the leased area, and any course improvements and facilities.

On April 7, 1957 a Band Council meeting was held. Mr. Anfield presided. The trial judge accepted evidence on behalf of the plaintiffs that not all of the terms of the Shaughnessy proposal were put before the Band Council at the meeting. William Guerin, a Councillor, said copies of the proposal were not given to them; he did not recall any mention of $25,000 per year for rental; he described it as a vague general presentation with reference to fifteen-year periods. Chief Edward Sparrow said he did not recall the golf club proposal being read out in full. At the meeting the Band Council passed a resolution which the trial

obtenir des terres sur la réserve Musqueam. D'autres parties étaient intéressées à aménager ces terres, mais la bande n'a jamais été mise au courant de ces projets d'aménagement.

Le 4 avril 1957, le président du club de golf a soumis, dans une lettre à M. Anfield, le surintendant de district de la direction des Affaires indiennes, une offre de location de 160 acres de la réserve indienne, dont les conditions pertinentes sont les suivantes:

[TRADUCTION] 1. Le club aurait le droit d'aménager sur le terrain loué un terrain de golf, des locaux et les autres bâtiments et installations qu'il jugerait appropriés pour ses membres.

2. La durée initiale du bail serait de quinze ans à compter du 1er mai 1957, mais le club pourrait opter pour quatre reconductions de quinze ans chacune, soit une durée globale de soixante-quinze ans.

3. Le loyer pour les premiers quinze ans serait de 25 000 $ l'an.

4. Le loyer pour chaque reconduction de quinze ans serait fixé de gré à gré entre le Ministère et le club ou, à défaut d'accord, par arbitrage, mais ce loyer, pour toute reconduction de quinze ans, ne serait en aucun cas haussé ou abaissé par rapport aux précédents quinze ans, de plus de 15 % du loyer initial.

5. À tout moment au cours du bail, et jusqu'à six mois après l'arrivée du terme définitif, le club conserverait le droit d'enlever tout bâtiment et autre structure construits ou érigés par lui sur la superficie louée ainsi que toute amélioration et autres installations.

Le 7 avril 1957, le Conseil de la bande s'est réuni sous la présidence de M. Anfield. Le juge de première instance a retenu la preuve administrée par les demandeurs, qui tendait à démontrer que toutes les conditions de l'offre Shaughnessy n'ont pas été soumises au Conseil de la bande au cours de cette réunion. William Guerin, un membre du Conseil, a affirmé qu'aucune copie de l'offre ne leur a été transmise. Il ne se souvenait pas qu'on ait mentionné un loyer de 25 000 $ l'an. Il a décrit la réunion comme une présentation vague et générale où il était question de périodes de quinze ans. Le chef Edward Sparrow a dit ne pas se rappeler que l'offre du club de golf ait été lue en entier. Au cours de la réunion, le Conseil de la bande a

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

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

These events followed the Band Council meeting:

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

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

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

adopté une résolution qui, a présumé le juge de première instance, avait été rédigée par M. Anfield. La partie de cette résolution qui nous intéresse est la suivante:

[TRADUCTION] Que nous approuvons la location des terrains non requis de notre réserve indienne Musqueam nº 2 et, au sujet de la demande du club de golf Shaughnessy, que nous approuvons la soumission à notre bande indienne Musqueam d'actes de cession pour la location de 160 acres environ tels que délimités, grosso modo, par l'arpentage McGuigan au crayon rouge . . .

À la suite de la réunion du Conseil de la bande, les événements suivants se sont produits:

a) M. Bethune, le surintendant des Réserves et des Fidéicommis de la direction des Affaires indiennes à Ottawa, a douté du bien-fondé d'un loyer annuel de 25 000 $ pour les premiers quinze ans. Pour un rendement de 5 à 6 pour 100, la valeur locative se situerait entre 40 000 $ et 48 000 $ l'an pour les premiers quinze ans. L'offre du club de golf signifiait un rendement d'environ 3 pour 100 de l'investissement. Bethune a proposé de consulter M. Alfred Howell. Ce dernier faisait partie de l'Office de l'établissement agricole des anciens combattants et avait déjà procédé à l'évaluation des terres de la réserve à la demande de la direction des Affaires indiennes.

b) Le 16 mai 1957, M. Anfield a écrit à M. Howell afin de lui demander si, à son avis, les loyers de 25 000 $ l'an pour les premiers quinze ans étaient [TRADUCTION] «justes et équitables». Toutefois, on n'a pas communiqué à M. Howell tous les détails de l'offre de Shaughnessy. On ne lui a pas dit que les augmentations de loyer seraient limitées à 15 pour 100. On ne lui a pas dit non plus que le club de golf voulait obtenir le droit d'enlever tout bâtiment ou toute amélioration.

c) Dans sa réponse à M. Anfield, M. Howell a exprimé l'avis qu'un bail de soixante-quinze ans, modifiable tous les quinze ans, conclu avec un locataire solvable, éliminait tout facteur de risque. En ce cas, selon M. Howell, le taux des obligations gouvernementales qui était alors de 3,75 pour 100 était le meilleur que l'on pouvait s'attendre à obtenir.

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

(d) On September 27, 1957 a Band Council meeting was held at the reserve, attended by members of the Band Council, Mr. Anfield, two other officials of the Department of Indian Affairs and representatives of the golf club. Chief Sparrow stipulated for 5 per cent income on the value of 162 acres, amounting to $44,000 per annum. The golf club people balked. They were asked to step outside while the Band Council and the Indian Affairs personnel had a private discussion. Mr. Anfield said the demand of $44,000 was unreasonable. Eventually, the Band Council reluctantly agreed to a figure of $29,000. William Guerin testified the Councillors agreed to $29,000 because they understood the first lease period was to be ten years; subsequent rental negotiations would be every five years; and the Band Council felt it could negotiate for 5 per cent of the subsequent values.

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

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

Au procès, M. Howell a témoigné que, s'il avait su que les améliorations ne reviendraient pas à la bande, il aurait recommandé un taux de rendement de 4 à 6 pour 100. Il s'est dit choqué de la clause de 15 pour 100. Il avait présumé qu'à l'expiration de la période initiale, le loyer pourrait être renégocié en fonction du principe de «l'usage le plus rémunérateur et le plus rationnel», sans aucune restriction quant au montant de l'augmentation.

d) Le 27 septembre 1957, une réunion du Conseil de la bande a été tenue dans la réserve, à laquelle ont assisté des conseillers de la bande, M. Anfield, deux autres fonctionnaires du ministère des Affaires indiennes et des représentants du club de golf. Le chef Sparrow a demandé un rendement de 5 pour 100 de la valeur des 162 acres, soit 44 000 $ l'an. Les représentants du club de golf s'y sont opposés. On leur a demandé de quitter la salle pendant que le Conseil de la bande et le personnel des Affaires indiennes tenaient une discussion privée. M. Anfield a qualifié de déraisonnable les 44 000 $ demandés. Finalement, le Conseil de la bande a accepté à contrecoeur le chiffre de 29 000 $. Dans son témoignage, William Guerin a affirmé que les conseillers ont accepté ce chiffre de 29 000 $ parce qu'ils croyaient comprendre que la durée du premier bail serait de dix ans, que le loyer serait renégocié tous les cinq ans et que le Conseil de la bande pensait pouvoir obtenir un rendement de 5 pour 100 de la valeur subséquente des terrains.

M. Grant, le responsable de l'agence de Vancouver du ministère des Affaires indiennes, a témoigné qu'il était [TRADUCTION] «absolument certain que le vote concernait un bail précis, avec un locataire précis, à des conditions précises» et que la bande n'a pas donné à M. Anfield [TRADUCTION] «le pouvoir de changer les choses».

e) Le 6 octobre 1957, une assemblée des membres de la bande, dite «assemblée de la cession», a été tenue dans la réserve. Le juge de première instance a tiré les conclusions suivantes: (i) ceux qui étaient présents ont présumé ou cru comprendre que le bail du club de golf serait, le premier terme excepté, d'une durée de dix ans, non de quinze; (ii) ceux qui étaient présents ont présumé ou cru com-

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

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

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

TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.

AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.

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

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

prendre qu'il n'y aurait aucun plafonnement à 15 pour 100 des hausses de loyer; (iii) il n'a pas été divulgué à l'assemblée que le club de golf proposait d'avoir le droit d'enlever tout bâtiment, toute structure, toute amélioration et toutes installations y érigés.

Le juge de première instance a conclu en outre que deux conditions, incluses par la suite dans le bail, n'ont même pas été soumises à l'assemblée de la cession. Elles ne se trouvaient pas non plus dans l'offre initiale du club de golf. Elles sont apparues pour la première fois dans les projets de bail rédigés après l'assemblée. La première de ces conditions concernait la fixation de loyers futurs; à défaut d'accord, la question devrait être soumise à l'arbitrage; le nouveau loyer serait le juste loyer du terrain comme s'il était toujours non défriché et non amélioré et utilisé comme club de golf. La seconde condition accordait au club de golf, mais non à Sa Majesté, un droit de résiliation du bail au terme de chaque période de quinze ans moyennant un préavis de six mois. Ces deux conditions n'ont pas été, par la suite, soumises au Conseil de la bande ni à la bande elle-même pour obtenir ses commentaires ou son approbation.

La cession, approuvée par une majorité de quarante et une voix contre deux, a eu pour effet de transférer les terres en question à Sa Majesté la Reine aux conditions suivantes:

[TRADUCTION] CÉDÉ ledit bien-fonds à Sa Majesté la Reine, ses hoirs et successeurs, définitivement, en fiducie, pour location à celui ou à ceux, et aux conditions, que le gouvernement du Canada jugera les plus favorables à notre bien-être et à celui de notre peuple.

ET à la condition supplémentaire que tous les loyers perçus pour cette location soient versés à notre crédit dans notre compte en fidéicommis à Ottawa.

