St. Mary's Indian Band *v*. Cranbrook (City), [1997] 2 S.C.R. 657

**St. Mary's Indian Band and St. Mary's Indian Band Council** *Appellants*

*v.*

**The Corporation of the City of Cranbrook** *Respondent*

and

**The Attorney General of Canada** *Intervener*

**Indexed as: St. Mary's Indian Band *v*. Cranbrook (City)**

File No.: 24946.

Hearing and judgment: February 19, 1997.

Reasons delivered: June 26, 1997.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

*Indians -- Reserves -- Definition of "reserve" amended to include "designated lands" released or surrendered "otherwise than absolutely" -- Reserve lands surrendered at market value for airport but with the proviso that land would revert*

*to reserve if not used for public purposes -- Whether lands surrendered for airport "designated lands" -- Whether common law real property principles apply to surrender of Indian reserve lands -- Indian Act, R.S.C. 1952, c. 149, ss. 2(1) "reserve", "surrendered lands", 37(1), 38(1), (2) -- Indian Act, R.S.C., 1985, c. I-5, ss. 2(1) "designated lands", "reserve", 37(1), (2), 38(1), (2), 83(1)(a).*



In 1966 the appellants surrendered part of their reserve for full market value to the Federal Crown for use as a municipal airport and subject to the stipulation that it would revert to the band if it ceased to be used for public purposes. The *Indian Act* limits a band's property tax power to interests of land "in the reserve", but in 1988 the Kamloops Amendments amended the *Indian Act* to provide that certain forms of surrendered land -- land surrendered "otherwise than absolutely" -- would be brought within the legal definition of reserve. The appellants levied property taxes in 1992 on the ground that the stipulation to the surrender made the transfer "otherwise than absolut[e]" with the result that the surrendered land fell within the "designated lands" category of the reserve.

When the respondent refused to pay, the band successfully sued but the judgment at trial was reversed on appeal. The Attorney General of Canada was granted intervener status because the band claimed taxes from it under identical circumstances but in a separate action.

The central question before this Court was whether the appellants' surrender was made "otherwise than absolutely" such that these surrendered lands now fall within the definition of "designated lands" under the current *Indian Act.* This required the Court to consider whether the *sui generis* nature of native land rights means that

common law real property principles do not apply to the surrender of the Indian reserve lands under the provisions of the *Indian Act.*

*Held*: The appeal should be dismissed.

Given the *sui generis* nature of native land rights, the Court must go beyond the usual restrictions of the common law (which would embrace the minutiae of the language in the surrender documents and traditional distinctions between determinable limitations and conditions subsequent) and look more closely at the respective intentions of the band and the Crown when the lands were surrendered.

The appellants intended to part with the land on an absolute basis. First, the band surrendered the land for sale. Second, the band entered into negotiations with the Crown upon the full understanding that the impugned lands were to be sold for use as an airport. Third, in return for its surrender, the Crown paid the appellants the full market value of the land. The mere fact that the band included a rider in its surrender does not necessarily mean that the surrender was other than absolute. "Absolute" and "conditional" are not mutually exclusive terms -- either conceptually or under the scheme of the *Indian Act*. A key element of both the 1952 and 1988 versions of the *Indian Act* is that they expressly provide that a surrender can be both absolute and conditional.

The Kamloops Amendments created a two-tier system of surrenders which was intended to clarify the status of reserve lands surrendered for lease primarily for purposes of taxation. Surrenders for lease fall within the definition of "designated lands" and surrenders for sale remain beyond the definition of reserve. The broad phrase "otherwise than absolutely" allows for other limited forms of surrenders (such as a right

of way) to be considered designated land and yet ensures that other forms of permanent surrenders, be they conditional or unconditional (such as an exchange or gift) remain beyond the notion of reserve land. The definition of "designated lands" therefore does not capture the airport lands.



**Cases Cited**

**Referred to:** *Leonard v. R. in Right of British Columbia* (1984), 52 B.C.L.R. 389; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

**Statutes and Regulations Cited**

*Indian Act*, R.S.C. 1952, c. 149, ss. 2(1) "reserve", "surrendered lands", 37(1), 38(1), (2).

*Indian Act*, R.S.C., 1985, c. I-5, ss. 2(1) "designated lands" [ad. c. 17 (4th Supp.), s. 1], "reserve" [am. *idem*], 37 [rep. & sub. *idem*, s. 2], 38 [*idem*], 83(1)(*a*) [*idem*, s. 10].

