2001 FCA 67

A-229-99

Cecile Martha Letendre on her own behalf and on behalf of those present descendants of the Beaver Band of Indians listed on Schedule A attached hereto (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band and the Blueberry River Band** (*Respondents*)

and

Public Guardian and Trustee of British Columbia (*Intervener*)

A-230-99

Bradley Wayne Courtoreille on his own behalf and on behalf of those present descendants of the Beaver Band of Indians listed on Schedule A attached hereto (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band and the Blueberry River Band** (*Respondents*)

A-231-99

Valerie Jennifer Askoty, April Joan Askoty and **Keith Chipesia** (*Appellants*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band and the Blueberry River Band** (*Respondents*)

A-232-99

Douglas Allan Green on his own behalf and on behalf of those present descendants of the Beaver Band of Indians listed on Schedule A attached hereto (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band and the Blueberry River Band** (*Respondents*)

A-239-99

Jean Mary Paul on her own behalf and on behalf of those present descendants of the Beaver Band of Indians listed on Schedule A attached thereto (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Indian Band and all present descendants of the Beaver Band of Indians** (*Respondents*)

A-240-99

Bonnie Belcourt, on her own behalf and on behalf of those present descendants of the Beaver Band of Indians listed on Schedule A attached hereto (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Band and all present descendants of the Beaver Band of Indians** (*Respondents*)

A-241-99

Bella Kucinsky on her own behalf and on behalf of those present descendants of the Beaver Band of Indians listed on Schedule A attached hereto (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry River Band** (*Respondents*)

A-254-99

Rita Rosie Glover on her own behalf and on behalf of those present descendants of the Beaver Band of Indians listed on Schedule A attached hereto (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band and the Blueberry River Indian Band and all present descendants of the Beaver Band of Indians** (*Respondents*)

A-285-99

Carol Dawn Monkman (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Band, on behalf of themselves and all other members of the Doig River Indian Band and the Blueberry River Band** (*Respondents*)

A-286-99

Joyce Price on her own behalf and on behalf of those claiming to be present descendants of the Beaver Band of Indians listed on Schedule A, attached (*Appellant*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all**

other members of the Doig River Indian Band, the Blueberry River Indian Band (*Respondents*)

A-287-99

Doris Ronnenberg, Brian Ronnenberg, Judith Ronnenberg, William Ronnenberg, Susan Gretz; and By their Next Friend, Doris Ronnenberg: William Ernest Ronnenberg, Christina Ronnenberg, Bryan Sparrow, Brianna Sparrow, William Houle, Jasline Houle, Michael Gretz and **Kevin Gretz** (*Appellants*)

v.

Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development and the Director of the Veterans Land Act, Joseph Apsassin, Chief of the Blueberry River Indian Band, and **Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band and the Blueberry River Band** (*Respondents*)

INDEXED AS: BLUEBERRY RIVER INDIAN BAND V. CANADA (DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT) (C.A.)

Court of Appeal, Richard C.J., Létourneau and Rothstein JJ.A.—Vancouver, January 15, 16; Ottawa, March 19, 2001.

Native Peoples — Appellants awarded damages against Crown for breach of fiduciary duty with respect to mineral rights in Indian Reserve — Among appellants, present descendants of Beaver Band of Indians claiming to share in award — Claim based on nature of cause of action, collective as opposed to individual entitlement, on procedural ground of estoppel — Indian band not legal entity — Interest of band members in reserve land communal, not individual interest — Cause of action against Crown for breach of fiduciary duty belonging to band members collectively, not individually — Not passing on to descendants of individual members — Latter not entitled to share in proceeds of judgment.

Estoppel — S.C.C. judgment in favour of "appellants" in an action by Indian Bands against Crown for breach of fiduciary duty regarding mineral rights argued as constituting cause of action estoppel — Not deciding, as between appellants, issue of entitlement to damages — Parties adverse in interest before S.C.C. different from those in subsequent proceedings before F.C.T.D. — Cause of action estoppel inapplicable — Argument based on issue estoppel ill-founded as question of entitlement of present descendants not previously decided in original F.C.T.D. proceedings — Key ingredients of estoppel by representation missing — Present descendants position not detrimentally changed due to representative plaintiffs' actions — Doctrine of estoppel by election also inapplicable — In bringing action on behalf of present descendants, representative plaintiffs not choosing between alternative, mutually exclusive, rights available to them.

This was an appeal from a Trial Division decision that present descendants of the Beaver Band of Indians, who are not members of the Doig River Indian Band and the Blueberry River Indian Band, are not entitled individually or as a group to be considered members of the collectivity which has the right to the proceeds of a judgment holding the Crown in breach of fiduciary duty with respect to certain mineral rights. In 1916, the Beaver Indian Band surrendered aboriginal title in exchange for Indian Reserve 172 in northeastern British Columbia. In 1977, the Beaver Band was divided into the

Blueberry River Band and the Doig River Band. An action for damages relating to mineral rights was brought in 1978 as a representative action. The plaintiffs in the action, who were the “appellants” before the Supreme Court of Canada, included all present descendants of the Beaver Band of Indians. The Supreme Court found a breach of fiduciary duty by the Crown with respect to mineral rights on Indian Reserve 172, but remitted the matter to the Federal Court, Trial Division for assessment of damages. By consent judgment, Hugessen J. awarded to the plaintiffs an amount of $147 million resulting from the discovery of oil and gas on the property that had been Indian Reserve 172. He added, however, that his ruling did not create any rights in favour of persons described in the style of cause as “present descendants of the Beaver Band of Indians” and that the latter were not entitled to share in the fund of $147 million. On appeal, the “present descendants” based their claim for entitlement to share in the $147 million fund on two grounds: (1) the nature of the cause of action, being an argument on the merits, and (2) the procedural ground of estoppel.

Held, the appeal should be dismissed.

(1) The present descendants could not argue that they were entitled, in their individual right, to share in the $147 million judgment. An Indian band is a creature of statute, the *Indian Act*. A “band”, as defined in the Act, is not a legal entity, but a distinct population of Indians for whose use and benefit, in common, a reserve has been set aside by the Crown. The term “in common” connotes a communal, as opposed to a private, interest in the reserve, by the members of the band. Any cause of action for breach of fiduciary duty against the Crown, with respect to reserve lands, is a communal cause of action that belongs to the band members in common, not individually, and does not follow an individual upon leaving the band. The cause of action against the Crown for breach of fiduciary duty in relation to Indian Reserve 172 would have belonged initially to the members of the Beaver Band, as a collectivity, and, as a result, the proceeds of any judgment would have belonged to the members of that Band as a collectivity. There was no cause of action accruing to members in their individual right and therefore no cause of action to pass on to descendants of individual members. The rights at issue are not treaty rights. They are rights that flowed from Indian Reserve 172 being set aside for the Beaver Band in accordance with the Crown’s treaty obligations. The rights were those of the members, collectively, of the Beaver Band, by reason of their membership in the Band and which passed to the members, collectively, of each of the Blueberry and Doig Bands.