ET nous, lesdits chef et conseillers de ladite bande indienne Musqueam, au nom de notre peuple et en notre nom propre, par la présente, avalisons et donnons notre agrément, et promettons d'avaliser et de consentir, à tout ce que ledit gouvernement pourra faire, ou verra à faire faire, licitement, au sujet de ladite location.

f) Le 6 décembre 1957, par le décret C.P. 1957-1606, Sa Majesté a accepté la cession «en vue de la

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

(g) On January 9, 1958, a Band Council meeting was held. A letter was read regarding the proposed golf club lease. The letter indicated the renewal periods were to be fifteen years instead of ten years. Chief Sparrow pointed out that the Band had demanded ten-year periods. William Guerin said the council members were "flabbergasted" to learn about the fifteen-year terms. Guerin testified the Band was told it was "stuck" with the fifteen-year terms. The Band Council then passed a resolution agreeing the first term should be fifteen years, but insisting the renewal periods be ten-year terms.

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

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

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

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

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

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

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

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

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

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

location d'une partie de la réserve indienne Musqueam nº 2».

g) Le 9 janvier 1958, il y a eu une réunion du Conseil de la bande. Lecture a été faite d'une lettre relative au bail qu'on projetait de consentir au club de golf. Cette lettre indiquait que les périodes de reconduction seraient de quinze ans au lieu de dix. Le chef Sparrow a fait remarquer que la bande avait demandé des périodes de reconduction de dix ans. William Guerin a affirmé que le Conseil avait été «abasourdi» d'apprendre que les périodes de reconduction seraient de quinze ans. Guerin a témoigné qu'on avait dit à la bande qu'elle était «prise» avec les périodes de reconduction de quinze ans. Le Conseil de la bande a alors adopté une résolution dans laquelle il acceptait que la première période soit de quinze ans, mais insistait pour que les périodes de reconduction soient de dix ans.

h) Le bail, qui a été signé le 22 janvier 1958, prévoit notamment:

1. La durée du bail est de 75 ans sauf résiliation antérieure.

2. Le loyer pour les premiers 15 ans est de 29 000 $ l'an.

3. Pour les 4 reconductions suivantes de 15 ans, le loyer annuel devra être fixé par accord mutuel ou, à défaut, par arbitrage

> ... ce loyer devant être égal au juste loyer des lieux fournis comme s'ils étaient toujours non défrichés et non améliorés [et utilisés comme terrain de golf.]

4. La hausse maximale du loyer pour les seconds 15 ans (du 1er janvier 1973 au 1er janvier 1988), est limitée à 15 % de 29 000 $, soit 4 350 $ l'an.

5. Le club de golf peut résilier le bail au terme de toute période de 15 ans en donnant un préavis de 6 mois.

6. Le club de golf peut, à tout moment en cours de bail, et jusqu'à 6 mois après l'arrivée de son terme, enlever tout bâtiment ou autre structure et toute amélioration et installation.

Ce n'est que douze ans plus tard, soit en mars 1970, que la bande a reçu copie du bail.

i) M. Grant a témoigné que les conditions du bail finalement conclu ne ressemblaient que fort peu à ce qui avait été débattu à l'assemblée de la cession. Le juge de première instance s'est dit d'accord

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

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

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

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

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

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

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

avec lui. Il a conclu que la majorité de ceux qui ont voté le 6 octobre 1957 n'auraient pas consenti à la cession des 162 acres s'ils avaient connu toutes les conditions du bail du 22 janvier 1958.

III L'appréciation faite en première instance et en appel des conséquences juridiques des conclusions de fait

Les demandeurs ont fondé leur action sur le manquement aux obligations de fiduciaire, en prétendant que Sa Majesté du chef du Canada était fiduciaire des terres cédées. Le juge de première instance a partagé ce point de vue.

Sa Majesté a tenté de faire valoir que s'il y avait fiducie, il s'agissait tout au plus d'une «fiducie politique» dont l'exécution relevait exclusivement du législateur, et non pas d'une «fiducie au sens strict» exécutoire en justice. Cette distinction a été reconnue dans deux arrêts de principe anglais qui traitent de la situation de Sa Majesté en tant que fiduciaire: *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129; *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619.

Dans l'arrêt *Kinloch*, le lord chancelier Selborne affirme, aux pp. 625 et 626:

> [TRADUCTION] Les termes «*in trust for*» [«en fiducie»] conviennent à toutes sortes de fiducies (*trust*) et constituent même la meilleure façon de les décrire—non seulement les fiducies sur des domaines dont peut connaître une juridiction d'*equity* mais aussi celles qui concernent des affaires d'une importance plus grande, comme la relation qu'il peut y avoir entre la Couronne et certains officiers publics exerçant, sous l'égide de la Couronne, des fonctions relevant de la prérogative et de l'autorité de la Couronne. Au sens strict de ces termes, ces questions sont du ressort et de la compétence des juridictions d'*equity* de droit commun; au sens large, elles ne le sont pas. Il faut déterminer dans quel sens ils sont employés en l'espèce, en examinant l'ensemble de l'acte, sa nature et son effet.

L'avocat de la bande s'est opposé à toute argumentation relative au moyen de défense fondé sur la «fiducie politique» pour le motif qu'il n'a pas été plaidé par Sa Majesté. Le juge Collier a autorisé, à certaines conditions, la modification de la défense de manière à soulever cette question, mais Sa Majesté a choisi de ne pas se prévaloir de cette possibilité. Par conséquent, le juge Collier a refusé d'examiner le point.

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

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

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

Sa Majesté a alors fait valoir que, s'il y avait une fiducie exécutoire en justice, ses conditions étaient celles énoncées dans l'acte de cession et l'autorisaient à louer les 162 acres aux personnes, aux fins et aux conditions qu'elle jugeait les plus favorables au bien-être de la bande. Selon Sa Majesté, l'acte de cession ne lui imposait aucune obligation de consentir au club de golf un bail aux conditions discutées lors de l'assemblée de la cession, pas plus qu'il ne l'obligeait à obtenir l'approbation de la bande au sujet des conditions du bail finalement conclu.

Le juge de première instance a rejeté ces arguments. Il a conclu, en citant l'arrêt *Tito*, précité, que Sa Majesté peut, à son gré, faire fonction de fiduciaire. Il a conclu également que la cession du 6 octobre 1957 a imposé à Sa Majesté, en sa qualité de fiduciaire, l'obligation, à partir de cette date, de louer au club de golf les terres cédées, aux conditions prévues par la bande. D'importantes modifications ont été apportées à ces conditions, sans que Sa Majesté n'ait cherché à obtenir, en tant que fiduciaire, aucune directive ou autorisation de la part des membres de la bande, les *cestuis que trust*. Le juge de première instance a conclu que Sa Majesté avait manqué à ses obligations de fiduciaire.

Au procès, un grand nombre de témoins, pour la plupart des experts, ont traité de la question des dommages-intérêts. Citant l'arrêt *Fales c. Canada Permanent Trust Co.*, [1977] 2 R.C.S. 302, à la p. 320, le juge de première instance a conclu que le montant des dommages-intérêts correspond à la perte réelle que les actes ou omissions ont fait subir au patrimoine confié en fiducie et que les demandeurs ont le droit, autant que faire se peut, d'être replacés dans la même situation que s'il n'y avait pas eu manquement aux obligations de fiduciaire. Le juge a tenu pour acquis que la bande n'aurait pas accepté les conditions du bail qui a été signé et que le club n'aurait pas signé de bail aux conditions qui, a-t-il conclu, étaient celles de la fiducie. Il aurait donc été possible à la bande, à un moment donné, de louer les terres à des fins résidentielles pour une durée de quatre-vingt-dix-neuf ans, à des conditions extrêmement avantageuses. En déterminant le montant des dommages-inté-

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

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

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

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

The extent to which the government assumes an administrative or management responsibility for the reserves of some positive scope is a matter of governmental discretion, not legal or equitable obligation. I am, therefore, of the opinion that s. 18 of the *Indian Act*

rêts, le juge a reconnu qu'il était incapable d'énoncer une raison précise ou un mode précis, mathématique ou autre, à cet égard. Il a affirmé qu'il s'agissait manifestement d'une somme «globale»: une appréciation réfléchie fondée sur la preuve administrée, les opinions fournies, les moyens soulevés et, finalement, ses propres conclusions de fait. Le juge a évalué les dommages des demandeurs à 10 000 000 $.

Le juge Le Dain, s'exprimant au nom de la Cour d'appel fédérale, est parti de la prémisse que la preuve soumise pour le compte de la bande reposait sur l'existence d'une fiducie légale au sens du droit privé, fondée principalement sur le texte du par. 18(1) de la *Loi sur les Indiens*. Le paragraphe 18(1) est ainsi rédigé:

18. (1) Sauf les dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; et, sauf la présente loi et les stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

Le juge Le Dain a examiné à fond ce paragraphe et il a conclu qu'il est incompatible avec une «fiducie au sens strict», c'est à dire une obligation d'*equity* exécutoire en justice. Il a jugé particulièrement significatif le pouvoir discrétionnaire que le par. 18(1) confère au gouverneur en conseil de décider si l'objet pour lequel on utilise ou on se propose d'utiliser les terres d'une réserve se trouve «à l'usage et au profit de la bande». À son avis, ce pouvoir discrétionnaire montre bien qu'il appartient au gouvernement et non pas aux tribunaux de déterminer ce qui est à l'usage et au profit de la bande. Il a jugé qu'un tel pouvoir discrétionnaire est incompatible avec l'intention d'imposer une obligation d'*equity*, exécutoire en justice, d'utiliser les terres d'une certaine manière. Par conséquent, le par. 18(1) ne pouvait avoir pour effet de constituer Sa Majesté fiduciaire, au sens strict, de ces terres:

L'étendue de la responsabilité administrative ou de gestion que le gouvernement assume envers les réserves est une question de discrétion gouvernementale, non une obligation de *common law* ou d'*equity*. Je suis donc d'avis que l'article 18 de la *Loi sur les Indiens* ne saurait

does not afford a basis for an action for breach of trust in the management or disposition of reserve lands.

