KRUGER ET AL. V. THE QUEEN

Federal Court of Appeal, Urie, Stone and Heald JJ.A., March 18, 1985

W.J. Worrall and K.S. Campbell, for the appellants
W.B. Scratch, Q.C. and T.B. Marsh, for the respondent

This is an appeal from the judgment of the Trial Division ([1982] 1 C.N.L.R. 50) dismissing with costs an action brought by the appellants, members of the Penticton Indian Band, seeking a declaration that they had been wrongfully dispossessed of the use and benefit of two parcels of land expropriated by the respondent in 1940 and 1943. The appellants also sought damages for breach of trust, loss of revenue and, in the alternative, damages as compensation for the wrongful taking.

Held: Appeal dismissed.

Per URIE J. (STONE J. concurring; HEALD J. concurring in part)

1. Section 48 of the Indian Act, R.S.C. 1927, c.98, empowers the Crown to expropriate land from an Indian reserve.

2. An airport is a public work within the contemplation of the Expropriation Act, R.S.C. 1927, c.64.

3. The requirement of s.50 of the Indian Act that lands be surrendered to the Crown is not required where such lands are expropriated pursuant to s.48.

4. There was no evidence to establish the appellants' argument that the "dominant purpose" for the expropriation was anything other than the purpose stated, namely to construct an airport and further develop it. It was not established that the respondent deliberately acquired the Indian lands in preference to those of non-Indians in order to construct the public work at a lower price.

5. The respondent satisfied her fiduciary duty to the appellants. More particularly (a) the Indian Affairs branch officials strongly advocated on behalf of the Indians the proper compensation and, although the compensation was not wholly satisfactory to the Indian band, all the circumstances were taken into account. The fiduciary duty did not require the respondent to disregard the obligations of the Department of Transport officials. (b) In carrying out their duties, the Indian Affairs officials were fully cognizant of the value and importance of the parcels to the Indians. (c) The failure by the Indian Affairs officials to advise the Indians that they had received a legal opinion to the effect that the surrender by the Indians was essential was not proven and, in any event, not something that would stand in the way of the expropriation.

   Competing considerations, namely those of the Department of Transport and those of the Indians, were resolved by way of compromise, and ultimately with the consent of the Indians, and this did not amount to a breach of the Crown's fiduciary duty.

6. Equitable fraud on the part of the Crown was not proven. The limitation period provided for by the Federal Court Act, R.S.C. 1970 (2nd Supp.), c.10, s.38 and the Limitations Act, R.S.B.C. 1979, c.236, s.3(4), which is six years, is applicable and therefore the case is statute barred.

Per STONE J.

1. In determining the amount of compensation, the government officials considered all the circumstances, acted prudently in making their decision and thereby discharged the duty to the Indian people.

Per HEALD J. (dissenting in part)

1. The facts demonstrate a breach of the fiduciary duty owed by the respondent to the appellants.

2. Government departments were in conflict concerning the manner in which the property should be dealt with. This created a conflict of interest and the federal Crown cannot default on its fiduciary obligation to the Indians by pleading competing considerations by different departments of government . As well, the onus is on the trustee or fiduciary to show that the beneficiary surrendered or conveyed his interest having all the relevant information known to the trustee. The federal Crown did not discharge the onus of showing that no advantage was taken of the Indians in the transaction.

3. The fact that the Indians consented ultimately to the transaction did not save the respondent because the Indians' consent was given out of shear desperation after the respondent had already occupied the property or part of it and taken away the Indians' livelihood.

4. The actions are nevertheless statute barred by reason of s.38 of the Federal Court Act. The appellants abandoned reliance on pleadings alleging fraudulent conduct. Because the expropriation procedures were valid, the appellants had no basis for an action to recover possession of the trust property itself. Therefore, it fell under no exception to the limitations.

* * * * * * * * *

URIE J.: This is an appeal from a judgment of the Trial Division [reported at (1982) 1 C.N.L.R. 50] dismissing with costs an action brought by the appellants seeking a declaration that they had been wrongfully dispossessed of the use and benefit of two parcels of land expropriated by the respondent in 1940 and 1943. The appellants had alleged that the respondent had failed to exercise the degree of care, stewardship and prudent management required of a trustee in the management of trust assets in connection with obtaining compensation for the expropriations. They also sought damages for breach of trust, loss of revenue and, in the alternative, an award of damages as compensation for the wrongful taking.

I. The Facts

1. Parcel A

By an Order-in-Council, 1036, approved by the Governor in Council on July 29, 1938, the Province of British Columbia conveyed to His Majesty the King, in the right of the Dominion of Canada, certain lands set out in a schedule attached to the Order-in-Council, including the lands referred to in these proceedings as Parcel A and Parcel B which are situate near Penticton in British Columbia. They form part of the Penticton Indian Reserve No.1. The conveyance was expressed in the Order-in-Council to be

> ...in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the tight of the Dominion Government to deal with the said lands in such manner as they deem best suited for the purpose of the Indians including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians.

The Penticton Indian Band, as one of the Indian bands in the province, thereby became entitled to the use and benefit of the lands described in the Schedule to the Order-in-Council as 34,036.50 acres in the "Osoyoos and Similkameen Districts at the foot of Okanagan Lake".

In September 1938, the Indian Agent for the Okanagan Agency at Vernon, reported that the municipality of Penticton wished to lease a portion of the Penticton Reserve No.1 for the municipal airport. Subsequently, on behalf of the Indian occupants of the lands, the Indian Agent signed forms of leases on behalf of the Indian lessees, who also signed for themselves and they were, as well, signed by the municipality, for approximately 72.56 acres of the reserve lands for an average rent of $6.50 per acre per annum and other benefits. On May 4, 1939, after making the amendments agreed upon by his superiors and the Indians, the Agent forwarded five signed leases to the Indian Commissioner for British Columbia for approval. The terms for each lease was to be five years renewable for further five year terms to a maximum of twenty-five years. On May 8, 1939, the leases were forwarded to the Indian Affairs Branch in Ottawa.

