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Significant Changes in the Expropriation Provisions of the *Indian Act*, 1906 and 1951

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I. Amendments to The Indian Act, Revised Statutes of Canada, 1906, Chapter 81

A. The "Expropriation Provisions" and "Surrender Provisions" of the Indian Act as at 1905-1906

Recently, I had occasion to assist in formulating a Specific Claim on behalf of a First Nation relating to the taking by Canada, in 1905, of lands from a Reserve in Manitoba for the purposes of providing a right of way to a Railway Company for the construction of a railway line across reserve lands.

In October of 1905, permission was granted by Canada to the Railway Company to commence construction of the railway line across reserve lands, subject to evaluation of the price to be paid for same. On or about October 27, 1905, the Railway Company paid a deposit on account of the total price and took possession of the subject reserve lands upon which the railway line was then constructed.

On November 29, 1905, the Privy Council of Canada formally approved the application by the Railway Company and the recommendation by the Minister "that under the provisions of Section 35 of the Indian Act as amended by Section 5 of Chapter 33, 50-51 Victoria, authority be given for the sale of the land to the railway company upon such terms as may be agreed upon between the Department of Indian Affairs and the railway company".

During December, 1905, the taken reserve lands were evaluated by Canada. On January 12, 1906 the Railway Company paid the balance owing and in due course Canada issued to the Railway Company a patent in respect of the taken reserve lands.

This 1905 taking of reserve lands, as noted by the Privy Council, was purportedly made pursuant to Section 35 of the Indian Act, as amended by Section 5 of Chapter 33, 50-51 Victoria (alternatively referred to as Section 35 of the Indian Act of 1886, as amended by Section 5 of Chapter 33, Statutes of Canada, 1887), which then provided:

> 35. No portion of any reserve shall be taken for the purposes of any railway, road, or public works without the consent of the Governor in Council, and if any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve is done under the authority of an Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; and the Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General for the use of the band of Indians for whose benefit the reserve is held and for the benefit of any Indian who has improvements thereon.

This Section of the Indian Act, and its predecessors and successors, have come to be more commonly referred to as the "lands taken for public purposes provisions" or the "expropriation provisions" of the Indian Act.

At the time of the 1905 taking of reserve lands, Section 38 of the Indian Act of 1886, as amended by statutes of Canada 1898, Chapter 34, Section 2, provided:

> 38. No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act: provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber. (emphasis added)

This Section, and its predecessors and successors, along with ensuing sections setting forth the requirements for a valid surrender, have come to be more commonly referred to as the "surrender provisions" of the Indian Act.

The First Nation submitted that the above-noted Sections 35 and 38 of the Indian Act were in effect and governed the 1905 taking of reserve lands by Canada for conveyance to the Railway Company.

The First Nation also submitted that the said 1905 taking of reserve lands by Canada for the benefit of the Railway Company constituted a "sale" or "alienation" such as to require the taking of a valid surrender from the First Nation in accordance with the provisions of Section 38 of the Indian Act.

The First Nation therefore submitted that the purported 1905 taking of reserve lands by Canada pursuant to Section 35 of the Indian Act, without the taking of a valid surrender, was wrongful, unlawful, unauthorized and invalid.

Subsequent to the 1905 taking of reserve lands by Canada, revisions were made to these Sections of the Indian Act, as published in the Revised Statutes of Canada, 1906, Chapter 81.

Section 35 above (the expropriation provision), became Section 46, which remained substantially the same, as follows:

Lands taken for Public Purposes.

> 46. No portion of any reserve shall be taken for the purposes of any railway, road, or public work without the consent of the Governor in Council, and, if any railway, road, or public work passes through or causes injury to any reserve, or, if any act occasioning damage to any reserve is done under the authority of an Act of Parliament or of the legislature of any province, compensation

> shall be made therefor to the Indians of the band in the same manner as is provided with respect to the lands or rights of other persons.
>
> 2. The Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation.
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> 3. The amount awarded in any case shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements taken or injured. R.S., c. 43, s. 35; 50-51 V., c. 33, s. 5.

Section 38 above (the surrender provision), became Section 48 which was amended by the addition of significant introductory words as follows:

> 48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered, to the Crown for the purposes of this Part: Provided that the Superintendent General may lease. for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber. 61 V., c. 34, s. 2. (emphasis added)

Section 46 and Section 48 were each contained in Part I of the Revised Statutes of Canada, 1906, Chapter 81.