**Authors Cited**

Canada. *House of Commons Debates*, vol. XIII, 2nd sess., 33th Parl., June 2, 1988, pp. 16046-47.

APPEAL from a judgment of the British Columbia Court of Appeal (1995), 10 B.C.L.R. (3d) 249, 62 B.C.A.C. 109, 103 W.A.C. 109, 126 D.L.R. (4th) 539, [1995] 10 W.W.R. 371, [1996] 2 C.N.L.R. 222, [1995] B.C.J. No. 1575 (QL), allowing an

appeal from a judgment of Spencer J., [1994] 3 C.N.L.R. 187, 114 D.L.R. (4th) 752, [1994] B.C.J. No. 1144 (QL). Appeal dismissed.

*John L. Finlay* and *Janna Sylvest*, for the appellants.

*Christopher S. Murdy* and *David Garraway*, for the respondent.

The judgment of the Court was delivered by

1 THE CHIEF JUSTICE -- In early 1966, the St. Mary's Indian Band surrendered a portion of its reserve to the Federal Crown for the construction of a municipal airport in Cranbrook, British Columbia. The purpose of this appeal, which is brought by the band from a judgment of the British Columbia Court of Appeal, is to determine whether these surrendered lands come within the legal definition of "reserve" and are subject, therefore, to the property tax jurisdiction of the band under s. 83(1)(*a*) of the *Indian Act*, R.S.C., 1985, c. I-5.

2 At the conclusion of the hearing, the Court rendered judgment in favour of the respondent, the City of Cranbrook. I indicated at that time that the result reached by the British Columbia Court of Appeal, disallowing the property tax, was correct and the Court thus dismissed the appeal with reasons to follow. The Court's full reasons for its decision are now set out below.

I. Factual and Procedural Background

3 The appellants are an Indian band with reserve lands in the Province of British Columbia. In 1966, the appellants surrendered a 598-acre portion of their reserve

(the "airport lands") to the Federal Crown on the express understanding that the land would eventually be sold for the construction and operation of a municipal airport. By order in council, the Crown paid the full market value of the lands ($35,880) into trust and both parties agreed "that should at any time the said lands cease to be used for public purposes they will revert to the St. Mary's Indian Band free of charge". Following the surrender, the Crown transferred the land by subsequent order in council to Transport Canada. It, in turn, leased the land to the respondent City of Cranbrook and together they built the planned airport.



4 From 1966-1992, the respondent operated the airport and at no point during that period did the appellants request any form of payment for local property tax purposes. This is presumably because: (a) s. 83(1) of the *Indian Act* limits a band council's property tax power to interests of land "in the reserve"; and (b) during that period, the *Indian Act* seemed to exclude lands which had been surrendered by a band from the operative definition of reserve. At that time, land was either in the reserve or surrendered -- it could not be both. See *Leonard v. R. in Right of British Columbia* (1984), 52 B.C.L.R. 389 (C.A.).

5 However, in 1988 the *Indian Act* was amended (S.C. 1988, c. 23, s. 1 (now R.S.C., 1985, c. 17 (4th Supp.)) (the "Kamloops Amendments")) and the definition of "reserve" was altered. "Reserve" was restructured to include "designated lands" which the Act defined as:

> **2.** ...
>
> ... a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, <u>otherwise than absolutely</u>, released or surrendered its rights or interests, whether before or after the coming into force of this definition; [Emphasis added.]

Put differently, the Kamloops Amendments made it such that certain forms of surrendered land -- land surrendered "otherwise than absolutely" -- would be brought within the legal definition of reserve.



6 In 1992, on the strength of the new definition, the appellants levied property taxes of approximately $300,000 on the City of Cranbrook for the airport lands pursuant to s. 83(1) of the *Indian Act*. It was the appellants' position that even though the lands were surrendered for sale in 1966, the agreement that the lands would revert to the band if they "cease[d] to be used for public purposes" meant that the transfer was "otherwise than absolut[e]" and hence within the "designated lands" category of the reserve.

7 The City of Cranbrook refused to pay the property taxes levied by the band. It interpreted the initial transfer of the airport lands as an absolute surrender for sale. The band received full market value compensation and the respondent interpreted the "cease[d] to be used for public purposes" rider as merely a condition upon the absolute transfer.

8 Given Cranbrook's refusal to pay, the band brought an action against the respondent for the payment of outstanding property taxes. The Attorney General of Canada was granted intervener status in the case because, in a separate action, the band claimed taxes from the Government of Canada under identical circumstances.