The lease arrangements were not approved by the supervising authority in view of the intervening requirement of the Department of Transport to acquire the land for airport purposes because the "valley there is one of the few places where landings may safely be made in bad weather in the mountain area; and as it is directly on the line of flight it is important from a safety point of view to

Trans-Canada Air Lines." (Letter from Deputy Minister of Transport to Director of Indian Affairs dated December 6, 1939.) The area required by the Transport Department was longer than that proposed to be leased to the municipality. The whole of the lands sought to be leased by that Department is hereinafter referred to as Parcel A which contained 153.8 acres as opposed to the 72.56 acres proposed to be leased to the municipality.

Negotiations on behalf of the Indians were conducted by Indian Agent A.H. Barber who reported to his superior as early as February 1940 that the occupants of Parcel A were skeptical about the whole deal. On June 27, 1940 he reported that the Indians were not favourable to leasing the increased acreage desired but he pointed out that he was not in a position to discuss the matter fully until he was advised by the Department "as to the nature and term of the lease, or whether it is to be a sale requiring a surrender of the Band as a whole". Moreover, he said, they did not wish work to be done on the land until the question of rent or compensation was satisfactorily resolved. On July 8, 1940, Mr. Barber, in a letter to the Secretary, Indian Affairs Branch, Ottawa, reported, in part as follows:

> With reference to the site required by the Department of Transport for the above purpose, I now beg to advise that I spent the 25th, 26 and 27th instants at Penticton interviewing the Indians concerned, with the result that finally all agreed to surrender the acreage required for the Airport, to be leased for a period of ten years at Ten dollars an acre and have signed the surrender hereto attached, in order that the lease may now be entered into by the Superintendent General if the terms are approved by the Department.
>
> It will be noted that the lease is to cover all the conditions set out in the agreement entered into by the Indians with the Corporation of the District of Penticton on October 15th 1939, and is to be effective from that date.
>
> It will be noted on the plan prepared by R.F. Brown, B.C.L.S., dated June 4th 1940, that the following areas are now required.

<u>Gabriel Estate</u> Narcisse Gabriel Victor Gabriel Sam Gabriel	60.6 acres
Joe Cawston	40.53 “
George Lissard [sic) (This property now sold to Joe Kruger)	19.97 “
Michel Jack	22.9 “
William Kruger	8.7 “
Band property, required for road.	1.1 “
Total acreage required	153.8 acres.

> The increased area takes in much of the hay and meadow land owned by these Indians, which accounts for them not being agreeable to accept a less rental than Ten dollars per acre and they also state that they are not desirous of leasing their land for this purpose, and have wasted too much time talking about it already, the whole matter being of continuous discussion for nearly two years, and not having yet received the rental paid by the City of Penticton in October last.

The Indian Commissioner for British Columbia in writing to the Secretary of the Indian Affairs Branch, expressed the view the rent demanded was not excessive. Notwithstanding this, the Department of Transport disagreed and decided to expropriate
Parcel A and offered $100 per acre as compensation.

By P.C. 3801 dated August 13, 1940, authority was granted pursuant to the Expropriation Act, R.S.C. 1927, c.64 and s-s.48(1) of the Indian Act, R.S.C. 1927, c.98 to expropriate Parcel A consisting of 152.7 acres together with a right of way containing 1.1 acres. By P.C. 6594 dated November 16, 1940, a further .52 acres was expropriated for a power line. No compensation was fixed in any Order-in-Council. It was not until P.C. 659 was approved on January 29, 1941 that compensation of $115 per acre, or a total of $17,687, was authorized, the figure which a recital in the Order states was the amount that the Indians agreed to accept. An amending Order-in-Council fixed the compensation for the .52 acres. The actual expropriation did not become effective until February 4, 1941 when the plans and descriptions of the Parcel A lands were deposited in the appropriate registry office pursuant to s.9 of the Expropriation Act, 1927. The compensation was paid to and accepted by the Indians in March and April 1941.

2. Parcel B

In June 1942, the Department of National Defence for Air decided that it was necessary to further develop the Department of Transport airport at Penticton "to serve as an emergency landing field for the West Coast defence system." To do so required the acquisition of a further 120 acres, approximately, of the reserve lands at Penticton. These lands are in these proceedings described as Parcel B.

The Director of the Indian Affairs Branch, on July 24, 1942, received notification from the Assistant Deputy Minister of Transport of the necessity to acquire Parcel B. On July 30, 1942, Indian Agent Barber was instructed to take up the matter with the Penticton Band and to cooperate as fully as possible in view of the purpose for which the lands were required. The precise nature of what transpired thereafter is not clear from the record. What is clear is that work was commenced on Parcel B on or about September, 1942 at which time the property had not been sold, leased or expropriated. It is also clear that at that time the Indians had made inquiries as to the amount of compensation they would receive for the additional lands and had objected to the taking of possession before payment. Negotiations continued on a regular basis.

The Department of Transport had, by May 16, 1943, obtained valuations for the property of $6,831.10 and $6,810.60 from two independent appraisers. The independent appraisal obtained by the Department of Mines and Resources appears to have been $16,958.75, although that amount was not acceptable to the Indians who sought the sum of $25,000 approximately. The Deputy Minister of Transport claimed that such an expenditure could not be justified so that an Order-in-Council, P.C. 9696, was obtained on December 20, 1943 authorizing the expropriation of Parcel B pursuant to s.48(1) of the Indian Act 1927 and of the Expropriation Act.

The plan and description of Parcel B were deposited, pursuant to s.9 of the Expropriation Act, in the appropriate registry office on February 17, 1944 thereby completing the expropriation of the parcel. The offer of an interim payment on account of compensation was refused by the Indians in May 1944.

On January 9, 1946, Indian Agent Barber reported to the Commission that the Indians had agreed to accept a settlement of $15,000 if paid immediately end to avoid litigation. The Deputy Minister of Transport advised the Indian Affairs Branch on January 14, 1946 that the offer of settlement was accepted. Notwithstanding this, Indian Agent Barber reported to his superiors on February 4, 1946 that, in accordance with instructions received from them shortly before that date to convene a meeting for the purpose of obtaining the band's consent to the surrender of Parcel B, he had presided at such a meeting on February 1, 1946. Of 46 eligible voters, 28 were present, of whom 18 voted for the surrender, nine voted against it and apparently one abstained. The following excerpt from his report is of interest:

> I would advise that this meeting was a very difficult one and I have not the least doubt but that, if all members of the Band had been present, or should the surrender be resubmitted to the Band, it will be defeated.
>
> The Indians do not understand just why they are required to surrender these parcels of land when the land has been taken from them for the past three years and they have been repeatedly told that the land had been expropriated by the Government. Also they point out very forcibly that there was no surrender submitted to them for the land taken previously. It will be realized that I was in an unfortunate position in having to ask them to agree to allow the Department to sell this land when I have for the past three years been telling them that the land was expropriated, and that there was no possibility of the land being returned to them.