(2) The present descendants have advanced a series of estoppel arguments which would preclude the Blueberry and Doig Bands from denying their entitlement to share. First, they argued that the Supreme Court of Canada decision in favour of “the appellants” constituted a cause of action estoppel or *res judicata* clearly determining their entitlement and that such issue could not be reopened in the Federal Court Trial Division. For cause of action estoppel to apply, the cause of action and the parties must be the same. The cause of action before the Supreme Court of Canada was a breach of fiduciary duty by the Crown with respect to mineral rights on Indian Reserve 172, whereas the question in the subsequent proceedings was one of entitlement to the damages awarded by the Supreme Court against the Crown. There is nothing in the judgment of the Supreme Court that decided, as between the appellants themselves, the question of entitlement to the damage award of $147 million. There can be no cause of action estoppel or *res judicata* where the parties to the dispute in the original and subsequent proceedings are not the same and the cause of action is not the same. The present descendants also invoked issue estoppel by arguing that the issue of their status as plaintiffs in the action was raised and decided in the original Trial Division proceedings. Such an argument is inacceptable since the issue of entitlement of the present descendants had not been decided by the Trial Judge, Addy J., in 1987. That issue was decided for the first time by Hugessen J. in his decision of April 7, 1999, which is the subject of this appeal. As to estoppel by representation, the present descendants submitted that the representative plaintiffs included them in the style of cause of their pleadings, pleaded that they were representing them as well as members of the Blueberry and Doig Bands, and could not now resile from that position. However, they suffered no detriment from that conduct, and thus one of the key ingredients of

estoppel by representation was missing. The mere inclusion of names or a class in a style of cause, even if the inclusion is deliberate, does not confer rights or entitlement on persons who could not, in a separate or individual action, prove those rights or entitlement. Bringing a representative action in the name of represented plaintiffs or classes of represented plaintiffs does not, of itself, establish that they have a common interest; this requires judicial determination. It was the April 7, 1999 decision that determined that the present descendants had no entitlement and therefore no common interest with the members of the Blueberry and Doig Bands. Nor was the doctrine of estoppel by election applicable. Election requires a choice to be made between two mutually exclusive rights available to a person. In bringing the action on behalf of the present descendants as well as the Blueberry and Doig Band members, the representative plaintiffs were not choosing between alternative, mutually exclusive, rights available to them as the doctrine of election requires. Rather, they made a voluntary decision to expand the class of plaintiffs.

It was not an abuse of process for the representative plaintiffs and counsel who had acted successfully before the Supreme Court of Canada to settle the question of damages with the Crown, and then question the entitlement of the present descendants. The abuse of process argument was yet another attempt at an estoppel argument which ignored the three-step process involved in this type of representative action: to determine liability, damages and entitlement amongst the represented class. There was no suggestion that the present descendants had not been fairly represented.

Finally, it could not be said that Hugessen J., in denying a motion for an advance of legal costs to some of the present descendants, indicated that he had predetermined the preliminary question, or at least, that his words raised a reasonable apprehension of bias.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Federal Court Rules, 1998, SOR/98-106, r. 114.

Federal Court Rules, C.R.C., c. 663, R. 1711.

Indian Act, R.S.C., 1985, c. I-5, ss. 2(1) “band”, 15(1) (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 5), 16(2), 17(2), 18(1).

Indian Act (The), S.C. 1951, c. 29, s. 15(1).

CASES JUDICIALLY CONSIDERED

APPLIED:

Oregon Jack Creek Indian Band v. Canadian National Railway Co. (1989), 56 D.L.R. (4th) 404; 34 B.C.L.R. (2d) 344; [1990] 2 C.N.L.R. 85 (C.A.); *Appleyard v. McInnis Equipment Ltd. (Receiver-Manager of)* (1986), 11 C.C.E.L. 285 (Ont. H.C.); *Clayoquot Band of Indians v. British Columbia* (1986), 3 B.C.L.R. (2d) 60; [1986] 3 C.N.L.R. 84 (S.C.).

CONSIDERED:

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344; (1995), 130 D.L.R. (4th) 193; [1996] 2 C.N.L.R. 25; 190 N.R. 89; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1998] F.C.J. No. 1952 (T.D.); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1998] F.C.J. No. 1722 (T.D.) (QL); *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; (1974), 47 D.L.R. (3d) 544; 74 DTC 6278; 2 N.R. 397; *Deputy Minister of National Revenue (Customs and Excise) v. Trane Co. of Canada, Ltd.*, [1982]

2 F.C. 194 (1982), 38 N.R. 72 (C.A.); *Henderson v. Henderson* (1843), 3 Hare 100; 67 E.R. 313; *Greenwood v. Martins Bank Ld.*, [1933] A.C. 52 (H.L.); *General Motors of Canada Ltd. v. Naken et al.*, [1983] 1 S.C.R. 72; (1983), 144 D.L.R. (3d) 385; 22 C.P.C. 138; 46 N.R. 139; *Blackie v. Post Master General* (1975), 61 D.L.R. (3d) 566 (F.C.T.D.); *Harding v. Thomson* (1982), 39 A.R. 361; 137 D.L.R. (3d) 715; [1982] 5 W.W.R. 258; 21 Alta. L.R. (2d) 114 (C.A.); *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (the "Kanchenjunga")*, [1990] 1 Lloyd's Rep. 391 (H.L.); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1999] F.C.J. No. 257 (T.D.) (QL).

REFERRED TO:

Sabattis v. Oromocto Indian Band (1988), 86 N.B.R. (2d) 351; [1989] 2 C.N.L.R. 158 (Q.B.); *May v. Wheaton* (1917), 41 O.L.R. 369; *Handford v. Storie* (1825), 2 Sim. and St. 195; 57 E.R. 320.

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Bower, George Spencer. *The Doctrine of Res Judicata*, 3rd ed. by K. R. Handley, London: Butterworths, 1996.

Bower, George Spencer. *The Law Relating to Estoppel by Representation*, 3rd ed. by A.K. Turner. London: Butterworths, 1977.

Goulding, Simon. *Odgers on Civil Court Actions*, 24th ed. London: Sweet & Maxwell, 1996.

APPEAL from a Trial Division decision ((1999), 171 F.T.R. 91) that the present descendants of the Beaver Band of Indians, who are not members of the Doig River Indian Band and the Blueberry River Indian Band, are not entitled individually or as a group to be considered members of the collectivity which has the right to the proceeds of a judgment against the Crown with respect to breach of fiduciary duty as to certain mineral rights. Appeal dismissed.

A-229-99

APPEARANCES:

Derek Van Tassell for appellant.

Mitchell Taylor for respondent Her Majesty the Queen.

Thomas R. Berger, Q.C., Gary A. Nelson and *Margaret D. Vanderkruyk* for respondents Joseph Apsassin et al.

Faith E. Hayman for intervener.

SOLICITORS OF RECORD:

Allan A. Greber Professional Corporation, Grande Prairie, Alberta, for appellant.

Deputy Attorney General of Canada for respondent Her Majesty The Queen.

Nelson Vanderkruyk, Vancouver, for respondents Joseph Apsassin et al.

Murphy, Battista, Vancouver, for intervener.

A-230-99, A-232-99

APPEARANCES:

Paul S. Rosenberg for appellants.

Mitchell Taylor for respondent Her Majesty the Queen.

Thomas R. Berger, Q.C., Gary A. Nelson and *Margaret D. Vanderkruyk* for respondents Joseph Apsassin et al.

Faith E. Hayman for intervener.

SOLICITORS OF RECORD:

Rosenberg and Rosenberg, Vancouver, for appellants.

Deputy Attorney General of Canada for respondent Her Majesty the Queen.

Nelson Vanderkruyk, Vancouver, for respondents Joseph Apsassin et al.

Murphy, Battista, Vancouver, for intervener.

A-231-99, A-254-99, A-285-99

APPEARANCES:

William A. Ferguson and *Maryam Rafi* for appellants.

Mitchell Taylor for respondent Her Majesty the Queen.

Thomas R. Berger, Q.C., Gary A. Nelson and *Margaret D. Vanderkruyk* for respondents Joseph Apsassin et al.