9 On May 20, 1994, the Supreme Court of British Columbia released its decision on an application for summary judgment made by the appellants ([1994] 3 C.N.L.R. 187). The single issue according to Spencer J. was whether the "cease to be used for public purposes" stipulation rendered the surrender of the airport lands "otherwise than absolut[e]". To make this determination, Spencer J. looked to the

provisions of the *Indian Act* as they existed at the time of the surrender in 1966. At that time, s. 38(2) provided that a "surrender may be absolute or qualified, conditional or unconditional". Spencer J. concluded that the "cease[d] to be used for public purposes" stipulation made the surrender a qualified one. Spencer J. acknowledged that there is a common law distinction between a determinable fee and a fee subject to a condition subsequent, but ultimately held that traditional real property concepts do not apply to Indian land holdings which have been characterized as *sui generis*. Instead, Spencer J. applied strict dictionary notions to the surrender, and for the simple reason that there was a limitation on the surrendered interest, he concluded that the surrender was qualified. Spencer J. ordered respondent to pay the appellants $334,611.38 in property taxes plus interest to the date of the judgment in the amount of $26,797.63.

10 On appeal, a unanimous British Columbia Court of Appeal (1995), 10 B.C.L.R. (3d) 249, reversed the ruling of Spencer J. Hutcheon J.A. first noted that the Kamloops Amendments were the direct legislative response to the Court of Appeal's prior holding in *Leonard*, *supra*, where it had held that land surrendered by an Indian band situated on the Kamloops Reserve was no longer a part of the reserve for the purpose of provincial sales tax exemptions. Parliament responded to *Leonard* by enacting a two-tiered system of surrender whereby lands surrendered for sale would remain outside the reserve and lands surrendered for lease would be drawn within the notion of reserve. Hutcheon J.A acknowledged that native land rights are *sui generis*, but rejected the band's argument that this status suspends the application of the ordinary rules of property law. Using ordinary real property principles, Hutcheon J.A. characterized the airport lands surrender as the transfer of a fee simple defeasible by a condition subsequent, and hence as an absolute transfer. He distinguished that surrender from the granting of a determinable fee, in which case the band would have retained a

taxable interest in the land. Accordingly, the Court of Appeal held that the City of Cranbrook was not liable to the band's property tax assessment.



II. Issues

11 This appeal asks one central question:

> Was the appellants' surrender of the airport lands made "otherwise than absolutely" such that these surrendered lands now fall within the definition of "designated lands" under the current *Indian Act*?

This requires the Court to consider the following issue, as identified and argued by the parties:

> Whether the *sui generis* nature of Native land rights means that common law real property principles do not apply to the surrender of the Indian reserve lands under the provisions of the *Indian Act.*

In my view, the other two issues raised by the appellants do not arise on the facts of this case.

III. Relevant Statutory Provisions

12 *Indian Act*, R.S.C. 1952, c. 149

> **2.** (1) ...
>
> (*o*) "reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;
>
> ...
>
> (*q*) "surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart.

**37.** Except where this Act otherwise provides, 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.

**38.** (1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.

(2) A surrender may be absolute or qualified, conditional or unconditional.

*Indian Act*, R.S.C., 1985, c. I-5

**2.** (1) ...

"designated lands" means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

"reserve"

(*a*) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(*b*) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 and 60 and the regulations made under any of those provisions, includes designated lands;

**37.** (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

**38.** (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

**83.** (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for....

> (*a*) ... taxation for local purposes of land, or interest in land, in the reserve, including rights to occupy, possess or use land in the reserve;

IV. Analysis



13 At the conclusion of the hearing of this case, I announced the Court's decision to dismiss the appeal. Implicit in that decision was this Court's finding that the St. Mary's Indian Band's surrender of the airport lands was not "otherwise than absolut[e]" and thus that these lands were not "designated lands" within the meaning of the current *Indian Act*. That holding was prompted by two conclusions. First, despite the *sui generis* nature of native land rights, the nature of the band's surrender of the airport lands, and the context in which it was made, make it clear that appellants' true intention was to part with the impugned lands on an absolute basis. Second, the effect of the Kamloops Amendments was to draw native lands surrendered for lease back into the reserve. Lands surrendered for sale were clearly intended to remain outside the band's property tax jurisdiction.

A. *The Sui Generis Nature of Native Land Rights*

14 I want to make it clear from the outset that native land rights are *sui generis*, and that nothing in this decision should be construed as in any way altering that special status. As this Court held in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, native land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving this case.