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

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

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

From these provisions it is argued that the conditions of a surrender, in order to be valid, must be voted on and approved by a majority of the electors of a band, be certified by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and be submitted to and approved by the Governor in Council, all of which presuppose that the conditions will be in written form. I agree with these contentions. These solemn formalities have been prescribed as a matter of public policy for the protection of a band and the proper discharge of the government's responsibility for the Indians. They are also important as ensuring certainty as to the effect of a surrender and the validity of a subsequent disposition of surrendered land. It is to be noted that they are the only provisions of the Act excluded from the power of the Governor in Council under s. 4(2) to declare by proclamation that particular provisions of the Act shall not apply in certain cases. The oral terms found by the trial

constituer le fondement d'une action pour manquement à une fiducie dans l'administration ou l'aliénation de terrains réservés.

Le juge Le Dain a également rejeté l'argument subsidiaire mis de l'avant au nom de la bande, selon lequel l'acte de cession, particulièrement les mots «en fiducie, pour location . . .», a créé une fiducie et Sa Majesté a manqué à cette fiducie parce qu'elle n'a pas apporté la diligence et le soin requis à la location du terrain:

. . . je suis d'avis que les termes «en fiducie» dans l'acte de cession n'avaient d'autre but que d'indiquer que celle-ci était faite pour le profit des Indiens et qu'elle conférait le pouvoir d'employer le bien-fonds d'une manière ou d'une autre à leur profit. On n'entendait pas imposer une obligation ou un devoir en *equity* d'employer le terrain d'une certaine façon. Pour ces raisons, je suis d'avis que la cession n'a pas créé de fiducie au sens strict et qu'en conséquence elle ne saurait autoriser la reconnaissance d'une responsabilité quelconque fondée sur un manquement à cette fiducie.

Même s'il avait pu conclure à l'existence d'une «fiducie au sens strict», le juge Le Dain aurait quand même refusé de faire sienne la conclusion du juge Collier que les conditions de cette fiducie étaient celles que, d'après ce que les Indiens avaient cru comprendre, Sa Majesté ferait inscrire dans le bail. Ces conditions ne figurent pas dans l'acte de cession et, de l'avis du juge Le Dain, elles n'étaient pas conformes aux art. 37 à 41 de la *Loi sur les Indiens*, régissant les cessions:

On prétend qu'aux termes de ces dispositions les conditions d'une cession, pour être valides, doivent être votées et approuvées par la majorité des électeurs d'une bande indienne, attestées par le surintendant ou autre fonctionnaire assistant à l'assemblée, et par le chef ou un membre du conseil de bande, puis être soumises et acceptées par le gouverneur en conseil; ces formalités supposent que les conditions ont été mises par écrit. Je souscris à ces arguments. Ces formalités solennelles, d'intérêt public, ont été prévues pour la protection de la bande indienne et pour assurer que le gouvernement s'acquitte de ses responsabilités envers les Indiens selon la procédure régulière. Elles permettent aussi de connaître avec certitude l'effet de la cession et assurent la validité de l'aliénation subséquente du bien-fonds cédé. On remarquera que ce sont les seules dispositions de la Loi à être exclues du pouvoir du gouverneur en conseil, prévu au paragraphe 4(2), de déclarer, par proclamation, que certaines dispositions de la Loi ne s'applique-

judge were not voted on and approved by a majority of the band. They were deduced by the trial judge from the testimony of three members of the band and a former official of the Indian Affairs branch as to what was said at the meetings, and in some cases as to what was not said. The oral terms of the surrender found by the trial judge were not accepted by the Governor in Council, as required by the Act. What was accepted by Order in Council P.C. 1957-1606 of December 6, 1957, was the "attached surrender dated the sixth day of October, 1957". It was an unqualified acceptance of the written surrender, with no reference, express or implied, to other terms or conditions.

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

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

IV Fiduciary Relationship

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

ront pas dans certains cas. Les conditions verbales retenues par le juge de première instance n'ont été ni votées ni approuvées par une majorité de la bande indienne. Elles ont été déduites par le premier juge du témoignage de trois membres de la bande et d'un ancien fonctionnaire de la Direction des affaires indiennes sur ce qui avait été dit aux assemblées et, en certains cas, sur ce qui n'avait pas été dit. Les conditions verbales de la cession constatées par le juge de première instance n'ont pas été acceptées non plus par le gouverneur en conseil comme l'exige la Loi. Ce qui a été accepté par le décret C.P. 1957-1606, du 6 décembre 1957, c'est «l'acte de cession en date du 6 octobre 1957, ci-annexé». Il s'agit donc d'une acceptation inconditionnelle de l'acte de cession écrit, sans référence, expresse ou tacite, à d'autres conditions.

Le juge Le Dain a conclu que les conditions verbales de la cession constatées par le juge de première instance ne pouvaient pas permettre, en droit, de conclure à la responsabilité et d'accorder des dommages-intérêts.

Ayant conclu que rien ne prouvait l'existence de la fiducie invoquée, la Cour d'appel fédérale a accueilli l'appel interjeté par Sa Majesté.

IV Le rapport fiduciaire

Les cours d'instance inférieure ont abordé la question de la responsabilité de Sa Majesté en fonction de l'existence ou de l'inexistence d'une fiducie. Dans son analyse de la différence quant à leurs effets entre une fiducie «au sens strict» et une fiducie «politique», le juge Le Dain a fait remarquer que Sa Majesté ne pouvait être responsable que si elle était soumise à une «obligation d'*equity* sanctionnée par les tribunaux». Tout en ayant des doutes quant à la justesse des expressions «au sens strict» et «au sens large» appliquées aux fiducies, je suis d'accord pour dire que l'existence d'une obligation d'*equity* constitue une condition sine qua non de la responsabilité. Cette obligation ne se limite toutefois pas aux rapports qui peuvent se définir comme des «fiducies» proprement dites. Comme nous allons le constater, j'estime que les obligations de Sa Majesté envers les Indiens ne peuvent se définir comme une fiducie. Cependant, cela ne signifie pas que Sa Majesté n'a envers les Indiens aucune obligation exécutoire dans sa façon d'utiliser leurs terres.

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

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

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

(a) The Existence of Indian Title

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

À mon avis, la nature du titre des Indiens et les modalités prévues par la Loi relativement à l'aliénation de leurs terres imposent à Sa Majesté une obligation d'*equity*, exécutoire en justice, d'utiliser ces terres au profit des Indiens. Cette obligation ne constitue pas une fiducie au sens du droit privé. Il s'agit plutôt d'une obligation de fiduciaire. Si, toutefois, Sa Majesté manque à cette obligation de fiduciaire, elle assumera envers les Indiens exactement la même responsabilité qu'aurait imposée une telle fiducie.

Le rapport fiduciaire entre Sa Majesté et les Indiens découle du concept du titre aborigène, autochtone ou indien. Cependant, le fait que les bandes indiennes possèdent un certain droit sur des terres n'engendre pas en soi un rapport fiduciaire entre les Indiens et Sa Majesté. Pour conclure que Sa Majesté est fiduciaire, il faut aussi que le droit des Indiens sur les terres soit inaliénable, sauf dans le cas d'une cession à Sa Majesté.

Il est interdit à une bande indienne de céder son droit directement à un tiers. La vente ou la location de terres ne peut avoir lieu qu'à la suite d'une cession et c'est alors Sa Majesté qui agit au nom de la bande. C'est dans la Proclamation royale de 1763 que Sa Majesté a pour la première fois endossé cette responsabilité qui lui est encore reconnue dans les dispositions de la *Loi sur les Indiens* relatives aux cessions. L'exigence d'une cession et la responsabilité qui en découle ont pour effet d'imposer à Sa Majesté une obligation de fiduciaire distincte envers les Indiens. Toutefois, avant d'examiner la nature de cette obligation, il est nécessaire d'analyser le fondement du titre aborigène et la nature du droit qu'il comporte sur le bien-fonds.

a) L'existence du titre indien

Dans l'arrêt *Calder c. Procureur Général de la Colombie-Britannique*, [1973] R.C.S. 313, cette Cour a reconnu le titre aborigène comme un droit, en *common law*, découlant de l'occupation et de la possession historiques par les Indiens de leurs terres tribales. Les motifs principaux ont été rédigés par les juges Judson et Hall et il y a eu partage trois contre trois sur la question importante de

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

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

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

savoir si le titre aborigène que détiennent les indiens Nishga sur leur territoire tribal ancien a été éteint par certaines lois générales en matière de biens-fonds qui ont été adoptées en Colombie-Britannique. Il y a eu partage également sur la question de l'applicabilité de la Proclamation royale de 1763 aux terres indiennes situées dans cette province. Les juges Judson et Hall ont cependant tous deux estimé que le titre aborigène existait au Canada (du moins dans le cas où il n'avait pas été éteint par une mesure législative appropriée) indépendamment de la Proclamation royale. Le juge Judson a déclaré explicitement que la Proclamation n'était pas l'«unique» fondement du titre indien (aux pp. 322, 323 et 328). Le juge Hall a affirmé (à la p. 390) que le «titre aborigène indien ne dépend d'aucun traité, ni d'aucune ordonnance du pouvoir exécutif ou disposition législative».