Faith E. Hayman for intervener.

SOLICITORS OF RECORD:

Shapiro Hankinson & Knutson, Vancouver, for appellants.

Deputy Attorney General of Canada, for respondent Her Majesty the Queen.

Nelson Vanderkruyk, Vancouver, for respondents Joseph Apsassin et al.

Murphy, Battista, Vancouver, for intervener.

A-239-99, A-241-99, A-286-99

APPEARANCES:

Robert A. Easton for appellants.

Mitchell Taylor for respondent Her Majesty the Queen.

Thomas R. Berger, Q.C., Gary A. Nelson and *Margaret D. Vanderkruyk* for respondents Joseph Apsassin et al.

Faith E. Hayman for intervener.

SOLICITORS OF RECORD:

Miller Thomson LLP, Vancouver, for appellants.

Deputy Attorney General of Canada for respondent Her Majesty the Queen.

Nelson Vanderkruyk, Vancouver, for respondents Joseph Apsassin et al.

Murphy, Battista, Vancouver, for intervener.

A-240-99

APPEARANCES:

Karin E. Buss for appellant.

Mitchell Taylor for respondent Her Majesty the Queen.

Thomas R. Berger, Q.C., Gary A. Nelson and *Margaret D. Vanderkruyk* for respondents Joseph Apsassin et al.

Faith E. Hayman for intervener.

SOLICITORS OF RECORD:

Ackroyd, Piasta, Roth & Day LLP, Edmonton, for appellant.

Deputy Attorney General of Canada for respondent Her Majesty the Queen.

Nelson Vanderkruyk, Vancouver, for respondents Joseph Apsassin et al.

Murphy, Battista, Vancouver, for intervener.

A-287-99

APPEARANCES:

Thomas K. O'Reilly for appellants.

Mitchell Taylor for respondent Her Majesty the Queen.

Thomas R. Berger, Q.C., Gary A. Nelson and *Margaret D. Vanderkruyk* for respondents Joseph Apsassin et al.

Faith E. Hayman for intervener.

SOLICITORS OF RECORD:

Field Atkinson Perraton LLP, Edmonton, for appellants.

Deputy Attorney General of Canada for respondent Her Majesty the Queen.

Nelson Vanderkruyk, Vancouver, for respondents Joseph Apsassin et al.

Murphy, Battista, Vancouver, for intervener.

The following are the reasons for judgment rendered in English by

ROTHSTEIN J.A.:

Introduction

[1] This is an appeal from an April 7, 1999 order of Hugessen J. of the Federal Court Trial Division [(1999), 171 F.T.R. 91]. The proceedings before Hugessen J. and this appeal arise out of a Supreme Court of Canada judgment dated December 14, 1995 and revised May 23, 1996 (reasons reported as *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development*), [1995] 4 S.C.R. 344). The Supreme Court found a breach of fiduciary duty by the Crown with respect to mineral rights on Indian Reserve 172. The Supreme Court's revised judgment states:

> The appeal is allowed with costs throughout and the cross-appeal is allowed without costs. The judgments below are set aside. The appellants are entitled to damages against the Crown for breach of fiduciary duty with respect to mineral rights in Indian Reserve 172 as were conveyed by the Director of the *Veterans' Land Act* after August 9, 1949 by agreement for sale and, in the case of conveyances to Pacific Petroleum and Clement Brooks, by deed. The action is remitted to the Federal Court, Trial Division, for assessment of damages accordingly. [Emphasis added.]

[2] The action had been brought in 1978 as a representative action. The plaintiffs in the action, who were the "appellants" before the Supreme Court were described in the style of cause as:

[3] In 1916, the Beaver Indian Band, by treaty with the Crown, surrendered aboriginal title in exchange for Indian Reserve 172 in northeastern British Columbia. In 1977, the Beaver Band was divided into the Blueberry River Band and the Doig River Band. The representative plaintiffs were the chiefs of the Blueberry and Doig Bands.

[4] The defendant in the action and respondent before the Supreme Court was described in the style of cause as:

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

[5] As a result of the Supreme Court judgment remitting the matter to the Federal Court Trial Division for the assessment of damages, by consent judgment dated March 2, 1998 [[1998] F.C.J. No. 1952 (QL)], Hugessen J. ordered [at paragraph 8]:

> THIS COURT ORDERS that the Plaintiffs are entitled to recover from the Defendant the sum of one hundred and forty-seven million dollars ($147,000,000), all inclusive of damages, pre-judgment interest and costs in all levels of court (the "Settlement Proceeds");

The large sum resulted from the discovery of oil and gas on the property that had been Indian Reserve 172.

[6] In submissions leading to the March 2, 1998 judgment of Hugessen J., counsel who had been acting for all the plaintiffs/appellants (as described in the style of cause before the Supreme Court), raised the issue of the entitlement of "all present descendants of the Beaver Band of Indians" to share in the fund of $147 million. As a result, the March 2, 1998 judgment contained the following reservation [at paragraph 11]:

> THIS COURT FURTHER ORDERS that this judgment and the settlement reached do not create any rights in favour of persons described in the style of cause as "present descendants of the Beaver Band of Indians" or in favour of persons described in paragraph 3 of the Statement of Claim as "all descendants of the Beaver Band of Fort St. John and the St. John Beaver Band, ascertained and unascertained and their legal personal representatives", including any right to claim entitlement to share in the Settlement Proceeds. The question of their entitlement remains to be resolved in accordance with Appendix "A" and upon further order of the Court; [Emphasis added.]

Appendix A provided for a procedure whereby present descendants, other than members of the Blueberry and Doig Bands, could file notices of claim with the Federal Court. Some 490 claims were filed and many of the present descendant claimants retained new counsel to act on their behalf.

[7] After hearing counsel, by order dated November 19, 1998 [[1998] F.C.J. No. 1722 (T.D.) (QL)], Hugessen J. ordered the following preliminary question of law to be determined [at paragraph 5]:

Are any persons, i.e., present descendants of the Beaver Band of Indians, who are not members of the Doig River Indian Band and the Blueberry River Indian Band for the time being, entitled individually or as a group to be considered members of the collectivity which has the right to the proceeds of judgment.

[8] Submissions by counsel for the present descendants on the one hand, and counsel for members of the Blueberry and Doig Bands on the other, were made on the merits of the entitlement of the present descendants. By order dated April 7, 1999, Hugessen J. decided the question in the negative, i.e. that the present descendants of the Beaver Band who are not members of the Blueberry or Doig Bands are not entitled to share in the fund of $147 million.

[9] This is an appeal from that order.

[10] The issue in the appeal is who is entitled to the $147 million. Are the rightful claimants limited to the members, collectively, of each of the Blueberry and Doig Bands or are "present descendants of the Beaver Band of Indians" who are not members of the Blueberry or Doig Bands also entitled to share?

ISSUES

[11] The "present descendants" base their claim for entitlement to share in the $147 million fund on two broad grounds: the first, on the merits, is that the cause of action belongs to the successors of members of the Beaver Band in their individual capacities; the second is on the procedural ground of estoppel. Some of the present descendants also raise abuse of process and predetermination by Hugessen J. and apprehension of bias as additional arguments.

ENTITLEMENT ON THE MERITS

[12] Some, but not all, of the present descendants argue that, on the merits, they are entitled, in their individual right, to share in the $147 million judgment.

[13] The gist of their argument is:

(a) Rights in relation to Indian Reserve 172, including mineral rights, were vested in the members of the Beaver Band in their individual capacities and not in the Beaver Band as an entity.