The First Nation submitted that these amended Sections of the Indian Act of 1906 were not effective and applicable to the 1905 taking of reserve lands by Canada and would not have precluded the requirement of a surrender under Section 38 in respect of the purported taking of reserve lands by Canada for the Railway Company pursuant to Section 35 of the Indian Act. Stated positively, the First Nation submitted that the taking of reserve land which occurred in October 1905, required both a surrender under Section 38 and an expropriation under Section 35.

The position advanced by the First Nation required an analysis of two primary components:

(a) the legal interpretation of the amendments; and

(b) the effective date of the amendments.

B. The Legal Interpretation of the 1906 Amendments

In *Kruger* v. *The Queen* (1985), 17 D.L.R. (4th) 591 (Fed. C.A., Leave to Appeal to SCC Refused July 31, 1985), the Federal Court of Appeal had occasion to consider, in the context of takings for public purposes by Canada in 1938 and 1942, the relationship between Section 48 of the Indian Act of 1927 (formerly Section 46, R.S.C. 1906) and Section 50 of the Indian Act of 1927 (formerly Section 48, R.S.C. 1906) and, in particular, the significance of the addition to Section 50 of the Indian Act R.S.C. 1906 of the introductory words: "Except as in this Part otherwise provided".

The Court considered these Sections in the context of a purported taking of reserve lands by Canada, in 1938 and 1942, for the benefit of its own Department of Transport for purposes of constructing an airport.

Heald, J. delivered a judgment which was concurred in by Stone, J. Urie, J. delivered a separate judgment. All judges agreed that, because of the addition of the said introductory words, Section 50 of the Indian Act (the surrender provision) would not apply to an expropriation of reserve lands by the Crown under Section 48. Urie, J. only differed from the majority in terms of his interpretation of the word "alienation" in Section 50.

Heald, J. (concurred in by Stone., J.) stated, at page 594:

> "I have the advantage of reading the draft reasons for judgment prepared by my brother, Urie J. I agree with him that s. 48 of the *Indian Act*, R.S.C. 1927, c. 98, enables the respondent to expropriate lands from an Indian reserve. I also agree that s. 50 of the Act which imposes a requirement for a release or surrender to the Crown in respect of portions "… sold, alienated or leased" does not apply to expropriations under s. 48 because of the opening words of s. 50 which read: "Except as in this Part otherwise provided …". Because ss. 48 and 50 are both found in Part I of the Act, it is clear, in my view, that the requirements of s. 50 do not here apply. Were it not so, I would have had difficulty in concluding that the word "alienated" as used in s. 50 would not encompass an expropriation of reserve lands by the Crown. However, for the reasons expressed, *supra*, it is unnecessary to finally decide that matter.

This latter comment by Heald, J., concurred in by Stone, J., is referred to as "*obiter dictum*", meaning a finding by the court which is not absolutely necessary to decide the case. Heald, J. is saying that it is clear from the added words that a surrender under Section 50 is not required in respect of an expropriation under Section 48. However, after noting that he has read the decision of Urie, J., and wishing to depart from the reasoning of Urie, J., he states, as *obiter*, that if he were to further consider the wording of Section 50, he would have concluded that the word "alienated" would encompass an expropriation of reserve lands by a department of the Crown itself. That is to say, were it not for those added words a surrender would be required in respect of any expropriation under Section 48, whether for the benefit of a third party railway or for the benefit of the Crown itself.

Urie, J., who was not prepared to go quite this far, stated, at page 641 of the decision:

> "I am further of the view that, contrary to what was submitted by counsel for the appellants, section 50, supra, does not require in all cases in which the Crown is to be the transferee of Indian reserve lands that a release or surrender to the Crown be obtained from the Indians. Section 50 clearly applies to cases where reserve lands are

> to be "sold, alienated or leased". As I see it, a release or surrender by the Indians to the Crown must be obtained if it is proposed to sell or lease such lands to a third party. This enables the Crown to ensure that its obligations to the Indians are protected. That may be so, counsel agreed, but the use of the word "alienated" would encompass an expropriation of reserve lands by the Crown.
>
> I do not agree. In its context, the word "alienated" is neither used in its technical sense nor does it apply on the facts of this case. In that sense Armour C.J. in Meek v. Parsons et al. (1900), 31 O.R. 529 (Div. Ct.) quoting from Masters v. Madison County Mutual Ins. Co. (1852), 11 Barb. 624 (N.Y. App. Div.), said [at page 533]:
>
> > The word, "alienate," has a technical legal meaning, and any transfer of real estate, short of a conveyance of the title, is not an alienation of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser, the "estate" is not alienated.
>
> That being so, while it might have been argued otherwise had the facts been different, in the circumstances of this case, because of the opening words of section 50, viz., "Except as in this Part otherwise provided" an alienation (if an expropriation does create an alienation in the technical sense) resulting from an expropriation pursuant to section 48 (which is included "in this Part") was excluded from the requirements of release or surrender which might otherwise have prevailed. In my opinion, therefore, compliance with section 50 is not required where reserve lands are expropriated pursuant to section 48 of the Indian Act."