La Proclamation royale de 1763 a réservé «sous Notre souveraineté, Notre protection et Notre autorité, pour l'usage desdits sauvages, toutes les terres et tous les territoires non compris dans les limites de Nos trois gouvernements ni dans les limites du territoire concédé à la Compagnie de la baie d'Hudson, ainsi que toutes les terres et tous les territoires situés à l'ouest des sources des rivières qui de l'ouest et du nord-ouest vont se jeter dans la mer» (S.R.C. 1970, Appendices, p. 123, à la p. 127). En reconnaissant que la Proclamation ne constitue pas l'unique fondement du titre indien, l'arrêt *Calder* va plus loin que l'arrêt du Conseil privé *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, où lord Watson a reconnu l'existence du titre aborigène, mais a affirmé que celui-ci avait son origine dans la Proclamation royale. À cet égard, l'arrêt *Calder* est compatible avec le point de vue exprimé par le juge en chef Marshall dans les arrêts de principe américains *Johnson v. M'Intosh*, 8 Wheaton 543 (1823), et *Worcester v. State of Georgia*, 6 Peters 515 (1832), que les juges Judson et Hall ont cités dans leurs motifs respectifs.

Dans l'arrêt *Johnson v. M'Intosh*, le juge en chef Marshall, tout en reconnaissant que la Proclamation royale de 1763 constitue l'un des fondements du titre indien, a néanmoins estimé que les droits des Indiens sur les terres qu'ils avaient

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

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

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399. That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in*

traditionnellement occupées avant la colonisation européenne existaient avant les revendications de souveraineté de différentes nations européennes sur les territoires du continent nord-américain et qu'ils ont continué d'exister après ces revendications. Selon le principe de la découverte, sur lequel reposaient ces revendications, les terres situées dans une région donnée appartenaient en dernière analyse à la nation qui en avait fait la découverte et qui en avait réclamé la possession. Sous ce rapport du moins, les droits des Indiens sur leurs terres ont été manifestement diminués, mais leurs droits d'occupation et de possession sont restés inchangés. Le juge en chef Marshall explique ce principe, aux pp. 573 et 574:

> [TRADUCTION] L'exclusion de tous les autres pays européens conférait nécessairement à la nation qui faisait la découverte le droit exclusif d'acquérir les terres des aborigènes et d'établir des colonies. Il s'agissait là d'un droit qu'aucun Européen ne pouvait entraver. C'était un droit que chacun faisait valoir pour lui-même, tout en reconnaissant ce droit aux autres.
>
> Les relations qui devaient exister entre découvreur et aborigènes devaient se régler entre eux. Les droits ainsi acquis étant exclusifs, aucun autre pouvoir ne pouvait s'interposer.
>
> Dans l'établissement de ces relations, on n'a, en aucun cas, entièrement omis de tenir compte des droits des aborigènes; mais ces droits se sont trouvés nécessairement restreints dans une large mesure. On reconnaissait que les aborigènes étaient les occupants de plein droit des terres, et pouvaient juridiquement et légitimement demeurer en possession de celles-ci, et les utiliser à leur gré; mais leurs droits à la souveraineté complète, en leur qualité de nations indépendantes, ont été nécessairement diminués, et leur pouvoir de disposer des terres en faveur de n'importe qui a été nié en vertu du principe initial de base selon lequel la découverte conférait à ceux qui l'avait faite un titre exclusif. [C'est moi qui souligne.]

Dans l'arrêt *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399, le Conseil privé a approuvé le principe voulant qu'un changement de la souveraineté sur un territoire particulier n'a, en règle générale, aucune incidence sur le titre présumé de ses habitants. Ce principe vient étayer l'idée qui se dégage implicitement de l'arrêt *Calder*, selon laquelle le titre indien est un droit qui a une existence juridique indépendante et qui, bien que reconnu dans la Proclamation royale de

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

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

(b) The Nature of Indian Title

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

1763, existait néanmoins avant celle-ci. C'est pourquoi les arrêts *Kinloch v. Secretary of State for India in Council* et *Tito v. Waddell (N° 2)*, précités, ainsi que les autres décisions concernant les «fiducies politiques» ne s'appliquent pas en l'espèce. La jurisprudence en matière de «fiducies politiques» porte essentiellement sur la distribution de deniers publics ou d'autres biens détenus par le gouvernement. Dans chaque cas, la partie qui revendiquait le statut de bénéficiaire d'une fiducie s'appuyait entièrement sur une loi, une ordonnance ou un traité pour réclamer un droit sur les deniers en question. La situation des Indiens est tout à fait différente. Le droit qu'ils ont sur leurs terres est un droit, en *common law*, qui existait déjà et qui n'a été créé ni par la Proclamation royale, ni par le par. 18(1) de la *Loi sur les Indiens*, ni par aucune autre disposition législative ou ordonnance du pouvoir exécutif.

À mon avis, il est sans importance que la présente espèce concerne le droit d'une bande indienne sur une réserve plutôt qu'un titre aborigène non reconnu sur des terres tribales traditionnelles. Le droit des Indiens sur les terres est le même dans les deux cas: voir l'arrêt *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401, aux pp. 410 et 411 (l'affaire *Star Chrome*). Il est à noter toutefois que la réserve présentement en cause a été créée unilatéralement par la colonie de la Colombie-Britannique avant la Confédération et à partir du territoire tribal ancien de la bande Musqueam.

b) La nature du titre indien

Dans l'arrêt *St. Catherine's Milling*, précité, le Conseil privé a conclu que les Indiens avaient un [TRADUCTION] «droit personnel, de la nature d'un usufruit» sur les terres traditionnellement occupées par eux. Lord Watson a affirmé que [TRADUCTION] «la Couronne a toujours eu un droit fondamental et suprême sous-jacent au titre indien, qui est devenu un *plenum dominium* dès que le titre indien a été cédé ou autrement éteint» (à la p. 55). Il a repris cette idée en affirmant que Sa Majesté [TRADUCTION] «a toujours eu un droit de propriété actuel sur les terres et le titre des Indiens ne faisait que le grever» (à la p. 58). Le Conseil privé a confirmé ce point de vue quant au titre aborigène

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

dans l'affaire *Star Chrome*. Dans l'arrêt *Amodu Tijani*, précité, le vicomte Haldane, se référant aux arrêts *St. Catherine's Milling* et *Star Chrome*, a qualifié la notion d'usufruit de [TRADUCTION] «simple restriction ou charge sur le titre radical ou final du Souverain ...» (à la p. 403). Il décrit ce titre comme étant purement un droit de tenure en *common law*, qui peut toutefois être restreint par un droit d'usage à titre bénéficiaire qui ne prend pas nécessairement la forme d'un droit de tenure sur le bien-fonds. Puis on dit que le titre des Indiens du Canada constitue un exemple [TRADUCTION] «de la nécessité de se débarrasser de la présomption que la propriété du bien-fonds se subdivise naturellement en droits distincts, conçus comme créés en vertu de principes juridiques inhérents». Le juge en chef Marshall a adopté un point de vue semblable dans l'arrêt *Johnson v. M'Intosh*, précité, où il affirme: [TRADUCTION] «Toutes nos institutions reconnaissent le titre absolu de Sa Majesté, sous la seule réserve du droit d'occupation indien ...» (à la p. 588).

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

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

Soulignons ici que, si le Conseil privé a insisté sur le caractère personnel du titre aborigène, cela est attribuable en partie aux arrangements constitutionnels propres au Canada. Le territoire indien en cause dans l'arrêt *St. Catherine's Milling* était en 1867 dévolu à Sa Majesté, sous réserve du droit des Indiens. Ce droit des Indiens constituait un «intérêt autre que celui de la province» au sens de l'art. 109 de la *Loi constitutionnelle de 1867*, dont voici le texte:

109. Les terres, mines, minéraux et redevances appartenant aux différentes provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick lors de l'Union, et toutes les sommes d'argent alors dues ou payables pour ces terres, mines, minéraux ou redevances, appartiendront aux différentes provinces d'Ontario, de Québec, de la Nouvelle-Écosse et du Nouveau-Brunswick, dans lesquelles ils sont sis et situés, ou exigibles, sous réserve des fiducies existantes et de tout intérêt autre que celui de la province à cet égard.

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

Lorsque, par suite de leur cession au gouvernement fédéral en 1873 par les Indiens qui les occupaient, les terres en question dans l'arrêt *St. Catherine's Milling* ont été dégrevées du titre autochtone, on a conclu que, parce que le droit des Indiens était un droit personnel de la nature d'un

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

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

It is true that in contexts other than constitutional the characterization of Indian title as "a personal and usufructuary right" has sometimes been questioned. In *Calder*, *supra*, for example, Judson J. intimated at p. 328 that this characterization was not helpful in determining the nature of Indian title. In *Attorney-General for Canada v. Giroux* (1916), 53 S.C.R. 172, Duff J., speaking for himself and Anglin J., distinguished *St. Catherine's Milling* on the ground that the statutory provisions in accordance with which the reserve in question in *Giroux* had been created conferred beneficial ownership on the Indian Band which occupied the reserve. In *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, Laskin J., dissenting on another point, accepted the possibility that Indians may have a beneficial interest in a reserve. The Alberta Court of Appeal in *Western International Contractors Ltd. v. Sarcee Developments Ltd.*, [1979] 3 W.W.R. 631, accepted the proposition that an Indian Band does indeed have a beneficial interest in its reserve. In the present case this was the view as well of Le Dain J. in the Federal Court of Appeal. See also the judgment of Kellock J. in *Miller v. The King*, [1950] S.C.R. 168, in which he seems implicitly to adopt a similar position. None of these judgments mentioned the *Star Chrome* case, however, in which the Indian interest in land specifically set aside as a reserve was held to be the same as the "personal

usufruit, leur droit de bénéficiaire sur les terres est passé en entier à la province de l'Ontario en vertu de l'art. 109, plutôt qu'au Canada. La même question constitutionnelle a été soulevée récemment en cette Cour dans l'affaire *Smith c. La Reine*, [1983] 1 R.C.S. 554. Dans cet arrêt, la Cour a conclu que, parce que le droit des Indiens sur une réserve est un droit personnel, il ne peut être transféré à un cessionnaire, que ce soit Sa Majesté ou un particulier. La «cession» entraîne l'extinction de ce droit.