(b) When the Beaver Band ceased to exist, the cause of action for the loss of the rights to the minerals did not pass to the Blueberry and Doig Bands, but rather, continued to belong to the members of the former Beaver Band in their individual capacities or to their descendants in their individual capacities.

[14] I am unable to accept the argument of the present descendants. An Indian band is a creature of statute, the *Indian Act*. A "band" is defined in the *Indian Act*[1] as:

> **2.** (1) …
>
> "band" means a body of Indians
>
> (*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

[15] The definition of "band" does not constitute an Indian band as a legal entity. Rather, I take it from the definition of "band", and other provisions of the *Indian Act*, that in relation to rights to an Indian reserve, a band is a distinct population of Indians for whose use and benefit, in common, a reserve has been set aside by the Crown. This interpretation was adopted by Macfarlane J.A. in *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 56 D.L.R. (4th) 404 (B.C.C.A.), at pages 409-410:

> The members of the band do not constitute a legal entity. The alleged wrong is not to a legal entity (the band) but to the members of the band who are entitled to the use and benefit of the land and the fisheries. For the action to be derivative the band would have to be regarded as a legal entity, like a corporation, and the members of the band would have to be regarded as akin to shareholders. In *Tijani v. Secretary Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), Lord Haldane cautioned against construing aboriginal title in terms which are appropriate only to traditional legal concepts. I think that the same caution must be exercised in considering rights in respect of reserve lands and reserved fisheries.

[16] However, it does not follow that because an Indian band is not a legal entity, rights accruing to the band are the rights of its members or their descendants in their individual capacities. The definition of "band" uses the term "in common" in relation to the interest that the members of the band have in the reserve. The term "in common" connotes a communal, as opposed to a private, interest in the reserve, by the members of the band. In other words, an individual member of a band has an interest in association with, but not independent of, the interest of the other members of the band. Again, in *Oregon Jack*, this is succinctly described by Macfarlane J.A. at page 408:

> It is common ground that the rights being asserted are communal in nature. In *Joe v. Findlay* (1981), 122 D.L.R. (3d) 377, at p. 379, [1981] 3 W.W.R. 60, 26 B.C.L.R. 376 (B.C.C.A.), this court held that the statutory right of use and benefit of reserve lands was a collective right in common conferred upon and accruing to the band members as a body and not to the band members individually.

[17] The communal nature of rights in a reserve is evidenced by other provisions of the *Indian Act*. For example, under subsection 16(2), when a person ceases to be a member of one band by becoming a member of another band, he or she loses any interest in the lands of the former band and is entitled to an interest in common with its other members in the lands of the band the person joins. Subsection 16(2) provides:[2]

> **16.** …
>
> (2) A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

[18] The right of a member of a band in a reserve cannot therefore be an interest in an individual sense because the interest does not follow the member when he or she leaves the band. And indeed, by simply joining another band, the individual becomes entitled to an interest in common in the lands of that band.

[19] The cause of action in this case is not an abstraction. It arises because of the interest of the members of the Beaver Band in the lands of Indian Reserve 172. It follows that any cause of action for breach of fiduciary duty against the Crown, with respect to reserve lands, is a communal cause of action that belongs to the band members in common, or communally, and not individually. The cause of action does not follow the individual when he or she leaves the band.

[20] Some of the present descendants rely on subsection 15(1) of the *Indian Act*[3] to support their individual right to share in the proceeds of judgment. Under subsection 15(1) of the Act, an Indian who ceased to be a member of a band was entitled to a *per capita* share of capital and revenue monies held by the Crown on behalf of the band and to a capitalized amount of future treaty monies to which the Indian would be entitled, had he or she continued to be a member of the band. Subsection 15(1) provided:

> **15.** (1) Subject to subsection (2), an Indian who becomes enfranchised or who otherwise ceases to be a member of a band is entitled to receive from Her Majesty
>
> (*a*) one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band, and
>
> (*b*) an amount equal to the amount that in the opinion of the Minister he would have received during the next succeeding twenty years under any treaty then in existence between the band and Her Majesty if he had continued to be a member of the band.

[21] The argument seems to be that under subsection 15(1) a member of the band that leaves is entitled to a proportionate share of the communal property of the band. Notably, however, there is no suggestion in subsection 15(1) that an Indian who ceases to be a member of a band is entitled, in any sense, to a proportionate share of the value of the reserve land. Indeed, subsection 18(1) confirms that reserves are set apart for the use and benefit of the band. Subsection 18(1)[4] provides:

> **18.** (1) Subject to this Act, reserves are 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.

Again, this supports the view that the interest of band members in reserve land is a communal, and not an individual, interest. And, it therefore follows that any cause of action against the Crown for breach of fiduciary duty in relation to reserve land belongs to the members of the band collectively and not individually. The reserve land in this case, according to Gonthier J. for the majority in *Blueberry*, *supra*, at paragraph 10, included “the tract of land forming I.R. 172, the minerals in that tract of land, and the right to exploit those minerals”.

[22] I find nothing in subsection 15(1) that suggests that a band member who leaves takes with him or her an individual cause of action for breach of fiduciary duty in respect of reserve land or the right to exploit the minerals thereon or therein. In this case, the cause of action against the Crown for breach of fiduciary duty in relation to Indian Reserve 172 would have belonged initially to the members of the Beaver Band, as a collectivity and, as a result, the proceeds of any judgment would have belonged to the members of that Band as a collectivity. There was no cause of action accruing to members in their individual right and therefore no cause of action to pass on to descendants of individual members.

[23] That is not to say that a band, through appropriate procedures, could not arrange to divide some or all of the proceeds of judgment among its members. However, such division of the proceeds of the judgment is not based on any individual right to those proceeds by the individual members. Rather, it would be a matter to be decided by the band in accordance with the band's decision-making procedure, after the band, as a collectivity, had been successful and had recovered the proceeds of judgment. This appears to be what occurred in *Sabattis v. Oromocto Indian Band* (1988), 86 N.B.R. (2d) 351 (Q.B.).

[24] Does the collective right rather than individual right to the proceeds of judgment change by reason of the Beaver Band being divided in 1977 to form separate bands, the Blueberry and Doig Bands? Some of the present descendants rely on subsection 17(2) of the *Indian Act*[5] which provides:

> **17.** …
>
> (2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.

They argue that because subsection 17(2) only refers to reserve lands and funds, and not to causes of action, the cause of action did not pass to the Blueberry and Doig Bands when they were formed and must therefore have devolved to the members of the Beaver Band in their individual capacities or to their descendants in their individual capacities.

[25] The simple answer here is that had there been no breach of fiduciary duty, when they were formed in 1978, the oil and gas rights to Indian Reserve 172 would have been divided and held for the use and benefit of the Blueberry and Doig Bands in proportions determined by the Minister under subsection 17(2). Because of the breach, there were no oil and gas rights to hold or to divide between the Blueberry and Doig Bands. Therefore, any cause of action against the Crown in respect of the loss of oil and gas rights on Indian Reserve 172 must belong to those who would have been entitled to the benefit of those oil and gas rights, namely the members, collectively, of each of the Blueberry and Doig Bands.

[26] Hugessen J. explains clearly what occurred at paragraph 26 of his April 7, 1999 reasons, which explanation I adopt:

> The rights of the Beaver Band in Indian reserve 172 were collective rights enjoyed by the members for the time being of that Band. When that Band ceased to exist those rights passed to the members of the two successor Bands, the Blueberry River and Doig River Bands. Since those rights were collective and not individual rights, they could neither be exercised by nor transmitted to individuals. The breach of fiduciary duty which has been established in this case was owed to the Beaver Band and the right of action which resulted therefrom was transmitted to the successor Bands. That right was equally a collective right which belonged and still belongs collectively and not individually to the members for the time being of those Bands. It is membership and not ancestry which determines entitlement to reserve lands and, in consequence, to the damages flowing from any breach of fiduciary duty in relation to those lands. Therefore, descendants who are not Band members can have no share in the proceeds of judgment.