The necessity for obtaining the surrender was explained by appellants' counsel as having arisen due to the receipt of an opinion of the Deputy Minister of Justice, to which opinion the only reference on the record is in P.C. 371, approved on February 5, 1946, that Indian lands could not be expropriated but a transfer thereof could be made to the Crown by a surrender by the Indians made pursuant to s.50 of the Act following the appropriate procedure to obtain such a surrender. The material part of the text of the Order reads as follows:

> The Committee of the Privy Council have had before them a report dated 1st February, 1946, from the Minister of Reconstruction and Supply, representing that, in the circumstances therein set out, authority was given by Order-in-Council, P.C. 9696 of December 7th, 1945, for the expropriation of some 100 acres of land included in the Indian Reserve at Penticton, B.C., and required for the development of the airfield at that place;
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> That on February 17, 1944, the land in question was duly expropriated and on October 24, 1944, an easement in perpetuity, required for the airfield's approach lighting system and covering a strip of land, 15 ft. wide and 1300 ft. long, was likewise expropriated;
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> That by Order-in-Council, P.C. 1560 of March 9, 1944, authority was given for making an advance payment of $6500.00 to the Department of Mines and Resources, Indian Affairs Branch, pending completion of the settlement;
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> That, when the Deputy Minister of Justice was requested to submit the matter to the Exchequer Court for settlement, he advised that the interest of the Indians in this land could not be taken by proceedings under the Expropriation Act and that the transfer of the land could be made only by a surrender duly made at a proper meeting of the Indian band and accepted by Your Excellency in Council;
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> That, as a result of further negotiations which have been carried on, the Department of Mines and Resources have now advised that they have succeeded in persuading the Indians concerned to accept the sum of $15,000.00 as the compensation for the 119.54 acres of land involved and the easement above referred to;
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> That this settlement was negotiated and agreed upon by the Lands Branch of the Canadian National Railways, acting for and on behalf of the Department of Transport, and is considered fair and reasonable;
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> That the comptroller of the Treasury has certified, Certificate of Encumbrance No. 14810 of January 15, 1946, that there are funds available out of the War Appropriation, 1945-46, to cover the commitment herein available out of recommended for approval; and
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> That the Minister of Reconstruction and Supply is informed that this expenditure has been reviewed and established in relation to essential requirements in the post hostilities period;
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> The Committee, therefore, on the recommendation of the Minister of Reconstruction and Supply, advise that authority be given for payment of the additional sum of $8,500.00 to the Department of Mines and Resources, Indian Affairs Branch, on behalf of the Indians concerned, such payment to be made upon a proper release or surrender being given and the transfer of title to the said land and easement to His Majesty the King, represented by the Minister of Reconstruction and Supply, being duly completed.

There is no other evidence in the record with regard to the legal opinion. Counsel for the respondent declined to produce it at trial on the ground of privilege. This, of course, he was quite entitled to do. The fact of its existence, however, without knowing the details thereof was heavily relied on by counsel for the appellants and was expressed in his Memorandum of Fact and Law in the following way:

> As noted in the Indian Agent's report, the Indians did not understand why they were purporting to surrender lands which they believed to have been forcibly taken from them some time earlier. The surrender was executed February 2, 1946 (pp. 193-197).
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> Because of the lack of understanding on the part of the Indians, it is submitted that the execution of the surrender does not constitute consent to the Crown's breach of fiduciary duty. Indeed, it is nowhere shown that the Crown advised the Indians of the fact that there

may have been some question as to whether or not the Crown could expropriate parcels A and B as it had purported to. Obviously, one cannot give a fully informed consent to a breach which has not been fully reported by the defaulting fiduciary. It should be noted, further, that the surrender dealt only with the parcel B lands. No surrender was ever requested or given for Parcel A.

It is submitted, further, that the execution of the surrender by the Indians notwithstanding their inability to understand the necessity for it demonstrates that the Indians were continuing to rely upon the Crown and that the fiduciary relationship between the Indians and the Crown was fully intact before, during, and after the Crown's acquisition of the subject property. Thus, on the authorities referred to above, the Appellants are entitled to hold the Crown to account as a fiduciary improperly obtaining property which is the subject matter of the obligation.

The surrender was accepted by the Crown on February 15, 1946 pursuant to the Order-in-Council, P.C. 533. Payment of compensation for Parcel B was made to some of those Indians who were recognized by the band as being entitled to occupy the parcel, on March 11, 1946. The balance was paid on April 18, 1946.

I have felt it necessary to review the history of the expropriations in some detail since it was the appellants' submission that the history of the transactions reveals that the use of the expropriating power by one branch of the federal Crown, the Department of Transport, deprived another branch charged with the responsibility for protecting the Indians, the Indian Affairs Branch of the Department of Mines and Resources, of the strongest weapon in its arsenal, viz. the right to refuse to sell or lease the land on terms it considered to be more appropriate in the circumstances. The Indians then had either to accept the terms offered for the lease or sale of the land or the expropriation I have felt it necessary expropriations in some detail would be proceeded with and the amount of compensation would be determined at a later date by arbitration or court action. These actions, in the appellants' view, constituted a breach of the Crown's fiduciary duty to the Indians. The nature of the duty and the alleged breaches thereof will be examined in greater depth later in these reasons.

II. The Issues

The appellants' Memorandum of Fact and Law defines the issues as follows:

1. Does s.48 of the Indian Act, R.S.C. 1927, Chapter 98, provide a right to the Respondent (hereinafter called the "Crown") to expropriate lands from an Indian reserve? It is submitted it does not.

2. If s.48 of the Indian Act permits the Crown to expropriate reserve lands, was such jurisdiction properly exercised in the case at bar? The Appellants again submit that this question should be answered in the negative. A threshold question which arose in the reasons of the learned trial Judge, however, is whether or not the Court can enquire into the propriety of the exercise of the jurisdiction. The Appellants submit that it can.