Aucun problème constitutionnel de cet ordre ne se pose en l'espèce, puisque, en 1938, le gouvernement provincial a transféré à Sa Majesté du chef du Canada le titre de propriété relatif à l'ensemble des réserves indiennes de la Colombie-Britannique.

Il est exact que, dans des contextes autres que constitutionnels, on a parfois mis en doute la caractérisation du titre indien de «droit personnel, de la nature d'un usufruit». Dans l'arrêt *Calder*, précité, par exemple, le juge Judson laisse entendre, à la p. 328, que cette caractérisation n'aide pas à déterminer la nature du titre indien. Dans l'arrêt *Attorney-General for Canada v. Giroux* (1916), 53 R.C.S. 172, le juge Duff, s'exprimant en son propre nom et en celui du juge Anglin, a fait la distinction avec l'arrêt *St. Catherine's Milling* en faisant valoir que les dispositions législatives en vertu desquelles la réserve en question dans l'arrêt *Giroux* avait été créée avaient eu pour effet de conférer à la bande indienne qui occupait la réserve un droit de propriété à titre bénéficiaire. Dans l'arrêt *Cardinal c. Procureur général de l'Alberta*, [1974] R.C.S. 695, le juge Laskin, dissident sur un autre point, a reconnu que des Indiens pouvaient avoir un droit de bénéficiaire sur une réserve. La Cour d'appel de l'Alberta, dans l'arrêt *Western International Contractors Ltd. v. Sarcee Developments Ltd.*, [1979] 3 W.W.R. 631, a retenu l'argument selon lequel une bande indienne possède réellement un droit de bénéficiaire sur sa réserve. Tel a été également l'avis du juge Le Dain de la Cour d'appel fédérale en la présente espèce. Voir aussi les motifs du juge Kellock dans l'arrêt *Miller v. The King*, [1950] R.C.S. 168, où il semble adopter implicitement un point de vue sem-

and usufructuary right" which was discussed in *St. Catherine's Milling.*

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

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

blable. Cependant, aucun de ces jugements ne mentionne l'affaire *Star Chrome* où on a conclu que le droit des Indiens sur les terres expressément désignées comme réserve correspond au «droit personnel, de la nature d'un usufruit» qui a été analysé dans l'arrêt *St. Catherine's Milling.*

Il me semble qu'il n'y a pas de conflit véritable entre les décisions qui qualifient le titre indien de sorte de droit de bénéficiaire et celles qui le qualifient de droit personnel, de la nature d'un usufruit. Toute apparence d'incompatibilité découle du fait que les tribunaux, en décrivant ce qui constitue un droit unique sur des terres, ont presque inévitablement appliqué une terminologie quelque peu inadéquate tirée du droit général des biens. Il y a un élément de vérité dans la description du titre indien qui se dégage de chacun des deux courants de jurisprudence, mais il y a tout de même apparence de conflit parce que dans ni l'un ni l'autre cas la catégorisation n'est tout à fait exacte.

Les Indiens ont le droit, en *common law*, d'occuper et de posséder certaines terres dont le titre de propriété est finalement détenu par Sa Majesté. Bien que leur droit n'équivaille pas, à proprement parler, à un droit de propriété à titre bénéficiaire, sa nature n'est pas définie complètement par la notion d'un droit personnel. Il est vrai que le droit *sui generis* des Indiens sur leurs terres est personnel en ce sens qu'il ne peut être transféré à un cessionnaire, mais il est également vrai, comme nous allons le constater plus loin, que ce droit, lorsqu'il est cédé, a pour effet d'imposer à Sa Majesté l'obligation de fiduciaire particulière d'utiliser les terres au profit des Indiens qui les ont cédées. Ces deux aspects du titre indien vont de pair, car, en stipulant que le droit des Indiens ne peut être aliéné qu'à elle-même, Sa Majesté voulait au départ être mieux en mesure de représenter les Indiens dans les négociations avec des tiers. Le droit des Indiens se distingue donc surtout par son inaliénabilité générale et par le fait que Sa Majesté est tenue d'administrer les terres pour le compte des Indiens lorsqu'il y a eu cession de ce droit. Toute description du titre indien qui va plus loin que ces deux éléments est superflue et risque d'induire en erreur.

(c) The Crown's Fiduciary Obligation

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

The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, *supra*, at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions is the present Act being ss. 37-41.

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians ...." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to

c) L'obligation de fiduciaire de Sa Majesté

Le concept de l'obligation de fiduciaire est issu depuis bien longtemps de la notion de l'abus de confiance, l'un des premiers chefs de compétence de la *Chancery*. Dans le présent pourvoi, l'importance de ce concept repose sur l'exigence qu'il y ait eu «cession» pour que des terres indiennes puissent être aliénées.

La Proclamation royale de 1763 prévoyait qu'aucun particulier ne pouvait acheter aux Indiens des terres qu'elle réservait à ces derniers et, de plus, que tout achat devait être effectué par et au nom de Sa Majesté au cours d'une assemblée publique des Indiens convoquée par le gouverneur ou le commandant en chef de la colonie dans laquelle se trouvaient les terres en question. Comme le fait remarquer lord Watson, à la p. 54 de l'arrêt *St. Catherine's Milling*, précité, cette politique concernant la vente ou le transfert du droit que possèdent les Indiens sur leurs terres a été maintenue de façon non interrompue par la Couronne britannique, par les gouvernements des colonies à partir du moment où ceux-ci sont devenus responsables de l'administration des affaires indiennes et, après 1867, par le gouvernement fédéral du Canada. Les lois fédérales successives qui ont précédé l'actuelle *Loi sur les Indiens* prévoyaient toutes l'inaliénabilité générale des terres des réserves indiennes, sauf dans le cas d'une cession à Sa Majesté. Les dispositions pertinentes de la Loi actuelle sont les art. 37 à 41.

Cette exigence d'une cession vise manifestement à interposer Sa Majesté entre les Indiens et tout acheteur ou locataire éventuel de leurs terres, de manière à empêcher que les Indiens se fassent exploiter. Cet objet ressort nettement de la Proclamation royale elle-même qui porte, au début de la disposition qui fait de Sa Majesté un intermédiaire, «qu'il s'est commis des fraudes et des abus dans les achats de terres des sauvages au préjudice de Nos intérêts et au grand mécontentement de ces derniers ...» En confirmant dans la *Loi sur les Indiens* cette responsabilité historique de Sa Majesté de représenter les Indiens afin de protéger leurs droits dans les opérations avec des tiers, le Parlement a conféré à Sa Majesté le pouvoir discrétionnaire de décider elle-même ce qui est vrai-

decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:

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

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

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. See, *e.g. Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R.

ment le plus avantageux pour les Indiens. Tel est l'effet du par. 18(1) de la Loi.

Ce pouvoir discrétionnaire, loin de supplanter comme le prétend Sa Majesté, le droit de regard qu'ont les tribunaux sur les rapports entre Sa Majesté et les Indiens, a pour effet de transformer l'obligation qui lui incombe en une obligation de fiduciaire. Le professeur Ernest Weinrib soutient dans son article intitulé *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, à la p. 7, que [TRADUCTION] «la marque distinctive d'un rapport fiduciaire réside dans le fait que la situation juridique relative des parties est telle que l'une d'elles se trouve à la merci du pouvoir discrétionnaire de l'autre». À la page 4, il exprime ce point de vue de la manière suivante:

> [TRADUCTION] [Lorsqu'il y a une obligation de fiduciaire] il existe un rapport dans lequel la manière dont le fiduciaire se sert du pouvoir discrétionnaire qui lui a été délégué peut avoir des répercussions sur les droits du commettant qui sont donc subordonnés à l'utilisation qui est faite dudit pouvoir. L'obligation de fiduciaire est le moyen brutal employé en droit pour contrôler ce pouvoir discrétionnaire.

Je ne me prononce pas sur la question de savoir si cette description est de portée assez large pour comprendre toutes les obligations de fiduciaire. J'estime toutefois que, lorsqu'une loi, un contrat ou peut-être un engagement unilatéral impose à une partie l'obligation d'agir au profit d'une autre partie et que cette obligation est assortie d'un pouvoir discrétionnaire, la personne investie de ce pouvoir devient un fiduciaire. L'*equity* vient alors exercer un contrôle sur ce rapport en imposant à la personne en question l'obligation de satisfaire aux normes strictes de conduite auxquelles le fiduciaire est tenu de se conformer.

On dit parfois que la nature des rapports fiduciaires est établie et définie complètement par les catégories habituelles de mandataire, de fiduciaire, d'associé, d'administrateur, etc. Je ne partage pas cet avis. L'obligation de fiduciaire découle de la nature du rapport et non pas de la catégorie spécifique dont relève l'acteur. Comme en matière de négligence, il faut se garder de conclure que les catégories de fiduciaires sont exhaustives. Voir,

(3d) 385 (Ont.C.A.), at p. 392: *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. 216 (Ont.C.A.), at p. 224.

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

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

par exemple, les arrêts *Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385 (C.A. Ont.), à la p. 392; *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. 216 (C.A. Ont.), à la p. 224.

Il nous faut remarquer que, de façon générale, il n'existe d'obligations de fiduciaire que dans le cas d'obligations prenant naissance dans un contexte de droit privé. Les obligations de droit public dont l'acquittement nécessite l'exercice d'un pouvoir discrétionnaire ne créent normalement aucun rapport fiduciaire. Comme il se dégage d'ailleurs des décisions portant sur les «fiducies politiques», on ne prête pas généralement à Sa Majesté la qualité de fiduciaire lorsque celle-ci exerce ses fonctions législatives ou administratives. Cependant, ce n'est pas parce que c'est à Sa Majesté qu'incombe l'obligation d'agir pour le compte des Indiens que cette obligation échappe à la portée du principe fiduciaire. Comme nous l'avons souligné plus haut, le droit des Indiens sur leurs terres a une existence juridique indépendante. Il ne doit son existence ni au pouvoir législatif ni au pouvoir exécutif. L'obligation qu'a Sa Majesté envers les Indiens en ce qui concerne ce droit n'est donc pas une obligation de droit public. Bien qu'il ne s'agisse pas non plus d'une obligation de droit privé au sens strict, elle tient néanmoins de la nature d'une obligation de droit privé. En conséquence, on peut à bon droit, dans le contexte de ce rapport *sui generis*, considérer Sa Majesté comme un fiduciaire.