[27] Some of the present descendants argue that their rights are treaty rights flowing to them as descendants of the signatories of Treaty 8. The rights at issue here are not treaty rights. They are rights that flowed from Indian Reserve 172 being set aside for the Beaver Band in accordance with the Crown's treaty obligations. The rights were those of the members, collectively, of the Beaver Band, by reason of their membership in the Band and which, for the reasons already set out, passed to the members, collectively, of each of the Blueberry and Doig Bands.

ESTOPPEL

[28] Notwithstanding that their claim to entitlement to share in the judgment of $147 million on the merits cannot succeed, many of the present descendants have advanced a series of estoppel arguments which they say precludes the Blueberry and Doig Bands from denying their entitlement to share:

(a) cause of action estoppel;

(b) issue estoppel;

(c) estoppel by representation; and

(d) estoppel by election.

(a) Cause of Action Estoppel

[29] Cause of action estoppel is, as Dickson J. (as he then was) pointed out in *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, at pages 253-254, one species of estoppel by record or estoppel *per rem judicatam*. Cause of action estoppel precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. For cause of action estoppel to apply, the cause of action must be the same and the parties must be the same.

[30] The present descendants say that the judgment of the Supreme Court, in which all the appellants, including the present descendants, were found to be entitled to damages, constitutes a cause of action estoppel or *res judicata*. They say the reference in the judgment to “the appellants” is a clear and unambiguous statement that the Supreme Court determined their entitlement and the question of their entitlement could not be reopened in the Federal Court Trial Division.

[31] In deciding whether cause of action estoppel is applicable, it is necessary to determine the cause of action upon which the plea of estoppel is based and compare it to the cause of action in the subsequent proceedings. It is apparent from the Supreme Court’s judgment that the cause of action it was deciding was a breach of fiduciary duty by the Crown with respect to mineral rights on Indian Reserve 172. The action was decided in favour of the appellants and against the Crown.

[32] The cause of action in the subsequent proceedings, i.e. on the preliminary question answered by Hugessen J., was one between members of the Blueberry and Doig Bands on the one hand and the present descendants of members of the Beaver Band who were not members of the Blueberry and Doig Bands on the other. The question was one of entitlement to the damages awarded by the Supreme Court against the Crown and not, as in the Supreme Court proceedings, whether the Crown was liable in damages for breach of fiduciary duty.

[33] As between the Crown and all the appellants, including the present descendants, I have no doubt that a cause of action estoppel applies. The Crown cannot relitigate the question of whether it breached its fiduciary duty in respect of mineral rights on Indian Reserve 172 against any of the appellants.

[34] However, it is equally clear that there is nothing in the judgment of the Supreme Court that decides, as between the appellants themselves, the question of entitlement to the damage award of $147 million.

[35] Indeed, the parties who were adverse in interest in the proceedings before the Supreme Court were different from the parties who were adverse in interest on the preliminary question decided by Hugessen J. At the Supreme Court, the cause of action was on behalf of the members of the Blueberry and Doig Bands and the present descendants of the Beaver Band and against the Crown. On the preliminary question decided by Hugessen J., the cause of action was between the present descendants on the one hand and the members of the Blueberry and Doig Bands on the other. There can be no cause of action estoppel or *res judicata* where the parties to the dispute in the original and subsequent proceedings are not the same and the cause of action is not the same.

[36] That the Supreme Court did not decide the entitlement of the present descendants is confirmed by a review of its reasons. However, before considering the Supreme Court’s reasons, it is necessary to deal with a preliminary argument of the present descendants, that it is impermissible to go outside the judgment of the Supreme

Court, that is, to look at its reasons, the pleadings or any other material to decide whether cause of action estoppel applies.

[37] In *Deputy Minister of National Revenue (Customs and Excise) v. Trane Co. of Canada, Ltd.*, [1982] 2 F.C. 194 (C.A.), at pages 205-206, Le Dain J.A. observed that the right to consult the reasons to determine what had been decided by a formal judgment for purposes of a *res judicata* argument was the subject of some division of opinion. Le Dain J.A. refers to Bower *The Doctrine of Res Judicata*, 2nd ed., 1969).

[38] However, in Bower, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996), the current author, Handley J., of the Court of Appeal of New South Wales, states that since the 2nd edition, the law has been settled "in favour of the broader view", that is, that the Court may look at any material that shows what cause of action or what issues were raised and decided. Paragraph 204 states:

> It was formerly considered that the subject matter of a decision for the purposes of *res judicata* could only be ascertained from the formal judgment or order and the court could not examine "what was said by the judges". The previous author was in some doubt but preferred the view that the court's reasons could be considered. There were then many cases favouring the broader view.
>
> Since then the law has been settled in favour of the broader view. In *R v Humphrys* Lord Hailsham said: "The court will inquire into realities, and not mere technicalities", and in *Rogers v R* Brennan J said that the court could look at "any material that shows what issues were raised and decided". The point now seems to be assumed. Thus, in *Thrasyvoulou* the House considered reports of planning inspectors. In *Arnold* it held that issue estoppel was excluded because of the special circumstances but that question could not be investigated if the court were confined to the pleadings and the order.
>
> The court can consider the pleadings, particulars, evidence, the notice of appeal or cross-appeal, the reasons for judgment, the summing up, any questions put to the jury and its answers. [Footnotes omitted.]

I agree that the Court should look into realities to decide what cause of action was decided. To confine the Court to what will often be a brief, cryptic judgment serves no useful purpose. Indeed, reference exclusively to such a cryptic judgment could be misleading as the judgment may appear to indicate as a decided cause of action one which in fact was not decided. I see no reasons to preclude a reviewing Court from at least having regard to reasons for judgment to satisfy itself as to what cause of action was actually decided. In this case, it is permissible to have regard to the reasons of the Supreme Court to determine whether cause of action estoppel applies.

[39] There are two references in the reasons of the Supreme Court to "the appellants". However, nowhere in its reasons is there any mention of "present descendants". On the other hand, there are some references in the reasons that suggest that the Supreme Court was focussing on the Blueberry and Doig Bands as the only appellants. Thus, in the minority reasons of McLachlin J. [at paragraphs 29, 30, 32 and 123]:

> In 1977, the Band [Beaver Band] was divided into the Blueberry River Band and the

> Doig River Band. … The Bands [Blueberry and Doig Bands] claimed damages against the Crown ….
>
> Addy J. at trial dismissed all the Bands' claims …. The Bands appealed to this Court ….
>
> …
>
> The Bands argue[d] ….
>
> The Bands are entitled to damages against the Crown ….

In these references, it would appear that McLachlin J. was equating "the appellants" with the Blueberry and Doig Bands. There is no reference to the present descendants. It would seem that the inclusion of the present descendants in the style of cause as represented plaintiffs was not of significance to the Supreme Court. I think it is quite obvious, from a review of its reasons, that the Supreme Court did not decide the question of the entitlement of the present descendants.