15 But what does this really mean? As Gonthier J. stated at paras. 6 and 7 in *Blueberry River, supra*, it means that we do not approach this dispute as would an ordinary common law judge, by strict reference to intractable real property rules:

> In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is *sui generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members' intention should be given legal effect.
>
> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.

This passage confirms that we do not focus on the minutiae of the language employed in the surrender documents and should not rely upon traditional distinctions between determinable limitations and conditions subsequent in order to adjudicate a case such as this. Instead, the Court must "go beyond the usual restrictions" of the common law and look more closely at the respective intentions of the St. Mary's Indian Band and the Crown at the time of the surrender of the airport lands.

16 The reason the Court has said that common law real property concepts do not apply to native lands is to prevent native intentions from being frustrated by an application of formalistic and arguably alien common law rules. Even in a case such as

this where the Indian band received full legal representation prior to the surrender transaction, we must ensure that form not trump substance. It would be fundamentally unjust to impose inflexible and technical land transfer requirements upon these "autonomous actors" and conclude that the "cease[d] to be used for public purposes" stipulation was a condition subsequent solely because the band made the mistake of using the word "should" instead of the word "until". Therefore, although I agree with the result reached by the British Columbia Court of Appeal in this case, I respectfully disagree with the manner in which Hutcheon J.A. arrived at it. Hutcheon J.A.'s reasons do not take into account this Court's recent decision in *Blueberry River*. That case makes it abundantly clear that we do not rely upon traditional distinctions between a determinable fee and a fee subject to a condition subsequent in adjudicating disputes relating to native land rights.



B. *The True Purpose of the Dealings*

17 All of the members of the Court that sat on *Blueberry River* acknowledged the need to pierce the veil of real property law in adjudicating native land rights disputes. As Gonthier J. asserted at para. 7, the Court must look to the "true purpose of the dealings". McLachlin J. similarly proclaimed at para. 83:

> The basic purpose of the surrender provisions of the *Indian Act* is to ensure that the intention of Indian bands with respect to their interest in their reserves be honoured.

What then, was the true intention of the St. Mary's Indian Band when it surrendered the airport lands to the Crown in 1966?

18 I have little hesitation in concluding that the appellants intended to part with the airport lands on an absolute basis. For one, the band surrendered the land for sale. The band thoroughly contemplated the prospect of a long-term lease, but ultimately preferred the option whereby the Crown would sell the surrendered land to a third party. Second, the appellants entered into negotiations with the Crown upon the full understanding that the impugned lands were to be sold for the purpose of constructing an airport for the City of Cranbrook. We are not talking about a facility or an enterprise with a short-term lifespan. A sale suggests a high degree of permanence and an airport requires an elaborate and lasting infrastructure. Third, in return for its surrender, the Crown paid the appellants the full market value of the land ($35,880). This further confirms the permanence of the arrangement. In fact, given the statutory scheme set out in the *Indian Act*, this is about as close as an Indian band can get to selling reserve land itself.

19 I do not find that the "cease[d] to be used for public purposes" stipulation frustrates this conclusion. In other words, I am not persuaded by the appellants' position that the mere fact that the band included a rider in its surrender necessarily means that the surrender was other than absolute. "Absolute" and "conditional" are not mutually exclusive terms -- either conceptually or under the scheme of the *Indian Act*. Indeed a key element of both the 1952 and 1988 versions of the *Indian Act* is that they expressly provide that a surrender can be both absolute and conditional. Section 38(2) of the 1952 *Indian Act* provided:

> **38.** ...
>
> (2) A surrender may be absolute or qualified, conditional or unconditional.

Section 38(1) of the 1985 *Indian Act* similarly states:

> **38.** (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.



Not only does this show that my interpretation of the airport lands surrender has been long contemplated in the *Indian Act*, but it also suggests, with respect, that Spencer J. was wrong to resort to a dictionary in order to distinguish between an absolute and a qualified surrender. For Spencer J. to have concluded that an absolute surrender is one without limits is to deny the *Indian Act* reality that there can be conditions to an absolute surrender.