3. Given the finding by the learned trial Judge that the Crown stood as a fiduciary vis-a-vis the Appellants (from which finding no appeal has been taken by either of the parties), has there been a breach of that fiduciary duty by the Crown, notwithstanding whatever powers of expropriation it might have prima facie? The Appellants submit that there has been such a breach, even if this Honourable Court finds that there was a jurisdiction to expropriate the land involved and that the exercise of that jurisdiction satisfied the relevant statutory requirements. The appellants take this position because the lands at issue are not only subject to the general law regarding Indian reserve lands, but are also subject to the specialized rules regarding trust property in British Columbia. The Crown is, therefore, subject to the rules prohibiting a fiduciary from acquiring trust property for himself or allowing himself to be in a position whereby his personal interests may conflict with his duties as a fiduciary.

4. If there has been a breach of fiduciary duty by the Crown, have the Appellants consented to it so as to absolve the Crown from liability for same? It is submitted that no such consent has been given. It is submitted that no such consent has been given.

III. The Argument

1. Section 48 of the Indian Act

Since the submissions of appellants' counsel as to the scope and applicability of s.48 of the Indian Act, R.S.C. 1927, c.98 are intertwined, to some extent, with a consideration of s.50 of that Act, it would be convenient to set out both sections hereunder.

> 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.
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> 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.
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> 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.
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> 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.
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> 50. 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; but 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.
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> 2. The Governor in Council may make regulations enabling the Superintendent General without surrender to issue leases for surface rights on Indian reserve, upon such terms and conditions as may be considered proper in the interest of the Indians covering such area only as may be necessary for the mining of the precious metals by any one otherwise authorized to mine such metals, said terms to include provision of compensating any occupant of land for any damage that may be caused thereon as determined by the Superintendent General. R.S., c.81, s.48; 1919, c.56, s.1.

Counsel for the appellants argued forcefully that the Indian Act 1927 confers no jurisdiction on the Crown to expropriate Indian reserve lands. He said that s.48 precludes any compulsory taking, for the purpose of a "public work", without the prior consent of the Governor in Council. As he interpreted the section, it provides that, on the obtaining of such consent, "any company or municipal or local authority having statutory power, either Dominion or provincial" to expropriate lands may expropriate reserve lands, subject to any restrictions imposed by the consent. Nowhere did counsel find in the section an express or implied provision conferring on the Crown, as distinct from companies or authorities having a statutory power to take, the jurisdiction to take reserve lands. Moreover, he contended, even if the Crown, on consent, is entitled to expropriate it can only do so pursuant to the Expropriation Act, R.S.C. 1927, c.64, in respect of a "public work" as that term is defined in s.2(g) of that Act, which does not include airports. That definition reads as follows:

> 2. In this Act, unless the context otherwise requires,
>
> . . . . .
>
> (g) "public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines. Government railways, canals, locks, dry-docks, fortifications and other

> works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys ate voted and appropriated by Parliament, and every work required for any such purpose, but or any work for which the money is appropriated as a subsidy only.

As to the latter argument, the learned trial judge, after quoting section 2(g) in full and emphasizing the last nine lines thereof dealt with it as follows [p.52 C.N.L.R.]:

> The portion of the definition which I have emphasized is clearly severable from the particular works enumerated before it and is not intended to be limited to works similar to those enumerated. Recitals in the pertinent Orders in Council, Exhibits P-44 as to Parcel 'A' and P-46 as to Parcel 'B', make clear that public moneys had been voted and appropriated for their acquisition. The Aeronautics Act (R.S.C. 1927, c.3) provided:
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> 3. It shall be the duty of the Minister
> . . .
>
> (c) to construct and maintain all Government aerodromes and air stations, including all plane, machinery and buildings necessary for their efficient equipment and upkeep;
>
> Airports were, at the relevant time, public works within the contemplation of the Expropriation Act. Furthermore, subsequent decisions make clear that once land was taken, as were both Parcels 'A' and by the procedure of recording the appropriate documents in the Land Titles office under section 9 of the Expropriation Act, it was not open to question that it had been taken for a "public work".

I agree with this reasoning and conclusion so unnecessary for me to elaborate upon it.

I turn now to the more difficult aspect of the argument based on s-s.48(1) of the Indian Act which I suspect did not receive the attention of counsel before the trial judge that it did in this court. On an initial reading, counsel's argument, supra, has considerable force particularly when read with s-s.2. It will be noted that that subsection commences with the words "In any such case..." which obviously refer to a case envisaged by the wording of s-s.1. At first blush a case of that kind would mean where "any company or municipal or local authority having statutory power... for taking or using lands... with the consent of the Governor in Council as aforesaid,..." (emphasis added) exercised such statutory power with respect to the taking of any reserve or portion of a reserve. The words "as aforesaid" must relate to the first words in the subsection, namely "No portion of any reserve shall be taken for the purpose of any...public work...without the consent of the Governor in Council." The only limiting factor relating to the "taking" body in those words, so fat as this case is concerned, is that the taking must be for the purpose of a "public work". It is not until after the word "but" that there is reference made to specific bodies having "statutory power. ..for taking...."

If the meaning to be ascribed to the subsection is that for which the appellants contend, why did the draftsman deem it necessary by the balance of the subsection to limit the generality of the first four lines in it by specifying bodies other than the Crown who had the power of compulsory taking? Surely it was to distinguish the position of such corporations or authorities from that of the Crown by enabling the imposition of "terms and conditions" in the consent. Read that way, the interpretation of the subsection given by the trial judge in the following passage appears to be supported and correct [p.54 C.N.L.R.]:

> The fundamental provision of subsection 48(1) is that no compulsory taking may be effected without the required consent; the balance of the subsection amplifies, rather than limits, that requirement, making clear that the consent may be given to any private or public authority and that conditions may be imposed. It would be an odd result, indeed, if, under subsection 48(1), the Governor in Council, without the concurrence of a band in surrendering reserve lands, could consent to another expropriating authority taking those lands but could not so consent when the expropriating authority was the Crown in right of Canada itself.