[40] There is one other reason why the Supreme Court cannot be said to have decided the entitlement of the present descendants to share in the proceeds of judgment. "Present descendants" is not a precisely defined term. Counsel for the present descendants acknowledged before this Court that membership in the class was something that had yet to be determined. The question of whether present descendants means present descendants at the time the action was commenced, when judgment was given, or at some other time, has to be answered. Further, it is not clear whether the present descendants class includes a descendant of anyone who was ever a member of the Beaver Band or only descendants of those who were members of the Beaver Band at the time the breach of fiduciary duty occurred. The Supreme Court judgment does not address the question of the precise definition of the present descendants class. I do not see how it can be said that the Supreme Court decided that the present descendants were entitled to participate in the proceeds of judgment when the definition of the present descendants class has not been determined.

[41] An alternative argument made by the present descendants is that cause of action estoppel applies even if the original court did not pronounce on the issue, if the issue properly belonged to the subject of the litigation and might have been brought forward. They suggest that if the entitlement of the present descendants was not expressly determined by the Supreme Court, it was an issue that should have been brought forward by the representative plaintiffs and they are now estopped from doing so. They rely on the well-known passage from the judgment of Wigram V.C. in *Henderson v. Henderson* (1843), 3 Hare 100; 67 E.R. 313, at pages 319-320:

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because

> they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time …. It is plain that litigation would be interminable if such a rule did not prevail.

[42] The argument of the present descendants does not apply here. The question of the entitlement of the present descendants to share in the proceeds of judgment is an issue between the present descendants and the members of the Blueberry and Doig Bands. It was not an issue between the represented plaintiffs as a class and the Crown. Put another way, if the Crown had failed to raise an argument or thought of a new argument against the represented plaintiffs, cause of action estoppel or *res judicata* would bar the Crown from fresh litigation against the represented plaintiffs.

[43] However, the question is now one between the represented plaintiffs. It is not something the Crown is raising to reopen the issue of its liability or the quantum of damages. The question is raised solely as between the represented plaintiffs. It is not a matter fundamental to the litigation between the represented plaintiffs and the Crown. The liability of the Crown arises because it breached its fiduciary duty in respect of oil and gas on Indian Reserve 172. The liability or quantum of damages does not depend on the entitlement of any specific represented plaintiff or group of represented plaintiffs. Clearly, the litigation proceeded on the assumption that the Crown, if liable, would be liable to some or all of the represented plaintiffs. But liability to any specific represented plaintiff or group of plaintiffs was not an issue in the litigation with the Crown.

[44] I am satisfied that cause of action estoppel or *res judicata* does not apply.

(b) Issue Estoppel

[45] Issue estoppel arises when, notwithstanding that the cause of action in the subsequent case is different, a point or issue was decided in the earlier case that one of the parties wishes to be redecided in the subsequent case. In *Angle*, *supra*, at page 254, Dickson J. cites the description of issue estoppel given in well-known cases from the High Court of Australia and the House of Lords:

> The second species of estoppel *per rem judicatam* is known as “issue estoppel”, a phrase coined by Higgins J., of the High Court of Australia in *Hoystead* v. *Federal Commissioner of Taxation*, at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where the cause of action being different, some point or issue of fact has already been decided (I may call it “issue estoppel”).
>
> Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, at p. 935, defined the requirements of issue estoppel as:
>
> > … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or

> their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. … [Footnotes omitted.]

[46] The present descendants say that the issue of their status as plaintiffs in the action was raised and decided in the original Trial Division proceedings. They rely on the transcript of proceedings before the Trial Judge, Addy J., in 1987, in which the description of the present descendants was discussed with the Court. It appears that the original style of cause read:

> Joseph Apsassin, Chief of the Blueberry Indian Band and Jerry Attachie, Chief of the Doig River Indian Band, on behalf of themselves and all other members of the Doig River Indian Band, the Blueberry Indian Band and all descendants of the St. John Beaver Band of Indians. [Emphasis added.]

Addy J. was concerned: first that the two named representative plaintiffs, Mr. Apsassin and Mr. Attachie, had authority to represent all the members of the Blueberry and Doig Bands; and second, that "all descendants" could include descendants who were dead or were not yet born and that non-living persons could not be represented before the Court.

[47] The transcript indicates that as a result of representations made, Addy J. was satisfied that the two named plaintiffs had the authority to represent the members of the Blueberry and Doig Bands. As to descendants, the parties agreed, and Addy J. ordered, that the style of cause be amended to read "present descendants" to avoid the problem of non-living persons being before the Court.

[48] Having regard to the pleadings and the transcript of proceedings before Addy J., it is apparent that in addressing the question of "descendants", Addy J. was not deciding their entitlement to claim against any fund of damages that might result from the proceedings. Their status as plaintiffs only arose because of Addy J.'s concern that the Court could not award damages to dead or unborn persons. Hence the insertion of the word "present" in the style of cause. This was a preliminary matter of status as to who were proper plaintiffs before the Court, not a substantive determination that any of the plaintiffs had any particular entitlement or indeed, any entitlement at all. The issue was raised before the trial began and before it was known whether the defendant was even liable.

[49] The issue of entitlement of the present descendants was decided for the first time by Hugessen J. in his decision of April 7, 1999, which is the subject of this appeal. It had not previously been decided by Addy J.

[50] The plea of issue estoppel is not well-founded.

(c) Estoppel by Representation

[51] In *Greenwood v. Martins Bank Ld.*, [1933] A.C. 51 (H.L.), at page 57, Lord Tomlin defined the essential conditions for estoppel by representation:

> (1.) A representation or conduct amounting to a representation intended to induce a

course of conduct on the part of the person to whom the representation is made.

(2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

(3.) Detriment to such person as a consequence of the act or omission.

Other statements of the doctrine of estoppel by representation are to similar intents. See Bower, *The Law Relating to Estoppel by Representation*, 3rd ed. by A. Turner (London: Butterworths, 1977), at pages 4-6.

[52] The present descendants say that the representative plaintiffs, Mr. Apsassin and Mr. Attachie, deliberately included the present descendants in the style of cause in their pleadings, pleaded they were representing the present descendants, admitted before Addy J., through their counsel, that the present descendants had rights, and obtained the confidence of the Court that they were representing the present descendants as well as the members of the Blueberry and Doig Bands. It is said that they cannot now resile from that position. Although the present descendants make this argument under the heading of "*Res Judicata*", the way in which this argument is framed is not that the Supreme Court has decided the matter, but rather that representations were made with respect to which the representative plaintiffs, on behalf of the members of the Blueberry and Doig Bands, cannot now resile. One recognizable legal doctrine which might apply is estoppel by representation. The other might be the doctrine of election with which I deal in the next portion of these reasons.

[53] As to estoppel by representation, it is apparent that the key ingredients are not present. Even if the representative plaintiffs' conduct could be said to constitute representations intended to induce the present descendants to rely on the representative plaintiffs in this action, the present descendants suffered no detriment as a result. By reason of the judgment of the Supreme Court, the action taken by the representative plaintiffs was ultimately successful. When the question of entitlement of the present descendants to share in the damage award arose, a procedure was established which gave notice to the present descendants to file claims, and subsequently, to be represented both in the formulation of the preliminary question as to their entitlement, and then, in the argument on that question. As Hugessen J. pointed out in his reasons, and I agree, there is no suggestion that the present descendants had detrimentally changed their position as a result of the actions of the representative plaintiffs.

[54] A variation of the estoppel by representation argument of the present descendants is that it is implicit in a representative action that all members represented have a common grievance and that there is no internal conflict of interest within the represented plaintiffs. Once judgment is given and no variation of the composition of the represented class has been requested or granted, the representative plaintiffs are estopped from denying the entitlement of any represented plaintiff.

[55] Rule 1711 [*Federal Court Rules*, C.R.C., c. 663] (now section 114 [SOR/98-106]) provides for the bringing of a representative action:

> *Rule 1711.* (1) Where numerous persons have the same interest in any proceeding, the proceeding may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them representing all or as representing all except one or more of them.