C. *The Effect of the Kamloops Amendments*

20 As I have emphasized above, the *sui generis* nature of native land rights means that we do not apply technical land transfer requirements to the surrender of Indian lands. It does not mean, however, that this Court should resolve this case without reference to the ordinary rules of statutory interpretation. Indeed, it is my view that the Court can dispose of this appeal by simple reference to the Kamloops Amendments themselves. Although the Kamloops Amendments were intended to clarify the status of reserve lands surrendered for lease, they were never intended to draw lands surrendered for sale into the definition of reserve. Parliament has always considered lands surrendered for sale to have been surrendered absolutely.

21 The appellants argued vigorously at the hearing that the nature of the surrender must be understood in the context of the *Indian Act* as it existed at the time of the surrender in 1966. To a certain extent they are right. If the band's relinquishment

of the airport lands was a surrender for lease under the *Indian Act* as it stood in 1966, nothing in the Kamloops Amendments can possibly be interpreted to alter that fact. But, with respect, this is not the issue. All of the parties to this appeal agree that the appellants surrendered the airport lands for sale. The question is whether the phraseology "otherwise than absolutely" in the Kamloops Amendments' definition of "designated lands" includes surrenders for sale. My conclusion is that it does not.



22 As I indicated at the outset of these reasons, the Kamloops Amendments were a legislative response to *Leonard*, *supra*. Mary Leonard, the Chief of an Indian band in British Columbia, contested the payment of sales tax on purchases made by members of her band from businesses located on land which the band had surrendered for lease in 1980. The band brought an action against the Crown claiming that its members were exempt from the sales tax because s. 87(*b*) of the *Indian Act*, R.S.C. 1970, c. I-6, provided that "personal property of an Indian or band situated on a reserve" is exempt from taxation. The central issue was, therefore, whether the surrendered land was part of the reserve. The Court of Appeal held that it was not. Macfarlane J.A. held that "reserve" and "surrendered lands" were defined separately and that each was given distinct legislative treatment throughout the *Indian Act*. Accordingly, the court held that all forms of surrendered land fell outside the reserve and thus personal property purchased by an Indian on surrendered land was subject to provincial sales tax.

23 The effect of *Leonard* was profound but the result was neither surprising nor incorrect. The 1952 *Indian Act* clearly distinguished between the notions of reserve lands and surrendered lands:

**2.** (1) ...

> (*o*) "reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;
>
> . . .
>
> (*q*) "surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart.



Consequently, I have little difficulty in endorsing the *Leonard* decision and concluding from it that from 1966-1988, the airport lands were not within the appellants' reserve. Given the structure of the 1952 *Indian Act*, all forms of surrendered land prior to 1988 -- be the surrender absolute or qualified, conditional or unconditional -- necessarily fell outside the definition of reserve. The question that remains to be answered is how the 1988 Kamloops Amendments altered that situation.

24 The stated purpose of the Kamloops Amendments is unequivocal. When introducing the new amendments to Parliament, the government made it clear that they were intended to clarify the status of surrendered lands and to draw lands surrendered for lease into the definition of reserve, primarily for the purpose of taxation. At that time, the Parliamentary Secretary to the Minister of Indian Affairs and Northern Development made the following statement (*House of Commons Debates*, vol. XIII, 2nd sess., 33rd Parl., June 2, 1988, at pp. 16046-47):

> There are two main purposes to this Bill: first, to clarify the legal status of Indian lands; second, to establish the legal foundation for property taxation by band councils. . . .
>
> The Bill before us will establish that a surrender may take one of two forms -- first, an absolute surrender for sale which would remove land completely of all Indian interests and take it out of reserve, which is extremely rare, and, second, a surrender for lease or some other restricted purpose, in which case the land remains part of the reserve. Setting aside part of a reserve for leasing is not a surrender, nor is it a release of the Indian interest in the land.

> In order to facilitate and strengthen the distinction between these two types of surrender, land surrendered for lease would be termed "designated land" and the process of such non-absolute surrender would be termed "designation". This terminology is obviously far superior to the word "surrender", and the symbolic importance of this change is of great value.
>
> As a result of these amendments Indian communities will be able to set land aside for development without fear of losing the Indian status of the land. The rights they obtain through the Indian Act will continue to apply, such as voting rights in band elections, protection of cultural property, and the power to govern the land through by-laws.
>
> The last point is very important. At present it is not at all clear in the Indian Act whether the word "reserve" includes surrendered land of any type. There is, therefore, a risk that when land is surrendered for lease it might cease to be defined as part of the reserve and the by-law powers of the band council could not govern the land. This is a totally unacceptable loss of Indian jurisdiction and control of Indian land. It would also mean a very serious vacuum of local jurisdiction over leased Indian land. This has taken place in many instances across Canada and is why the band at Kamloops requested the change. This situation cannot be permitted to continue.
>
> One of the most important by-law powers that bands need is their power to tax use of the land. That brings me to the second purpose of these amendments, which is to establish clearly that band councils have the power to tax any interest or use of reserve lands in order to defray their costs as the government of that land. Such taxation power is obviously indispensable to any form of modern government. Some bands may not wish to use this power, but it must be there for bands which wish to exercise it.