Le paragraphe 18(1) de la *Loi sur les indiens* confère à Sa Majesté un large pouvoir discrétionnaire relativement aux terres cédées. En la présente espèce, l'acte de cession, reproduit en partie précédemment, par lequel la bande Musqueam a cédé les terres en cause, confirme l'existence de ce pouvoir discrétionnaire dans la clause qui prévoit la cession des terres à Sa Majesté [TRADUCTION] «en fiducie, pour location ... aux conditions, que le gouvernement du Canada jugera les plus favorables à notre bien-être et à celui de notre peuple.» Lorsque, comme c'est le cas en l'espèce, une bande indienne cède son droit à Sa Majesté, cela fait naître une obligation de fiduciaire qui impose des limites à la manière dont Sa Majesté peut exercer son pouvoir discrétionnaire en utilisant les terres pour le compte des Indiens.

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

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

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

Je suis d'accord avec le juge Le Dain pour dire qu'avant une cession, Sa Majesté ne possède pas les terres en fiducie pour les Indiens. Je suis également d'accord pour dire qu'au moment de la cession l'obligation de Sa Majesté ne se cristallise pas d'une manière ou d'une autre en fiducie explicite ou implicite. Le droit des fiducies constitue un domaine juridique très perfectionné et spécialisé. Pour qu'il y ait fiducie explicite, il faut un disposant, un bénéficiaire, une masse fiduciaire, des mots portant disposition, certitude quant à l'objet et certitude quant à l'obligation. Ces éléments ne sont pas tous présents en l'espèce. En fait, il n'y a même pas de masse fiduciaire. Il ressort clairement de l'arrêt *Smith*, précité, qu'à la suite d'une cession inconditionnelle il y a disparition du droit des Indiens sur le bien-fonds. Aucun droit de propriété pouvant constituer l'objet de la fiducie n'est transféré, de sorte que, même s'il est possible d'établir l'existence des autres indices d'une fiducie explicite ou implicite, on ne satisfait pas à l'exigence fondamentale d'une disposition de biens. Par conséquent, bien que la nature du titre indien ainsi que le pouvoir discrétionnaire conféré à Sa Majesté suffisent pour donner naissance à une obligation de fiduciaire, la cession ne crée ni une fiducie explicite ni une fiducie implicite.

La cession n'engendre pas non plus de fiducie par interprétation. Comme l'a affirmé cette Cour dans l'arrêt *Pettkus c. Becker*, [1980] 2 R.C.S. 834, à la p. 847, «Le principe de l'enrichissement sans cause est au coeur de la fiducie par interprétation.» Voir aussi l'arrêt *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436. Toute ressemblance entre une fiducie par interprétation et l'obligation de fiduciaire qu'a Sa Majesté envers les Indiens tient uniquement à ce que les deux résultent de la loi; la première vise essentiellement la restitution, alors que ce n'est pas le cas de la dernière. Dans la présente instance, par exemple, la cession n'a procuré à Sa Majesté aucun enrichissement de manière injuste ou autrement, mais le fait qu'il en soit ainsi ne change rien à l'existence ou à la nature de l'obligation qui lui incombe.

L'obligation de fiduciaire qu'a Sa Majesté envers des Indiens ne constitue donc pas une fiducie. Toutefois, cela ne revient pas à dire que, de

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

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

par sa nature même, l'obligation n'est pas semblable à une fiducie. Comme ce serait le cas s'il y avait fiducie, Sa Majesté doit détenir les terres à l'usage et au profit de la bande qui les a cédées. L'obligation est donc soumise à des principes très semblables à ceux qui régissent le droit des fiducies, en ce qui concerne notamment le montant des dommages-intérêts en cas de manquement. Le rapport fiduciaire entre Sa Majesté et les Indiens présente aussi une certaine analogie avec le mandat, puisque l'obligation imposée peut être qualifiée de devoir d'agir pour le compte des bandes indiennes qui ont cédé des terres, en engageant des négociations en vue de leur vente ou de leur location à des tiers. Mais Sa Majesté n'est pas le mandataire pas plus qu'elle n'est le fiduciaire des Indiens; non seulement le pouvoir qu'a Sa Majesté d'agir pour le compte de la bande est-il dépourvu de tout fondement contractuel, mais encore la bande n'est partie ni à la vente ou ni au bail finalement conclus, comme ce serait le cas si elle était le mandant de Sa Majesté. L'obligation de fiduciaire qu'a Sa Majesté envers les Indiens est, je le répète, *sui generis*. Vu la nature unique à la fois du droit des Indiens sur leurs terres et de leurs rapports historiques avec Sa Majesté, cela n'est guère surprenant.

Le pouvoir discrétionnaire qui constitue la marque distinctive de tout rapport fiduciaire peut, dans un cas donné, être considérablement restreint. Cela s'applique aussi bien au pouvoir discrétionnaire que possède Sa Majesté à l'égard des Indiens qu'au pouvoir discrétionnaire des fiduciaires, des mandataires et des personnes qui relèvent des autres catégories traditionnelles de fiduciaire. Les paragraphes 18(1) et 38(2) de la *Loi sur les Indiens* prévoient expressément une telle restriction. Il va toutefois sans dire que l'obligation de fiduciaire n'est pas supprimée par l'imposition de conditions ayant pour effet de restreindre le pouvoir discrétionnaire du fiduciaire. Le défaut de remplir ces conditions constitue tout simplement, à première vue, un manquement à l'obligation. En l'espèce, l'acte de cession et le décret acceptant la cession parlent tous les deux de la location des terres par Sa Majesté au nom de la bande. Avant la cession, on avait aussi laissé entendre à la bande qu'un bail serait conclu avec le Shaughnessy

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

(d) Breach of the Fiduciary Obligation

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

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

Heights Golf Club à certaines conditions, mais ces conditions n'ont pas été inscrites dans l'acte de cession lui-même. Nous allons examiner sous la rubrique suivante l'effet de ces conditions dites verbales.

d) Manquement à l'obligation de fiduciaire

Le juge de première instance a conclu que les mandataires de Sa Majesté ont promis à la bande de louer les terres en cause à certaines conditions précises et qu'après la cession ils ont conclu un bail dont les conditions étaient différentes. Le bail qui a été conclu est beaucoup moins avantageux. Comme nous l'avons déjà mentionné, l'acte de cession ne mentionne pas les conditions «verbales». Or, je refuse de conclure que ces conditions ont néanmoins été incluses de quelque manière dans l'acte de cession. Elles n'ont pas été formellement sanctionnées par une majorité des électeurs de la bande, ni acceptées par le gouverneur en conseil, conformément aux al. 39 (1)*b*) et *c*). À l'instar du juge Le Dain, je considère non fondé l'argument des appelants selon lequel, aux fins de l'art. 39, une cession peut être examinée indépendamment de ses conditions. Cela n'est pas plus logique que de prétendre qu'un contrat peut avoir une existence tout à fait indépendante de ses modalités.

J'estime néanmoins que l'acte de cession n'autorisait pas Sa Majesté à ignorer les conditions verbales qui, selon ce que la bande avait cru comprendre, seraient incluses dans le bail. C'est en fonction de ces représentations verbales que doit être appréciée la conduite adoptée par Sa Majesté en s'acquittant de son obligation de fiduciaire. Elles définissent et limitent la latitude dont jouissait Sa Majesté dans l'exercice de son pouvoir discrétionnaire. Après que les mandataires de Sa Majesté eurent amené la bande à céder ses terres en lui laissant entendre qu'elles seraient louées à certaines conditions, il serait déraisonnable de permettre à Sa Majesté d'ignorer tout simplement ces conditions. Lorsqu'il s'est révélé impossible d'obtenir le bail promis, Sa Majesté, au lieu de procéder à la location des terres à des conditions différentes et défavorables, aurait dû retourner devant la bande pour lui expliquer ce qui s'était passé et demander son avis sur ce qu'il lui fallait faire. L'existence de cette conduite peu scrupuleuse est

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

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

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

VI Limitation of Action and Laches

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

primordiale pour qu'on puisse conclure que Sa Majesté a manqué à son obligation de fiduciaire. L'*equity* ne sanctionnera pas une conduite peu scrupuleuse de la part d'un fiduciaire qui doit faire preuve d'une loyauté absolue envers son commettant.

Bien que l'existence de l'obligation de fiduciaire que Sa Majesté a envers les Indiens dépende de la nature du processus de cession, la norme de conduite que comporte cette obligation est à la fois plus générale et plus exigeante que les conditions de n'importe quelle autre cession. Dans la présence instance, l'aspect pertinent de la norme de conduite requise est défini par un principe analogue à celui qui sous-tend la doctrine de l'exception promissoire ou reconnue en *equity*. Sa Majesté ne peut promettre à la bande qu'elle louera ses terres à certaines conditions précises, incitant ainsi la bande à modifier sa situation juridique en cédant lesdites terres, et ensuite simplement ignorer cette promesse au détriment de la bande. Voir, par exemple, les affaires *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227 (C.A.)

En signant, sans consultation, un bail beaucoup moins avantageux que celui promis, Sa Majesté a manqué à son obligation de fiduciaire envers la bande. Elle doit donc réparer la perte subie par suite de ce manquement.