[56] In *General Motors of Canada Ltd. v. Naken et al.*, [1983] 1 S.C.R. 72, Estey J., referring to the case of *May v. Wheaton* (1917), 41 O.L.R. 369, stated at page 84:

> There was there a "fund" or common asset of finite proportions determinable without a series of individual damage or other assessment proceedings. There may, of course, be some hearing, with or without evidence, to determine proportionate interests as between claimants on the common fund, but this is a process quite separate and distinct in character from the hearing to determine the finite common fund or asset sought to be recovered *in toto* by a representative action for the class as a whole.

[57] In *Appleyard v. McInnis Equipment Ltd. (Receiver-Manager of)* (1986), 11 C.C.E.L. 285 (Ont. H.C.), Rosenberg J. wrote at page 287:

> In my view, the appropriate sequence is first, the determination of whether or not there is any money to be divided up and secondly, if there is such money to be divided, a determination of how it is to be divided with the defendants playing no role in that determination.
>
> It seems probable that each of the four classes of employees will have to be represented separately if such a reference becomes necessary ….
>
> I am of the view, as I have expressed, that the first stage of the proceedings should determine whether or not there are any funds available for all employees who have contributed to the plan. Any amount found to be available, will then have to be divided and this should be the second stage. The defendants should not be involved in that second stage.

[58] What seems clear from these authorities is that in a representative action, three determinations must be made: liability; quantum of damages; and entitlement amongst the represented plaintiffs. The order in which these determinations are made will depend on the relevant legislation or rules of court, e.g. class action rules, and the circumstances, e.g. whether damages are determinable independent of, or dependent on, the identity or number in the represented class.

[59] The present case is quite similar to *Appleyard*. There, a class action was brought on behalf of former employees for proceeds of a pension surplus. The representative plaintiffs disputed the composition of the class, noting that one group had no claim since their pension rights had not vested. The Court recognized the problem but allowed the action to proceed, with the disputed group included, noting that the defendant's liability would be the same regardless of the number of people included in the class. In other words, the defendant's liability for lump sum damages could be determined first, and the entitlement of groups within the class be determined later.

[60] Similarly, in the present case, the Supreme Court of Canada found the Crown liable for a finite amount of damages based on the loss of mineral rights in I.R. 172. This

is quite unlike *Naken*, where damages had to be calculated for each individual member of the class; in such a situation, the defendant has an interest in restricting the class as much as possible and will raise this before the Court. Such judicial scrutiny of the composition of a represented group is less likely to be requested at an early stage where the defendant has no interest in the question, or even prefers it to be construed as widely as possible.

[61] In most cases, it is likely that the composition of the represented class will be determined prior to the hearing of the case on liability and damages. Perhaps this is preferable. Nonetheless, where relevant legislation or rules, e.g. class action rules, do not apply so as to require certification of the class in advance of the case proceeding on liability and damages, it remains open to the Court to examine the issue when it is raised.

[62] Ultimately, neither subsection 1711(1) of the Rules nor the bringing of a representative action, of itself, confers rights on any specific member of the represented class. As noted by Cattanach J. in *Blackie v. Post Master General* (1975), 61 D.L.R. (3d) 566 (F.C.T.D.), at page 569:

> Further, in my view, Rule 1711 does not entitle those who are suing in a representative capacity to obtain relief on behalf of the persons represented which those represented could not obtain themselves.

The mere inclusion of names or a class in a style of cause, even if the inclusion is deliberate, as was the case here, does not confer rights or entitlement on persons who could not, in a separate or individual action, prove those rights or entitlement.

[63] The bringing of a representative action in the name of represented plaintiffs or classes of represented plaintiffs does not, of itself, establish that they have a common interest. This requires a determination by a court. Here, prior to the decision of Hugessen J. on April 7, 1999, there had been no determination of whether the present descendants had a common interest with the other represented plaintiffs, the members of the Blueberry and Doig Bands. It was the April 7, 1999 decision that determined that the present descendants had no entitlement and therefore no common interest with the members of the Blueberry and Doig Bands.

[64] As I have said, it is clear that the representative plaintiffs and the Blueberry and Doig Bands deliberately intended to include the present descendants as plaintiffs in the representative action. Comments of counsel for the plaintiffs at the trial (different counsel than appeal in the Supreme Court of Canada, before Hugessen J. and before this Court) suggest that he and the members of the two bands were of the view that the present descendants did have the right to share in an award of damages arising from the action. However, until the judgment of Hugessen J. of April 7, 1999, the entitlement of the present descendants had never been decided.

[65] The most that can be said is that the representative plaintiffs included as plaintiffs all who may have had an interest in an award of damages, leaving it for a later date for actual determination of entitlement. That seems to be what occurred in *Clayoquot Band*

of Indians v. British Columbia (1986), 3 B.C.L.R. (2d) 60 (S.C.), at page 65. McEachern C.J.S.C. (as he then was) observed:

> As I said to counsel during the hearing, we are in a problem-solving exercise on these applications and I have the view that the best that can be done is to cover all bases by ensuring that all proper interests are represented and to leave it to the trial judge to decide on the evidence whether the rights asserted in the action, if any, belong to the bands or to some other entities or to the members.

[66] The circumstances are similar here. The proceedings before Hugessen J. in which he determined that the present descendants had no entitlement to share in the damage award of $147 million followed a procedure similar to that in *Appleyard* and the process envisaged by McEachern C.J.S.C. in *Clayoquot Band of Indians*.

[67] The present descendants' claim based on estoppel by representation fails.

(d) Estoppel by Election

[68] In general, election is the doctrine that if a person has a choice of one of two rights, but not both, where he chooses one, he cannot afterwards assert the other. Although an election must normally be communicated, detrimental reliance by a second party is not a necessary element. The doctrine was reviewed by Laycraft J.A. in *Harding v. Thomson* (1982), 39 A.R. 361 (C.A.), at paragraphs 27-29:

> In *United Australia Ltd. v. Barclay's Bank Ltd.*, [1941] A.C. 1, Lord Atkin developed further a principle which he had earlier stated in *Lissenden v. C.A.V. Bosch Ltd*., [1940] A.C. 412. In the latter case at page 429 he expressed "what is meant by election whether at common law or in equity":
>
> > In cases where the doctrine does not apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law.
>
> In *United Australia Ltd. v. Barclay's Bank Ltd.*, *supra*, at page 30, Lord Atkin said:
>
> > On the other hand, if a man is entitled to one or two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal: the right of a landlord where forfeiture of a lease has been committed to exact the forfeiture or to treat the former tenant as still tenant and the like. To those cases the statement of Lord Blackburn in *Scarf v. Jardine* ((1882) 7 App. Cas. 345 (H.L.) at 360) applies "where a man has an option to choose one or other or two inconsistent things when once he has made his election it cannot be retracted."
>
> This rule has not been doubted in Canada though, on occasion, it is not applied because, on examination, the two rights in contest prove not to be inconsistent with each other.

[69] The leading British authority on election is the decision of the House of Lords in *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corporation of India (the "Kanchenjunga")*, [1990] 1 Lloyd's Rep. 391 (H.L.). In speaking for a unanimous court, Lord Goff held at page 398:

> Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision being a matter of choice for him, is called in law an election …. In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it.

[70] The present descendants contend that the representative plaintiffs made an election to bring the action for breach of fiduciary duty against the Crown on behalf of the present descendants as well as members of the Blueberry and Doig Bands. As the Supreme Court of Canada has rendered judgment in favour of "the appellants" including the present descendants, the present descendants argue that the election to represent them is now irrevocable and that the representative plaintiffs cannot resile from their obligation to allow the present descendants to share in the proceeds of judgment.