Provisions in a statute should, of course, be construed in the context in which they appear. That being so, s-s.2 of s.48 cannot be ignored. Not only does the subsection commence with the words "In any such case...", which can only be referable to s-s.1, but the last three lines thereof refer to

the determination of the compensation payable on a taking of lands which shall "be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases" (emphasis added). Those are the bodies referred to in the latter part of s-s.1 as having the statutory power to take lands. How then is the construction of s-s.1 given by the trial judge affected by the limited scope of the directions as to the determination of compensation given by s-s.2?

To assist in answering that question it is necessary, in my view, to examine the legislative history of s.48. The first appearance of its predecessor was in the Railway Act, 1868, as s.37. The wording was considerably different from the section here under review. It continued in virtually the same language in the Consolidated Railway Act, 1879, 42 Vict. c.9, s.37.

In the Indian Act of 1880, S.C. 1880, c.28, there appeared s.31 which differed from s.37 of the 1879 Railway Act, as shown in the underlined portions of the section set out hereunder:

> 31. 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 be done under the authority of any 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; the Superintendent-General shall, in any case in which an arbitration may be had, name the arbitrator on behalf of the Indians, and shall act for them on any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Receiver-General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian having improvements thereon.

For the first time the Indians became entitled to compensation not only when railways passed through their reserve but when any "road or public work" did so. As will be noted, provision was made for the appointment of an arbitrator and for the disposition of an award of compensation, Sections 36 and 37, it should be pointed out, provided for the cases in which a release or surrender of Indian lands was required before they could be sold, alienated or leased. They were predecessor sections to s.50 of the Indian Act, 1927, supra.

In the Revised Statutes of Canada, 1886, s.31 became s.35 (virtually unchanged from the 1880 Act) and ss.36 and 37 became ss.38 and 39. By an amendment in 1886, the underlined words were added to s.35 which became s.46 of the Revised Statutes of Canada, 1906.

> 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:
>
> 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·

Two things should be noted. First, the underlined words are identical to those appearing in all subsequent versions of the Act and in particular, in the first three lines of s.48 of the Indian Act, 1927, although the balance of the section is substantially different in that section. Second, s-s.2 and 3 are identical with s-s.3 and 4 of the 1927 Act.

Section 46 was repealed in 1911 and was replaced by the following as it appeared in 1-2 Geo. V., c.14, s.1:

> 46. 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; and 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.

There were several noteworthy changes:

(1) the words commencing with "but" in line 4 which are all new;

(2) the use of the word "but" rather than the conjunction "and";

(3) the inclusion of the additional words, following semi-colon, "and in any such case compensation shall be made therefor to the Indians of the band..." to the end of the section.

The significance of these changes are, as I see it, the following:

(1) The use of the word "but" by the draftsman was to distinguish the requirements for expropriation by a body, other than the Crown, having the statutory power of compulsory taking, by importing the procedures for expropriation applicable to them by their constituent statutes, into the Indian Act and, as well, by enabling terms and conditions to be imposed by the Governor in Council in giving his authority to such a body to expropriate reserve lands. No such power of limitation was imposed in the earlier words in the section. Since the only body having the power of compulsory taking other than a company, municipal or local authority having such power to expropriate conferred on it by either the Dominion or provincial Crown, was the Crown in the right of Canada, the first four lines of the subsection must relate to it.

(2) The latter part of the subsection dealing with compensation, opening with the words "and in any such case", obviously refer to the authorities having the statutory power " for taking or using lands without the consent of the owner".

In my view, this analysis of s.46 assists greatly in construing s.48 of the 1927 Act. My observations respecting s.46 continue to apply to the interpretation of s.48 because the wording is, with the exception to which I will hereunder refer, identical. Moreover, the relevance of s-s.2 of s.48, supra, in that interpretation is clarified. That subsection is in precisely the same language as s.46 after the words "and in any such case" with the deletion of the conjunction "and". What happened was that s.46 was simply divided into two subsections. Since, as I see it, the words following "and in such case" in s.46 clearly applied only to bodies having the statutory power to expropriate, the same must be true after the section was renumbered if a coherent construction of the subsection is to be found.

My view that this is the correct interpretation to be given s-s.1 of s.48 is reinforced by noting that s-s.3 and 4 of that section appeared in identical terms as s-s.2 and 3 in the 1906 version of the Indian Act and appear to have continued in such terms as s-s.2 and 3 of s.46 of the 1911 amending Act because only s-s.1 was repealed and substituted for in that Act. Since those subsections apply "in any case in which arbitration is had", they would appear to apply to those companies and authorities which have a statutory power to expropriate and whose constituent statutes provide for arbitration. I have not found, nor were we referred to buy section in the 1927 Indian Act, providing for arbitration. That being so, it seems that two separate expropriating procedures were contemplated by s-s.1 of s.48, i.e., one where the federal Crown was expropriating and the second where other statutory powers were being exercised.

I am further of the view that, contrary to what was submitted by counsel for the appellants, s.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 "ell 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 (1900), 31 O.R. 529 quoting from Masters v. Madison County Mutual Ins. Co. (1852), 11 Barb. 624, said:

> 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 land 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 s.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 s.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 s.50 is not required where reserve lands are expropriated pursuant to s.48 of the Indian Act.

Counsel for the appellants found support for his submissions in Point v. Dibblee Construction CO· Ltd., [1931] O.R. 142 at pp.151 and 152. The passage upon which he relied reads as follows:

> The legal title to the land set apart by treaty or otherwise for the use or benefit of a particular band of Indians is in the Crown. The tenure of the Indians is a personal and usufructuary right, dependent upon the good will of the Sovereign. They have no equitable estate in the lands: Attorney -General for Quebec v. Attorney-General for Canada, [1921] 1 A.C. 401; Reg. V. St. Catharines Milling and Lumber Co. (1885), 10 O.R. 196, affirmed (1886) 13 A.R. 148, (1887), 13 S.C.R. 577, (1889), 14 App. Cas. 46. For the history of the public lands of Ontario and the Canadian policy upon Indian questions, see the classic judgment of Boyd C., in 10 O.R., at p.203, and the Report on the Affairs of the Indians in Canada (1842) Appendix E.E.E. of the Journals of the Legislative Assembly of the Province of Canada, vol. 4. The land comprising Cornwall Island is the property of His Majesty the King in the right of the Dominion of Canada (The British North America Act, 1867, 30 Vic., ch.3 (Imp.), see: 91(24); The King v. Easterbrook, [1929] Ex. C.R. 28, affirmed [1931] S.C.R. 210). And that is the reason why no release or surrender by the Indians of any reserve or portion of a reserve to any person other than His Majesty is valid (secs.50 to 54). This being so, how can the prerogative right Crown to deal with its own property be fettered? No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby (The Interpretation Act, R.S.C. 1927, ch.1, sec.16).
>
> There is, in my reading of The Indian Act, R.S.C. 1927, ch.98, no limitation upon this prerogative right. The provisions of sec. 48, whereby 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, and the compulsory taking by any company or municipal or local authority having the statutory power is regulated, refer, obviously, to the case where land if taken away or withdrawn from the reserve and the title to the land so taken passes from the Crown to the company, municipal or local authority concerned. (Emphasis added)