VI Prescription et manque de diligence

Sa Majesté soutient que l'action de la bande est prescrite en vertu de la *Statute of Limitations*, R.S.B.C. 1960, chap. 370, parce qu'elle n'avait pas été intentée le 22 janvier 1964, soit dans les six ans de la signature du bail. Le juge de première instance a toutefois conclu que la bande et ses membres n'ont pris connaissance des conditions véritables du bail et, par conséquent, du manquement à l'obligation de fiduciaire, qu'en mars 1970. S'il en a été ainsi, ce n'est pas par manque d'effort de leur part. La direction des Affaires indiennes, conformément à la politique qu'elle pratiquait à l'époque, avait refusé de remettre une copie du bail à la bande, et ce, malgré des demandes répétées.

It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. The limitations period did not therefore start to run until March 1970. The action was thus timely when filed on December 22, 1975.

Il est bien établi qu'en cas de dissimulation frauduleuse de l'existence d'une cause d'action, le délai de prescription ne commence à courir qu'à partir du moment où le demandeur découvre la fraude, ou du moment où, en faisant preuve de diligence raisonnable, il aurait dû la découvrir. Il n'est pas nécessaire que la dissimulation frauduleuse requise pour interrompre ou suspendre l'application de la loi constitue une tromperie ou une fraude de *common law*. Il suffit qu'il y ait fraude d'*equity* qui est définie, dans la décision *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, comme [TRADUCTION] «une conduite qui, compte tenu de la relation spéciale qui existe entre les parties concernées, est fort peu scrupuleuse de la part de l'une envers l'autre». Je partage l'avis du juge de première instance selon lequel la conduite de la direction des Affaires indiennes à l'égard de la bande équivaut à une fraude d'*equity*. Même si les fonctionnaires de la Direction n'ont pas agi de façon malhonnête ou blâmable en cachant à la bande les conditions du bail, j'estime néanmoins que leur conduite a été peu scrupuleuse, compte tenu du rapport fiduciaire qui existe entre la Direction et la bande. Par conséquent, le délai de prescription n'a commencé à courir qu'à partir de mars 1970. Il s'ensuit que, lorsqu'elle a été intentée le 22 décembre 1975, l'action n'était pas prescrite.

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

Il n'est pas nécessaire de s'attarder sur le moyen subsidiaire de Sa Majesté portant que l'action de la bande doit être rejetée pour cause de manque de diligence. Puisque la conduite du personnel de la direction des Affaires indiennes a constitué une fraude d'*equity*, puisque ce n'est qu'en mars 1970 que la bande a vraiment pris connaissance des conditions véritables du bail consenti au club de golf et puisque Sa Majesté n'a subi aucun préjudice en raison du délai qui s'est écoulé entre mars 1970 et l'engagement des poursuites en décembre 1975, il n'y a pas lieu d'appliquer la doctrine d'*equity* du manque de diligence.

VII Measure of Damages

In my opinion the *quantum* of damages is to be determined by analogy with the principles of trust law: see, *e.g. In Re West of England and South Wales District Branch, ex parte Dale & Co.*

VII Montant des dommages-intérêts

À mon avis, le montant des dommages-intérêts doit être déterminé par analogie avec les principes du droit des fiducies: voir, par exemple, la décision *In Re West of England and South Wales District*

(1879), 11 Ch. D. 772, at p. 778. Reviewing the record it seems apparent that the judge at trial considered all the relevant evidence. His judgment, as I read it, discloses no error in principle. I am content to adopt the *quantum* of damages awarded by the judge, rejecting, as he did, any claim for exemplary or punitive damages.

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

The following are reasons delivered by

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

There is no difference between the parties on the factual relationship between them. The only issue is, what is the appropriate juridical basis upon which the remedy and consequential relief should be founded. The nature of the interests of the Indian Band, the Federal Crown and the Crown in the right of the Province has been long ago settled in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, and in *Ontario Mining Co. v. Seybold*, [1903] A.C. 73, affirming (1899), 31 O.R. 386; all of which was, only in 1982, re-examined and affirmed in the unanimous decision of this Court in *Smith v. The Queen*, [1983] 1 S.C.R. 554. In 1938, prior to the surrender in question, the title to the Indian reservation land in British Columbia was transferred to the Crown in the right of Canada by British Columbia Orders in Council 208 and 1036 pursuant to Article 13 of the Terms of Union of 1871. Consequently, the primary constitutional issue discussed

Branch, ex parte Dale & Co. (1879), 11 Ch.D. 772, à la p. 778. À l'examen du dossier, il semble évident que le juge de première instance a pris en considération tous les éléments de preuve pertinents. À mon sens, son jugement n'est entaché d'aucune erreur de principe. Je me contente donc d'adopter le montant des dommages-intérêts qu'il a fixé, et de rejeter, comme il l'a fait, toute demande de dommages-intérêts exemplaires ou punitifs.

Par conséquent, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel fédérale et de rétablir sans modification le montant des dommages-intérêts accordés par le juge de première instance, et d'adjuger aux appelants en l'espèce leurs dépens dans toutes les cours.

Version française des motifs rendus par

LE JUGE ESTEY—Les faits et les questions en litige dans le présent pourvoi sont traités à fond par mes deux collègues, dans leurs motifs de jugement que j'ai eu l'avantage de lire. Je m'empresse de souligner dès le début que je suis respectueusement d'accord avec l'issue qu'ils proposent. J'estime toutefois, avec égards, que cette action devrait être tranchée tout simplement en fonction des principes du mandat.

Au point de vue des faits, les parties s'entendent sur le rapport qui existe entre elles. L'unique point en litige est de savoir quel doit être le fondement juridique du recours en justice et du redressement qui en résulte? L'arrêt *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, et l'arrêt *Ontario Mining Co. v. Seybold*, [1903] A.C. 73, confirmant (1899), 31 O.R. 386, ont établi depuis longtemps la nature des droits respectifs de la bande indienne, de Sa Majesté du chef du Canada et de Sa Majesté du chef de la province; tout cela a été, pas plus tard qu'en 1982, réexaminé et confirmé à l'unanimité par cette Cour dans l'arrêt *Smith c. La Reine*, [1983] 1 R.C.S. 554. En 1938, antérieurement à la cession en cause, le titre sur les terres des réserves indiennes situées en Colombie-Britannique a été transféré à Sa Majesté du chef du Canada au moyen des décrets 208 et 1036 de cette province et conformément à l'article 13 des Conditions de l'adhé-

in the *Smith* and *St. Catherine's Milling* cases, *supra*, do not arise.

The *Indian Act*, R.S.C. 1952, c. 149, as amended, the Constitution, the pre-Confederation laws of the colonies in British North America, and the Royal Proclamation of 1763 all reflect a strong sense of awareness of the community interest in protecting the rights of the native population in those lands to which they had a longstanding connection. One common feature in all these enactments is reflected in the present-day provision in the *Indian Act*, s. 37, which requires anyone interested in acquiring ownership or some lesser interest in lands set aside for native populations, from a willing grantor, to do so through the appropriate level of government, now the Federal Government. This section has already been set out by my colleagues. In the elaborate provisions in the *Indian Act*, there are many alternative ways of protecting the interests of the Indians and of reflecting the community interest in that protection. The statute and the cases make provision for a surrender of the Indian interest in Indian lands as defined in the Act. And cases such as *St. Catherine's*, *supra*, indicate the extent to which the Indian Band must go in order to sever entirely the connection of the native population from the lands in question. This type of surrender would be better described as a release, in the modern lexicon.

Unfortunately, the statute employs the word "surrender" in another connotation. In order to deal with what has been found to be the personal interest of the Indian population in Indian lands, the Act requires the Band to "surrender", the land to the Crown in the right of Canada in order to effect the proposed alternate use of the land for the benefit of the Indians. The Act, in short, does not require the Indian to limit his interest in Indian lands to present and continuous occupation. The Band may vicariously occupy the lands, or part of such lands, through the medium of a lease or licence. The marketing of the personal interest is not only permitted by the statute, but the machinery is provided for the proper exploitation of

sion de 1871. Par conséquent, la question constitutionnelle principale traitée dans les arrêts *Smith* et *St. Catherine's Milling*, précités, ne se pose pas en l'espèce.

La *Loi sur les Indiens*, S.R.C. 1952, chap. 149, et ses modifications, la Constitution, les lois des colonies de l'Amérique du Nord britannique antérieures à la Confédération ainsi que la Proclamation royale de 1763 traduisent toutes une conscience aiguë de l'intérêt qu'a la société à protéger les droits des autochtones sur les terres avec lesquelles ils ont des liens de longue date. Un trait commun à tous ces textes trouve son reflet dans l'art. 37 de la *Loi sur les Indiens* actuelle, selon lequel toute personne qui souhaite acquérir un droit de propriété ou quelque droit moindre sur des terres réservées aux autochtones, d'une personne disposée à le céder, doit passer par le palier de gouvernement approprié, en l'occurrence le gouvernement fédéral. Mes collègues ont déjà reproduit l'art. 37. Les dispositions complexes de la *Loi sur les Indiens* énoncent un bon nombre de façons différentes de protéger les droits des Indiens et de refléter l'intérêt qu'a la société à les protéger. La Loi et la jurisprudence prévoient la cession du droit qu'ont les Indiens sur les terres définies dans la Loi. Des arrêts tels que l'arrêt *St. Catherine's*, précité, montrent d'ailleurs jusqu'où une bande indienne doit aller pour rompre complètement le lien qui existe entre la population autochtone et ces terres. Il serait plus exact de nos jours de qualifier de renonciation ce genre de cession.