25 In keeping with its stated objectives, Parliament passed the Kamloops Amendments, altering the definition of "reserve" to include "designated lands" which the new Act defined as:

> ... a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition....

Parliament similarly amended ss. 37 and 38 of the *Indian Act* to explain which forms of surrender would be absolute and which would not. On the one hand, Parliament made it clear that surrenders <u>for lease</u> would not be absolute. Sections 37(2) and 38(2) were amended to provide:

> **37.** ...
>
> (2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.
>
> **38.** ...
>
> (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.



On the other hand, Parliament made it equally clear that surrenders for sale would continue to be considered absolute. Sections 37(1) and 38(1) were amended to confirm:

> **37.** (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.
>
> **38.** (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

26 Parliament thus responded to the *Leonard* decision by making significant clarifications to the legal status of surrendered land under the *Indian Act*. It is obvious, however, that Parliament did not draw all lands surrendered by an Indian band within the legal definition of "reserve". Had this been the desired end, the means would have been decidedly less elaborate. Instead, recognizing the need to keep land surrendered for sale outside the definition of "reserve", Parliament created a two-tiered system of surrenders. That surrenders for sale were meant to remain beyond the definition of reserve is evidenced by the precondition in s. 37(1) that land be surrendered absolutely prior to being sold. That surrenders for lease were meant to be drawn within the

definition of "designated lands" is evidenced by a number of features of the Kamloops Amendments, the most obvious being the fact that s. 38(2) uses the word "designate".

27 Why did Parliament use this broad "otherwise than absolutely" language? If its express intention was to keep surrenders for sale outside the reserve, why did Parliament not define "designated lands" in a more explicit manner? I offer one convincing response: Parliament must have selected the broad "otherwise than absolutely" phraseology in order to account for other contingencies -- to allow, at one end, for other limited forms of surrenders, such as a right of way, to be considered designated land, and to ensure, at the other end, that other forms of permanent surrenders such as exchange or gift remain beyond our notions of reserve land. Parliament could have tailored its definition of "designated lands" to the specific distinction between lease and sale. Had it done so, this litigation would likely have been preempted. But this distinction is merely a threshold distinction and such a narrow legislative response would have given rise to many other disputes which would have been presumably more difficult to adjudicate.

28 The duality in the Kamloops Amendments provides clear guidance in defining "otherwise than absolutely". Given the *Leonard* decision, Parliament wanted to draw land surrendered for lease (or other means short of lease) within the legal definition of "reserve". At the same time, Parliament sought to confirm that land surrendered for sale (or other means similar to sale) remain beyond the definition of reserve. I have no hesitation, therefore, in concluding that "otherwise than absolutely" specifically excludes all lands surrendered for sale, be it conditionally or unconditionally.

D. *Other Issues*

29 Given the above analysis, there is no need to resolve any of the other issues raised by the parties to this appeal. In my opinion, there is no ambiguity to resolve in the manner outlined by this Court in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29. Moreover, it is neither necessary nor desirable for the Court to determine whether there is any principled basis for maintaining the common law real property distinction between a determinable fee and a fee simple subject to a condition subsequent.

V. Conclusion

30 As the Court indicated at the conclusion of the hearing, the British Columbia Court of Appeal was correct to have disallowed the property tax assessment of the Cranbrook Airport made by the St. Mary's Indian Band against the City of Cranbrook. Although the *sui generis* nature of native land rights means that courts should not resort to traditional real property concepts in adjudicating such a dispute, the true intentions of the parties and the context of the transaction reveal that the surrender of the airport lands was absolute. Moreover, it is clear that the Kamloops Amendments were enacted to clarify the status of surrendered lands under the *Indian Act*, and to do so by bringing lands surrendered for lease within the definition of reserve while keeping lands surrendered for sale outside that status. It necessarily follows, in my opinion, that "otherwise than absolutely" in the definition of designated lands does not capture the airport lands in the case at bar.

31 It is for all these reasons that the appeal was dismissed.

*Appeal dismissed.*

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