The judgments of all three judges support the submission that, in 1905, prior to the addition of the introductory words to Section 48 by R.S.C. 1906, a taking of reserve land by Canada for sale and conveyance to a third party railway, purportedly pursuant to the expropriation provisions of the previous Section 35 of the Indian Act, would require a surrender in accordance with the previous Section 38 of the Indian Act. For Canada to purport to effect such a taking of reserve lands under Section 35, in 1905, without a surrender from the First Nation would be unlawful, wrongful, unauthorized and invalid.

Interestingly, *Kruger* was one of the first decisions to recognize the extension of the fiduciary relationship and fiduciary duty upon Canada in the context of

the taking of reserve lands for public purposes under Section 35 and similar provisions. Between the decision of the trial judge in *Kruger* and the appeal in *Kruger,* the Supreme Court of Canada delivered landmark reasons for judgment in *Guerin* v. *The Queen* (1984), 13 D.L.R. (4^{th}) 321 in respect of fiduciary duties upon Canada in the context of a surrender of reserve lands. In *Kruger* these duties were extended to takings by Canada or others for public purposes.

These fiduciary duties with respect to takings for a public purpose have been further extended and broadened. See for example:

CPR v. Matsqui [2000] CNRL (Fed. CA)
Fairford First Nation v. Canada [1997] FCJ 270 (Fed. Ct.)
Osoyoos Indian Band v. Oliver [2002] 1 CNLR 273 (SCC)
Wewaykum Indian Band v. Canada [2002] SCC 79

The initially recognized duty of a fiduciary of "utmost loyalty to its principal" has been broadened to include "the protection and preservation of the Indian interests in the land to the greatest extent possible", "to ensure that the best interests of the band were protected insofar as Canada's unilateral discretion with respect to the Section 35 transaction was concerned", and "to act in a reasonable and prudent manner as if it were looking after its own interests".

C. The Effective Date of the 1906 Amendments

When did the need for a Surrender cease to be a requirement in respect of a taking of reserve lands by expropriation for a public purpose?

The simple answer is on January 31, 1907, that being the date upon which the Revised Statutes of Canada, 1906, came into effect. While this answer might be said

to have been "hiding in plain sight", our journey of discovery was more circuitous than expected.

As those of you who research legislation are aware, a statute, whether provincial or federal, generally comes into effect in one of two ways. The statute may include a section which specifies an effective date or, alternatively, the statute may state that the legislation is to become effective on a date to be proclaimed in the future.

Our review of the Indian Act, being Chapter 81 of the Revised Statutes of Canada, 1906, revealed neither of these approaches.

I had first become aware of the effective date being January 31, 1907 (a considerably later date than I anticipated) as a result of footnotes observed in two reported decisions by the Indian Claims Commission.

One footnote in “Paul First Nation: Kapasiwin Townsite Inquiry” reads, in part: “Although the parties agreed during the oral hearing that the Indian Act in effect at the time of the surrender was the Indian Act, RSC 1906, c. 81, it was not proclaimed into law until January 31, 1907.”

Another footnote in “Cowessess First Nation: 1907 Surrender Phase II Inquiry” reads: "It should be noted that although the date of the surrender vote is January 29, 1907, the statute in force at the time was the *Indian Act*, RSC 1886, c. 43, and not the *Indian Act*, RSC 1906, c. 81. The consolidated Acts of 1906 were not proclaimed until January 31, 1907. Therefore, the relevant act in force for the date of the surrender is the 1886 Act and the relevant act in force for the required Order in Council to give effect to the surrender is the 1906 Act. The surrender provisions of the 1886 Act are s. 39, as opposed to s. 49 of the 1906 Act. Phase I of this inquiry proceeded under the mistaken

impression that the 1906 Act was in force. Although the relevant sections of the 1886 and 1906 Acts are paragraphed differently, the requirements are identical."

While this told me the "when", I still wanted to find out "how" the new amendments came into effect. This answer lay in the specific nature of the "Revised Statutes of Canada". Periodically, a compilation of the Revised Statutes of Canada is authorized to be prepared by a commission appointed by Order In Council and confirmed by Statute. The Revised Statutes of Canada, 1886, were followed by the Revised Statutes of Canada, 1906, which were in turn, followed by the Revised Statutes of Canada, 1927. The Commision could include existing Statutes of Canada, without amendment or repeal, but also had authority to amend and repeal existing legislation.