Malheureusement, la Loi prête au mot «cession» un autre sens. Quant à ce qui a été jugé comme le droit personnel de la population indienne sur ses terres, la Loi exige que la bande «cède» lesdites terres à Sa Majesté du chef du Canada pour qu'elles puissent être affectées à l'autre usage que l'on propose d'en faire au profit des Indiens. Bref, la Loi n'exige pas que le droit des Indiens sur leurs terres se limite à une occupation actuelle et continue. La bande peut occuper la totalité ou une partie des terres indirectement par le biais d'un bail ou d'un permis. La Loi autorise non seulement la commercialisation de ce droit personnel, mais elle prévoit aussi des mécanismes visant à assurer que les Indiens y procèdent de façon rationnelle, en

this interest by the Indians, subject always to compliance with the statute (*vide St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211). The step to be taken by the Indian Band in seeking to avail itself of the benefits of their right of possession in this manner is, unhappily, also referred to in the statute and in the cases as a "surrender", of the lands and their interest therein to the Crown. This is not a release in the sense of that term in the general law. Indeed, it is quite the opposite. It is a retention of interest and the exploitation of that interest in the manner and to the extent permitted by statute law. The Crown becomes the appointed agent of the Indians to develop and exploit, under the direction of the Indians and for their benefit, the usufructuary interest as described in *St. Catherine's*.

The appellants clearly, and beyond any argument here, did not release their interest in the lands in the *St. Catherine's* sense but appointed the Crown in the right of Canada to carry out the commercial exploitation of the Indian interest in the manner prescribed in detail in *Surrey (Corporation of) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.), *The King v. McMaster*, [1926] Ex.C.R. 68, and *St. Ann's*, *supra*.

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

conformité toujours avec ses dispositions (voir l'arrêt *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] R.C.S. 211). Malheureusement, la mesure que doit prendre la bande indienne qui cherche à se prévaloir ainsi des avantages de son droit de possession est également désignée dans la Loi et dans la jurisprudence comme une «cession» à Sa Majesté des terres et du droit sur ces terres. Il ne s'agit pas d'une renonciation au sens du droit général. En fait, c'est tout le contraire puisqu'il s'agit de conserver ce droit et de l'exploiter de la manière et dans la mesure prévues par les textes de loi. Sa Majesté devient alors le mandataire désigné des Indiens et elle a pour tâche de mettre en valeur et d'exploiter, sous la direction de ces derniers et à leur profit, le droit de la nature d'un usufruit dont il est question dans l'arrêt *St. Catherine's*.

Il ne fait pas le moindre doute que les appelants en l'espèce n'ont pas renoncé à leur droit sur les terres au sens de l'arrêt *St. Catherine's*; au contraire, ils ont chargé Sa Majesté du chef du Canada de l'exploitation commerciale du droit des Indiens de la manière prescrite en détail dans les affaires *Surrey (Corporation of) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (C.A.C.-B.), *The King v. McMaster*, [1926] R.C. de l'É. 68, et *St. Ann's*, précitée.

D'après les faits en l'espèce, la bande indienne a manifestement décidé d'exercer son droit sur les terres au moyen d'un bail consenti au club de golf. On ne conteste pas sérieusement les conclusions de fait tirées par le savant juge de première instance quant aux directives détaillées que les Indiens ont données aux représentants du gouvernement du Canada concernant les conditions du bail dont le montant du loyer, la durée du bail, sa reconduction, l'enlèvement des installations et un bon nombre d'autres aspects habituels de la préparation d'un bail. On ne conteste pas non plus que les représentants du gouvernement n'ont pas, pour une raison quelconque, suivi ces directives, pas plus qu'ils n'ont tenu la bande indienne au courant du déroulement des dernières phases des négociations. Le plus grave dans tout cela, c'est que l'intimée n'a remis aux Indiens qui lui avaient donné des directives une copie du bail finalement conclu ou une

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

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

Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent.

. . .

The essence of the agent's position is that he is only an intermediary between two other parties.

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

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

description écrite de son contenu que bien des années après sa signature.

Il suffit de consulter *Halsbury's Laws of England* (4e éd.), vol.1, à la p. 418, pour décider de l'application des principes du mandat aux faits clairs et relativement simples de la présente instance:

[TRADUCTION] L'existence de ce rapport dans une situation donnée dépend non pas des termes précis employés par les parties pour décrire leurs rapports, mais de la nature véritable de l'entente ou des circonstances précises des rapports qui existent entre le prétendu mandant et le mandataire . . .

. . .

Le mandataire sert essentiellement d'intermédiaire entre deux autres personnes.

Ce n'est pas parce que la Loi désigne le mandataire que la capacité juridique de celui-ci d'agir en cette qualité se trouve diminuée. De plus, le fait que la loi oblige le mandant (la bande indienne en tant que titulaire du droit personnel sur les terres) à agir par l'intermédiaire de Sa Majesté, ne porte aucunement atteinte au droit du mandant qui donne les directives d'exiger que le mandataire rende compte de l'exécution du mandat. Ce n'est pas parce qu'on impute le droit d'action des demandeurs à une violation des obligations du mandataire qu'il y a lieu de modifier le montant des dommages-intérêts fixé par le savant juge de première instance. En fait, il est conforme à l'objet du mandat légal prescrit par le Parlement, aussi bien dans la loi actuelle que dans les textes législatifs antérieurs, que tous les actes du mandataire (savoir Sa Majesté) doivent servir uniquement les intérêts de la population autochtone dont les droits font seuls l'objet des dispositions protectrices de la Loi. Dans le rapport ainsi établi les droits du mandant sont certainement mieux garantis qu'ils ne le seraient en l'absence d'un mandat prescrit par la Loi. Le mandant est limité quant au choix du mandataire, mais la Loi n'offre au mandataire aucune protection contre les conséquences juridiques d'une violation des obligations découlant de ce mandat.

Pour ces motifs, en toute déférence pour ceux qui sont d'avis contraire, j'hésite à recourir aux doctrines plus techniques et de portée plus vaste du

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

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

Appeal allowed with costs.

Solicitors for the appellants: Davis and Company, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

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

droit des fiducies et aux règles concomitantes applicables au fiduciaire. L'issue reste la même, mais j'estime respectueusement que l'application future de la Loi et de la *common law* aux droits des autochtones sera beaucoup plus facile en vertu des principes du mandat.

Je souscris donc à la conclusion de mes collègues que ce pourvoi doit être accueilli avec dépens.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Davis and Company, Vancouver.

Procureur de l'intimée: Ministère de la Justice, Vancouver.

Procureur de l'intervenante: William T. Badcock, Ottawa.

TAB # 9.

ESTATES & TRUSTS JOURNAL

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DOING ONE'S DUTY: PENSION PLAN ADMINISTRATORS, AGENTS AND TRUSTEES

*Patricia J. Myhal**

With the coming into force of the *Pension Benefits Act, 1987* (the "Act"),[1] there was imposed for the first time in Ontario a statutory duty of care on administrators of pension plans and their agents. While plan sponsors and other participants in the pension plan industry are generally aware of this change in the law, there has been little detailed analysis of the scope and ramifications of this change. The purpose of this article is to explore in some detail certain specific questions relating to the duties of administrators, agents and trustees under the Act. In particular, the focus is on the following:

1. How does a corporate administrator discharge its obligations under the Act?
2. What is the position of the directors of a corporate administrator and are they subject to the statutory duty of care?
3. Is an investment manager or a trustee subject to the statutory duty of care? and
4. What is the liability of directors of a corporate administrator if there is a breach of the Act and how (if at all) may directors protect themselves against such liability?

1. The Corporate Administrator, its Employees and Agents

The Duty of Care Under the Act

The statutory duty of care is set out in s. 23(1) of the Act. An administrator is required to exercise "the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person".[1a] Pursuant to s. 23(2) and (4), in the administration of the plan and the pension fund an administrator

* Of Tory, Tory, DesLauriers & Binnington.

[1] S.O. 1987, c. 35.

[1a] In other subsections of the Act, the expression that is used is the "administration of the pension plan and the administration and investment of the pension fund". There are a number of drafting anomalies and inconsistencies in the Act of which this appears to be one.

is also required to use all relevant knowledge and skill that the administrator possesses or, by reason of his or her profession, business or calling, ought to possess and shall not knowingly permit his or her interest to conflict with his or her duties and powers in respect of the pension fund. In this article, these duties are collectively referred to as the "statutory duties".

The statutory duties are modelled on the duties imposed on trustees at common law,[2] but they are not identical to those duties. Under the Act, the duty of care, diligence and skill is measured by reference to what a person of ordinary prudence would do when dealing with the property of another person. At common law, however, the duty is measured by reference to what a person of ordinary prudence would do when dealing with his or her own property.[3] Arguably, a person of ordinary prudence would be even more prudent with the property of a third party than with his or her own property and so the Act seems to require a higher duty than that required of trustees at common law. In addition, under the Act there is an obligation to use all relevant skill which the person possesses or ought to possess by reason of his or her profession, business or calling. The case-law in Canada appears to be to the effect that "professional" trustees or trustees with particular expertise are not subject to a higher standard than are other trustees,[4] and so the statutory obligation may impose a higher standard than would prevail at common law in the case of "professional" and other expert trustees.

As noted above, prior to the coming into force of the Act there were no statutory duties similar to those in s. 23 imposed on persons involved in pension plan administration . It is possible that some of those persons were (and continue to be) subject to common law duties as fiduciaries, but the situation was not at all clear since there has been no reported decision in Canada on the question.

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[2] In this article, the expression "common law" is used to denote the legal principles developed by the courts in the absence of or in addition to any applicable statutory rules. These legal principles include those developed by the courts of equity, as well as by the common law courts.

[3] See, for example, *Fales v. Canada Permanent Trust Co.* (1976), 70 D.L.R. (3d) 257, [1977] 2 S.C.R. 302 at p. 315, [1976] 6 W.W.R. 10, where Dickson J. states that the duty "is that of a man of ordinary prudence in managing his own affairs".

[4] In *Fales v. Canada Permanent Trust Co.*, *ibid.*, the question whether the professional trustee was required to perform to a higher standard was alluded to, but not expressly dealt with.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Court File No: 09CV-8221-00CL

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE MONITOR
(Motion Returnable November 10, 2010)

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