[71] The doctrine of election is not applicable here. As the House of Lord's pronouncement in *The* "*Kachenjunga*" and Laycraft J.A.'s review of the law in *Harding v. Thomson*, *supra*, show, election requires a choice to be made between two mutually exclusive rights available to a person. Examples include deciding whether to affirm a contract in spite of a breach or to rescind it, whether to accept a benefit under a will or challenge the will's validity or whether to accept a tenant's rent in spite of a breach of the lease or to forfeit the lease. Election is about choosing between alternative rights available to oneself.

[72] In bringing the action on behalf of the present descendants as well as the Blueberry and Doig Band members, the representative plaintiffs were not choosing between alternative, mutually exclusive, rights available to themselves as the doctrine of election requires. Rather, they made a voluntary decision to expand the class of plaintiffs.

[73] This was a representative action in which it was their intention to include as plaintiffs all possible claimants. There is a suggestion in the transcript of the proceedings before Addy J. that they did so because of some pressure on the part of the Crown, that the Crown wanted to ensure that all possible plaintiffs be included to avoid subsequent litigation. There is also an indication that counsel for the representative plaintiffs thought that the present descendants did have a right to share in the proceeds of a successful judgment. Whatever the reason, the voluntary inclusion of the present descendants as represented plaintiffs did not involve the choice of one of two mutually exclusive rights accruing to the representative plaintiffs or to members of

the Blueberry River or Doig River Bands. No authority was cited by the present descendants to the effect that representative plaintiffs choosing to broaden the class of represented plaintiffs constitutes an election which, of itself, entitles all the included plaintiffs to share in the proceeds of judgment. The doctrine of election is not applicable.

ABUSE OF PROCESS

[74] Some of the present descendants argue that it was an abuse of process for the representative plaintiffs and counsel who had acted and achieved success in the Supreme Court of Canada to settle the question of damages with the Crown and to then question the entitlement of the present descendants. It is said that it was an abuse of process for counsel for the representative plaintiffs to seek a court order for the settlement amount of $147 million and then to participate with the Motions Judge to formulate the preliminary question as to the entitlement of the present descendants.

[75] The abuse of process argument is another attempt at an estoppel argument. It ignores the three-step process involved in this type of representative action, to determine liability, damages and entitlement amongst the represented class. For purposes of the questions of liability and quantum of damages, the representative plaintiffs were *dominus litus*. They were fully entitled to carry the litigation and settle the question of damages.[6] The duty to the represented plaintiffs is one of fair representation.[7] However, there is no suggestion by any of the present descendants that they were not fairly represented or that any issues relating to the settlement that may have affected them were not brought to the attention of the Court.

[76] Once liability and quantum of damages were finalized, I can see nothing wrong, and indeed, I think it was probably incumbent on counsel for the representative plaintiffs, in bringing to the Court's attention the question of entitlement of the present descendants. The Court required that notice be given to the present descendants, heard the present descendants on the formulation of the preliminary question and on the answer to the preliminary question. When the issue of entitlement arose and notice was given to them, many of the present descendants retained counsel, including counsel who appeared before this Court.

[77] The abuse of process argument is without merit.

APPREHENSION OF BIAS AND PREDETERMINATION

[78] Some of the present descendants say that Hugessen J., in reasons for order and order dated February 24, 1999 [[1999] F.C.J. No. 257 (T.D.) (QL)] denying a motion for an advance of legal costs to some of the present descendants, indicated that he had predetermined the preliminary question, or at least, that his words raised a reasonable apprehension of bias.

[79] Hugessen J. pointed out in his reasons that the costs that were being sought in advance were for the purpose of the present descendants establishing their entitlement to share in the damage fund. He observed that if the question of entitlement was determined favourably to one or more of the present descendants, the question of costs

could then be addressed. Conversely, if the question of entitlement of any present descendant was determined adversely, the present descendants would have no right of any kind to the proceeds of judgment. He concluded [at paragraph 4]:

> I [*sic*] would be grotesque if the costs of such claimants unsuccessful attempt to claim that which was not their due should be charged against those who are entitled to such proceeds. To put the matter another way, the present claimants are seeking to have now a part of the fruits of these very proceedings before those proceedings are determined in the [*sic*] favour. Given the large number of claimants, such an attempt, if successful, would result in the speedy dissipation of the judgment proceeds to persons who may not be entitled thereto.

[80] With respect to the application for an oral hearing, Hugessen J. stated [at paragraph 2]:

> The plaintiffs, respondents on the present motion, while opposing the motion, also seek an oral hearing thereof. In my view, the motion is so manifestly forlorn and without hope of success that the ordering of an oral hearing would be a waste of everybody's time and money.

[81] I agree with Hugessen J. that such a motion was "manifestly forlorn" so as not to justify an oral hearing. And I also agree that to confer on present descendants any part of a fund in advance of their entitlement to share being established would have been totally inappropriate.

[82] The language of the Motions Judge was strong, but was, in my opinion, apposite in view of the presumptuous nature of the motion.

[83] There is nothing in his reasons of February 24, 1999 that suggests any apprehension of bias or predetermination. On the contrary, the reasons express, in an even-handed manner, the possible outcome, either way, of the preliminary question as to entitlement.

[84] This argument is entirely without merit.

CONCLUSION

[85] The entitlement to the judgment of $147 million arising from the breach of the Crown's fiduciary duty in respect of Indian Reserve 172 belongs to the two collectivities that are successors to the Beaver Band, the Blueberry and Doig Bands. The present descendants who are not members of either Band have no right to share in the proceeds of judgment. I would dismiss the appeal with costs. I would make no award of costs for or against Her Majesty the Queen in Right of Canada or the Public Guardian and Trustee of British Columbia.

RICHARD C.J.: I agree.

LÉTOURNEAU J.A.: I agree.

[1] This section is cited from R.S.C., 1985, c. I-5, s. 2(1). In prior versions of the *Indian Act*, which were in force at the time of the breach by the Crown of its fiduciary duty in respect of mineral rights on Indian Reserve 172, or when the action was commenced, a “band” was defined, for purposes of this case, in similar terms.

[2] This section is cited from R.S.C., 1985, c. I-5. In prior versions of the *Indian Act*, which were in force at the time of the breach by the Crown of its fiduciary duty in respect of mineral rights on Indian Reserve 172, this provision was defined, for purposes of this case, in similar terms.

[3] S. 15(1) was enacted by S.C. 1951, c. 29. It was repealed by R.S.C., 1985 (1st Supp.), c. 32, s. 5.

[4] This section is cited from R.S.C., 1985, c. I-5. In prior versions of the *Indian Act*, which were in force at the time of the breach by the Crown of its fiduciary duty in respect of mineral rights on Indian Reserve 172, this provision was defined, for the purposes of this case, in similar terms.

[5] This section is cited from R.S.C., 1985, c. I-5. In prior versions of the *Indian Act*, which were in force at the time of the breach by the Crown of its fiduciary duty in respect of mineral rights on Indian Reserve 172, this provision was defined, for purposes of this case, in similar terms.

[6] S. Goulding, *Odgers on Civil Court Actions*, 24th ed. (London: Street & Maxwell, 1996), at paras. 2.27 and 2.29; *Handford v. Storie* (1825), 2 Sim. and St. 196; 57 E.R. 320, at p. 321.

[7] *Odgers*, *supra*, note 6, at paras. 2.34-2.36.