Far from supporting the appellants' interpretation of s-s.48(1) as I read the excerpt, it appears to support that of the trial judge, which as I have said earlier herein, is consonant with my construction of the subsection.

For all of the foregoing reasons, I am of the opinion that the appellants fail on the first ground of their appeal.

2. Review of Expropriation

This issue, as defined by appellants' counsel is, if s.48 of the Indian Act permitted the Crown to expropriate reserve lands, was such jurisdiction properly exercised in the case at bar? The thrust of this argument is that the court is entitled to examine not only the expressed purpose for the expropriation but the actual reason therefor. In counsel's submission the dominant purpose for the expropriations was not that expressed in either Order-in-Council P.C. 3801 (to construct public work, namely, an airport at Penticton) nor in P.C. 9696 (to further develop the Penticton airport as a public work), but rather for the beneficiaries of a fiduciary relationship (the Penticton Indian Band) to deliver up Parcels A and B at prices which suited the fiduciary notwithstanding that they were not satisfactory to the beneficiaries. Counsel argued in his memorandum that "had it been

necessary to expropriate land for the establishment of an airport, the Crown could have exercised its powers against non-Indian land on the river bank opposite the relevant Indian lands. The price which would have had to be paid for such alternate land, however, would have been higher than that at which the Crown hoped to obtain the reserve lands." Such motivation, he said, fails to satisfy the "dominant purpose" test thus entitling this court to review the exercise of the Crown's jurisdiction, if any, to expropriate reserve lands. The test upon which he relied he found in the decision of the Nova Scotia Supreme Court Trial Division in Warne v. Province of Nova Scotia et al. (1969), 1 N.S.R. (2d) 150 at 152-53.

Before reviewing that authority, it should be said that there is neither any direct nor indirect evidence which I have found disclosed in the record which might attribute to the Crown the motive for the expropriation suggested by the appellants. At its very highest the record is replete with evidence that when the Department of Transport concluded that it could no longer hope to negotiate with the Indian Affairs Branch valuations for Parcels A and B which it could justify and, given the urgency, in the case of Parcel B, for enlarging the runways at the airport for defence purposes, it decided the only course open to it was to expropriate the lands. It is a very long step, indeed, to proceed from that factual situation to one which ascribes to the respondent the motive that the Departmental officials deliberately acquired the Indian lands in preference to those of non-Indian a because they could be acquired at lower prices. As I have said I could find no evidence to support such a contention. In fact, there is substantial evidence that the lands were desired because they were the most suitable for the purposes for which they were required. I turn now to the Warne case. The key passage in that decision, as I appreciate it, is the passage which appears at page 152 of the report where Cowan C.J.T.D., after reviewing cases examining the power of a court to inquire into the exercise by a Minister of his statutory power to expropriate, said:

> In my opinion, however, the exercise of the discretion referred to in the foregoing cases was one which was for a purpose contemplated by the statute under consideration. If the predominant purpose of the expropriation is in furtherance of a tortious conspiracy to injure the owner of the land taken, the action of the Minister is, in my opinion, subject to review by the Court.

Here I have been unable to find the slightest evidence that the "predominant purpose" of the expropriation was in furtherance of "tortious conspiracy to injure the owner of the land." Undoubtedly the Department of Transport, having been unable to negotiate what they deemed to be suitable prices for the lands, obtained authorization to expropriate. That had the effect of limiting the options available to the Indians in that they were unable then to elect not to sell or lease their lands. All they could do was negotiate the compensation. However, that is a far cry from attributing to the Department the predominant purpose attributed to it by the appellants.

Since that was the only test of the five propounded in the Warne case which was relied upon by the appellants, it is unnecessary to further examine the applicability of that case. The second ground of appeal in my view, therefore fails.

3. Breach of Fiduciary Duty

The appellants' attack on the basis that the respondent was in breach of Her fiduciary duty to the Penticton Band, was three-pronged:

(a) Although the relationship between the band and the respondent was that of a fiduciary requiring Her to deal with lands occupied by Indians for their benefit rather than that of a trustee and cestui que trust, the rules applicable to conflicts of interest of trustees are, it was said, equally applicable to fiduciaries. Therefore, since a trustee is liable for breach of trust if he deals with property for his own interest in preference to that of his cestui que trust, so will a fiduciary be liable to those for whom he is responsible in the fiduciary relationship, in this case the Indians of the Penticton Band;

(b) The respondent failed to exercise the degree of care expected of a fiduciary when Her officials failed to consider the peculiar value and importance of Parcels A and B to the band and its locatees in determining the compensation payable to them;

(c) The Crown in failing to ensure that the Indians of the Penticton Band were fully informed of the opinion acquired by the Crown relating to the inability of the Crown to expropriate reserve lands and that they may be acquired only after a surrender by the Indians, was in breach of its fiduciary duty of full disclosure.

Before dealing with these attacks it should be pointed out that the Trial Division decision, which was delivered on July 9, 1981, was rendered before the judgment of the Supreme Court of Canada in Delbert Guerin et al. v. Her Majesty The Queen and the National Indian Brotherhood (judgment rendered November 1, 1984) [reported at (1984) 6 W.W.R. 481, 55 N.R. 161, (1985) 1 C.N.L.R. 120]. That judgment will be referred to hereafter as the Guerin case. To appreciate its significance in the context of the three attacks above referred to, the decision should be reviewed in some depth.