Such was the case with the Indian Act which came to be Chapter 81 of the Revised Statutes of Canada, 1906. The Commission in respect of this endeavour was initially appointed by Order in Council dated November 21, 1902.

In "The Historical Development of *The Indian Act*" (1978) by John Leslie and Ron Maguire, it is stated, at page 104:

> "By 1906 *The Indian Act*, with all the amendments since 1886, had become too cumbersome for ready reference by Departmental Agents and judicial officers. Hence, a new consolidated Indian Act appeared in the Revised Statues of 1906. It changed the wording of certain passages because of the provincial status given Saskatchewan and Alberta in 1905. It altered the order of the sections under the 1886 format. As well, the Indian Advancement Act, 1886, was incorporated as Part II of *The Indian Act*. The statute consisted, therefore, of one hundred and ninety-five sections in two parts and under thirty-eight headings. Sub-sections of the previous legislation were, in many cases, re-written as sections.
>
> The distribution of sections in the 1906 Revised Statute illustrated the shift in Departmental policies and legislation since 1886. Twenty-six sections now filled the category of "Offences and

> Penalties." Sixteen sections came under "Enfranchisement," and no less than forty-six clauses dealt directly with management of Indian lands and timber resources. Since the Rebellion the Government had increased its influence over Indian moral behaviour, means of livelihood, land resources and capital funds, and had effected little legislation which gave Indians more control over their own affairs. Legislation and policy had originated from disillusionment with Macdonald's civilization progammme and also from Sifton's perspective that Indian assimilation in "white" society took second place to rapid economic development."

Many of the changes proposed by the Commission appointed in 1902 were intended to better facilitate the rapid economic development which was becoming a government priority. An example of this can be found in the removal of the requirement of a Surrender (arguably the greatest protection afforded to a First Nation in respect of the alienation of its Reserve Lands) when reserve lands were being expropriated for a public purpose.

Because the Revised Statutes of Canada did include amendments to existing legislation, the compilation eventually put forward by the Commission required enactment by Parliament. In respect of the Revised Statutes of Canada 1906, this took place by the passage of the Revised Statutes of Canada, 1906, Act, assented to on January 30, 1907 which included provisions as follows:

> "3. The Revised Statutes of Canada, 1906, are hereby confirmed and declared to have and to have had, on, from and after the thirty-first day of January, 1907, the force of law as if herein enacted."
>
> …
>
> "7. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.
>
> 2. If upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then, as

> respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail, but, as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

Locating the content of this enacting legislation was also somewhat unique. The Act did not appear to be contained in the Statutes of Canada published in respect of either 1906 or 1907. However, the Act and the official Proclamation did appear in the published set of the Revised Statutes of Canada, 1906, in Volume I, at pages ix to xv. (A copy of the Act and Proclamation are attached hereto.)

Having determined the legal interpretation applicable to the "old provisions" and the timing in respect of when they remained in effect, namely January 31, 1907, the First Nation felt supported in its submission that a surrender ought to have been required in respect of the taking of reserve lands for railroad purposes, which taking was performed by construction of the railroad in October 1905 and concluded by the approval of issuance of Letters Patent to the Railway Company in January 1906.

II. Amendments to the Expropriation Provisions of the Indian Act, 1951

While formulating another Specific Claim, I had occasion to consider an expropriation of reserve lands in Manitoba in 1965-1966. The reserve lands in question were taken by the Province of Manitoba for purposes of a right-of-way for the construction of a provincial highway.

We ascertained that as at 1965-1966, the applicable Indian Act was that published in 1951 and in particular, Section 35 thereof as follows:

> "35.(1) Where by an Act of the Parliament of Canada or a provincial legislature His Majesty in right of a province, a

> municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subjection one shall be governed by the statute by which the powers are conferred.
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> (3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers, referred to in subsection one, the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
>
> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection one.

The First Nation was adherent to Treaty #2, which did not appear to contain a clause with respect to the taking of lands for public purposes subject to the provision of compensation, as is found amongst the provisions of other treaties, and in particular Treaty #4. We were therefore left to the provisions of the Indian Act applicable at the appropriate time as the basis for assessing the propriety of the taking and any claim being made for compensation.

Section 35 is entitled "Lands Taken for Public Purposes" notwithstanding that we will not find the express words "public purposes" within the body of the Section itself. Subsection 35(1) provides that where legislation empowers the Province to take lands without the consent of the owner, that power may, with the consent of the Governor-in-Council and subject to any terms that may be prescribed by the

Governor-in-Council, be exercised in relation to lands in a reserve. Without this empowerment, reserve lands would be exempt from such powers of "expropriation".