The headnote sufficiently sets forth the facts as follows:

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

At pp.19 and 20 [pp.131-32 C.N.L.R.] of the reasons of Dickson J. (as he then was), speaking for himself and Beetz, Chouinard and Lamer JJ. (all other members of the Court concurred in the result) had this to say of the Crown's obligations to the Indians:

> ...it is my view that the Crown's obligations vis-a-vis the Indians cannot be defined as a trust. That does not, however, mean that the Crown owes no enforceable duty to the Indians in the way in which it deals with Indian land.
>
> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except under surrender to the Crown.
>
> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the Indian Act. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. (Emphasis added)

Mr. Justice Dickson then discussed the nature of Indian title to reserve lands and concluded that either characterizing it as a beneficial interest of some sort or a personal, usufructuary right was not quite accurate. Rather he said at p.30 [p.136 C.N.L.R.]:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact

> that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading. (Emphasis added)

It should be noted that in the above passages from his judgment, Dickson J. says that "[t]he surrender requirement…[is] the source of a distinct fiduciary obligation…', that the interest of the Indians "gives rise upon surrender to a distinctive fiduciary obligation…" and that "the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered". At p.31 [p.136 C.N.L.R.] he stated "In the present appeal its [the fiduciary obligation] is based on the requirement of a "surrender" before Indian land can be alienated" (emphasis added). Lastly, at p.35 [p.138 C.N.L.R.], Mr. Justice Dickson said, "When, as here, an Indian band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf (emphasis added).

From the foregoing, it is clear that what was said by Dickson J., in the Guerin case was related to a fiduciary relationship in the context of that case, i.e., where there was a surrender of Indian lands to the Crown on certain terms, which terms were changed by the Crown without consultation with or approval by the Indians. That is not the factual situation in the case at bar. Nevertheless, for the purposes of this appeal I am prepared to accept that the principle propounded by Dickson J., applies. When the Crown expropriated reserve lands, being Parcels A and B, there would appear to have been created the same kind of fiduciary obligation, vis-a-vis the Indians, as would have been created if their lands had been surrendered. The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians, just as in the Guerin case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. How they ensured that lies within Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.

Before dealing with the attacks based on the alleged breach of fiduciary duty, it should be observed that there was virtually no viva voce evidence adduced to support the allegations of breach of duty. Of two witnesses called by the appellants at trial for the purpose of proving the allegations, only one, Louise Gabriel, was ,old enough to have participated in any of the band meetings concerning the taking of the airport lands. While she was old enough to have participated, she, as a woman, was not entitled to attend band meetings nor to vote on questions there raised. That situation did not change until the late 1940's after the relevant events in this case had occurred. Neither was she a locatee on either Parcel A or B, although her husband had an interest in an estate, part of the property of which was in Parcel A. She could only testify that the expropriation disrupted band life in many ways.

The second witness in respect of this issue, Morris Kruger, is one of the appellants herein and is the present chief of the band, was born in the early 1940's and, thus, has no memory of any of the events surrounding the expropriation.

None of the locatees alive at the time of trial, if any, were called as witnesses. The Indian Agent, Mr. Barber was then dead so that the allegations must be established through the documentary evidence to which extensive reference will be made hereafter.

I turn now to the attacks based on the alleged breach of fiduciary duty.

(a) Assuming, without deciding, that the rules applying to conflicts of interest between trustees and their cestuis que trust apply to fiduciaries, what was found by the learned trial judge is most pertinent. At page 8 [p.57 C.N.L.R.] of his reasons, (A.B. V.1, p.42):

> The plaintiffs, at trial, expressly abandoned reliance on all pleadings alleging fraudulent conduct.
>
> Among the terms of the trust is subsection 48(1) of the Indian Act. Parliament cannot have intended that the Governor in Council consider only the best interests of the band concerned in deciding whether or not to consent to an expropriation of reserve lands. It is rarely in the best interests of an occupant to be dispossessed or of an owner to be deprived of his property against his will. Certainly, there, it was not in the best interests of the Band.

> The defendant's duty to the Band, as trustee, by no means the only duty to be taken into Account. The evidence is clear that those officials responsible for the administration of the Indian Act urged a lease while those responsible for the airport ultimately urged expropriation. The Governor in Council was entitled to decide on the latter. There was no breach of trust in doing so.
>
> The defendant, as trustee, had also the obligation to obtain proper compensation for the Band. Since the time has long since passed that the compensation paid and accepted could be reviewed in court, there is little to be said on the subject.

I agree with these findings. There was no breach of the fiduciary obligation of the Crown based on the alleged conflict existing between two of its Departments -- Mines and Resources, Indian Affairs Branch, and Transport. In fact, the record contains many letters involving particularly the Indian Agent and his superior, the Indian Commissioner for British Columbia, which revealed that they were articulate, forceful and passionate spokesmen for the Penticton Indians. Their superior in Ottawa, the Secretary of the Indian Affairs Branch, also was a strong advocate in advancing the views of the Indians as to the proper compensation payable as a matter of rent, as a purchase price for the property or for the expropriation thereof. Their views did, in fact, influence those of the senior officials in the Department of Transport with whom they dealt since their original offers of compensation for the expropriation were increased because of the representations. In fact, the sum of $15,000 was substantially closer to the independent evaluation obtained by the appellants than to those obtained by the respondent. Moreover, as the trial judge pointed out, the Transport officials, too, owed a duty in the performance of their functions, not a direct duty to the Indians but duty owed to the people of Canada as a whole, including the Indians, not to improvidently expend their moneys. Ultimately a decision had to be taken which, unfortunately, may not have been wholly in accord with the view of the Indians as to the worth of their lands to them although, as earlier pointed out, the settlement figure was one which was originally suggested by them. (See letter from Barber dated January 9, 1946, supra, pp.21-22). That fact does not mean that there was a breach of fiduciary duty nor that there was a conflict of interest which had to be resolved in their favour, disregarding the obligations of the Department of Transport officials. To summarize, I do not understand how it could be said that there was a conflict of duty precluding the Indian Affairs Branch from settling the compensation at a figure which was not wholly satisfactory to the Indian band when all of the circumstances relating to the transactions were taken into account.

(b) With respect to the second attack, supra, there is no doubt in my mind that the Indian Affairs officials were fully cognizant of the "peculiar value and importance" of Parcels A and B to the Indians.