Subsection 35(2) provides that unless the Governor-in-Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under Subsection 1 shall be governed by the statute by which the powers are conferred. In other words, if the Province of Manitoba is purporting to exercise powers under The Expropriation Act, then, unless the Governor-in-Council directs otherwise, the procedures and provisions of The Expropriation Act shall govern, presumably in respect of the need for, and determination of, compensation, but as well in respect of the technical procedures that have to be carried out to implement a formal expropriation.

Subsections 35(1) and 35(2) are not that different in content from the predecessor sections which were found at Section 48(1) of the Indian Act of 1927, the provisions of which are as follows:

> "48. No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.
>
> 2. In any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.
>
> 3. The Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and

> shall act for them in any matter relating to the settlement of such compensation.
>
> 4. The amount awarded in any case shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements taken or injured. R.S., c. 81, s. 46; 1911, c. 14, s. 1."

Subsection 35(3), however, was a new amendment introduced by the Indian Act of 1951. Subsection 3 provides that when the Governor-in-Council has consented to the exercise by a Province of its powers of expropriation in respect of reserve lands, the Governor-in-Council, instead of having the Province take the lands pursuant to the provisions of The Expropriation Act that relate to compulsory taking, may authorize a transfer or grant of such lands to the Province, subject to any terms that may be prescribed by the Governor-in-Council.

Under the old Section 48, where the consent of the Governor-in-Council was obtained, the Province of Manitoba, being the expropriating authority, was obliged to conform to all of the provisions and requirements of The Expropriation Act including requirements with respect to notices, publishing of plans, filing of declarations, all within express time limits, etc. While it would appear that for some time after the amendment, the Province often proceeded to carry out these requirements in any event, Section 35(3) was introduced in order to permit the Province to avoid such formalities where the Governor-in-Council consented to the exercise of power and there was agreement in respect of terms that might be prescribed by the Governor-in-Council.

Section 35(4) provides that any amount that is agreed upon or awarded in respect of the compulsory taking or using of land (i.e., where the expropriation formalities are followed through) or that is paid for a transfer or grant of land pursuant to

this Section (i.e., where the Governor chooses to adopt a transfer instead of the expropriation procedures) shall be paid to the Receiver General of Canada for the use and benefit of the Band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to by the Province of Manitoba.

It is of interest to note that Section 35 does not expressly mandate the payment of compensation to the First Nation, notwithstanding that the prior Section 48 clearly did so. This may have been an attempt to negate the suggestion that there was an obligation upon Canada, as distinct from the expropriating third party, to compensate the First Nation. Clearly both the old and the new provisions gave Canada the discretion and power to determine the amount and the payment of compensation as part of its granting of consent, instead of having it determined through the expropriation process.

Traditionally the expropriation provisions of the Act have been such that they did not create an expropriation but merely gives permission to the occurrence of an expropriation which "shall be governed by the statute by which the powers are conferred". To find the obligation to compensate, in circumstances where it is not imposed by Treaty, nor expressed in the Indian Act, we would therefore look to the The Expropriation Act.

While it is outside of the parameters of this particular presentation, we found that a review of The Expropriation Act in Manitoba revealed interesting amendments from time to time which could impact upon the determination and assessment of compensation, were that to be the basis for the Specific Claim.

In practice, however, after the amendments to the 1951 Indian Act, most of the claims which I have dealt with involved circumstances where Canada i.e. the Department of Indian Affairs, and ultimately the Governor in Council, exercised its discretion to take upon itself the negotiation and determination by agreement of the amount of compensation, which was incorporated into the Order in Council authorizing a transfer or grant of the reserve lands to the expropriating authority. The amendment clearly made things easier for the expropriating authority and to considerable extent facilitated the taking of reserve lands for public purposes. The amendments would not have lessened the fiduciary duties owed by Canada in respect of such public takings. In fact, one might argue that Canada may have a higher level of fiduciary duty in the circumstances wherein it chooses to authorize a transfer or grant in lieu of the expropriating procedures and also negotiates the compensation applicable.

From a research standpoint, the movement away from actual expropriation procedures eliminated the need to be concerned as to whether the exact procedures had been appropriately carried out by the expropriating authority. In most cases, this would be the case, but the practice under the amendments would permit researchers to focus instead upon the fiduciary duties upon Canada in respect of the granting of consent to the expropriation of reserve lands and the settling of terms and compensation for that consent.