A few examples of many in the record beginning as early as July, 1940, will be sufficient to show that that awareness existed:

(1) From a letter from Indian Agent Barber to the Secretary, Indian Affairs Branch, dated July 8, 1940:

> The increased area takes in much of the hay and meadow land owned by these Indians, which accounts for them not being agreeable to accept a less rental than Ten dollars per acre; they also state that they are not desirous of leasing their land for this purpose, and have wasted too much time talking about it already , the whole matter being of continuous discussion for nearly two years, and not having yet received the rental paid by the City of Penticton in October last.

(2) From a letter from Indian Commissioner for B.C., to the Secretary, Indian Affairs Branch, dated August 28, 1940:

> In addition to the payment of rental an important consideration was the fact that the Corporation undertook to clear, level and seed the land to a suitable hay and permit the Indians to crop the land. The seeding item is set out in the Agent's letter of May 4, 1939. From this it will be observed that the Indians not only received a rental but secured improvements in addition to continued use of the property with very little inconvenience as at that time it was not contemplated that the project would be more than a small municipal airport.
>
> The proposal of the Department of Transport is on an entirely different basis to that originally made with the Corporation. Whereas the Municipal Airport covered only about 72 acres and did not materially affect the hay meadows of the Indian cattlemen, leaving them

with land outside of the airport, the new proposition by the Department of Transport requiring some 153 acres from the use of which they will be entirely excluded, will practically cover the entire useful portion of the land of some of these men and seriously impair their means of livelihood. Consequently, the rental of ten dollars is much less favorable than the $6.50 asked from the Corporation

. . .

I enclose sketch showing location of these areas in relation to the proposed airport. At the time of the application of the Corporation it was considered that the land was mostly very sandy soil, but some levelling of the land subsequently disclosed that the sand was a superficial layer of about three or four inches underlaid by very good soil, mostly sub-irrigated sufficiently to grow good hay crops. Attached sketch will show part of the locality and various prices paid for land in the vicinity.

(3) From a letter from Indian Commissioner for B.C. to the Secretary, Indian Affairs Branch, dated September 16, 1942:

I am in receipt of a copy of Mr. Indian Agent Barber's letter of the 8th instant addressed to you in respect to the acquisition of additional land on Penticton Indian Reserve by the Department of Transport for airfield purposes, and note that the subject of valuations has arisen, particularly in connection with the amount requested by William Kruger.

Reviewing the establishment of this airport on the Reserve, I would point out that originally it was only intended to take up about 72 ½ acres of the Reserve on a rental basis of $5.00 to $6.00 per acre for 25 years, the Indians to be permitted to cut hay on the portion not in actual use. This would not have materially interfered with the Indian agricultural activities on the Reserve. However, the Department of Transport took over the matter and arranged for the out-right purchase of 152.72 acres, all of which is agricultural lands and are now requesting the purchase of an additional 187.8 acres making a total of 340.52 acres.

Had it been anticipated that the area required would eventually have been so large it is extremely doubtful whether the Indian Agent would have recommended the establishment of the airport on this location as it comprises the best agricultural land on the Reserve and its loss will put several Indians completely out of business and considerably modify the output of others as there is no other land available on the Reserve suitable for agriculture owing to the lack of irrigation water.

There can be not the slightest doubt that the Indian Affairs officials were not only cognizant of the value and importance of both Parcels A and B to the Penticton Indian Band but they had communicated that awareness on more than one occasion, as the record discloses, to the Department of Transport at the Deputy Minister level. One example of several is in the following excerpt from a letter from the Deputy Minister of Mines and Resources to the Deputy Minister of Transport dated January 12, 1943.

Through your agent, Mr. G.G. Baird, Land Commissioner at Winnipeg, we assume that you are in possession of the proposal made to him by our Agent, Mr. A.H. Barber, in which he places a value on these lands of $300 an acre for cultivated land and $200 for unimproved land. In the stand taken by him as to valuation Indian Agent Barber is supported by the Indian Commissioner for British Columbia, Major D.H. MacKay, in whose judgment we have every confidence. In his report dated September 16th Commissioner MacKay makes the following statement:-

> I would point out that the actual compensation at the rate asked for by Kruger is not disproportionate to the loss he will sustain as he will be compelled to greatly reduce his cattle holdings due to the loss of hay and pasture lands. Under the circumstances I am of the opinion that Kruger's own valuation is not excessive, and the valuation of the other properties made by Mr. Barber are not unreasonable in view of the fact that the transfer to the Department of Transport will mean the loss of livelihood for some of the Indians concerned.

While we are keenly aware of the need in this national emergency to assist you in the accomplishment of your purposes, <u>we cannot lightly throw off our own statutory responsibility as trustee of the Indian interest</u>. It has taken many years of hard work and patient effort by our field staff in British Columbia to bring even a small portion of the aboriginal group of that Province up to a point where they can adequately maintain

themselves. This particular group at Penticton have by their efforts achieved a measure of economic independence in agricultural pursuits. If they are dispossessed, as it appears they must be, they have got to start over again elsewhere and the actual value of their lands is of comparative insignificance when you consider the task that confronts them in re-establishing themselves. For that reason compensation paid to them must be generous and in arriving at even fair compensation the physical value of the land is in our judgment more or less incidental. (Emphasis added)

In response to that letter the Department of Transport obtained independent valuations of Parcel B and so did the Indian Affairs Branch. A further letter to the Deputy Minister of Transport on November 12r 1943 contains the following paragraphs illustrating how forcefully the Indians cause was presented:

Further to my letter of July 27th regarding the above, we are now in receipt of a report from Major D.M. MacKay, Indian Commissioner for B.C., regarding the valuation of the lands taken for the Penticton Airfield. A report from the local valuators employed by this Department, Messrs. H. Barnard and A.E. Key of Penticton, has also been received. Those gentlemen describe themselves in their report as follows:

> ...we both have resided in Penticton for the last thirty-five years and for a number of years we have been engaged in farming. The valuations as shown, are in our unanimous opinion and judgment, just and reasonable.

They should, in our opinion, be competent to judge the actual agricultural value of the lands taken, which they fix at $16,958.75. We have had a comparative statement of the various valuations made up and are enclosing a copy for such value as it may have to you.

Neither our Indian Agent at Vernon, not our Indian Commissioner at Vancouver ate satisfied to accept this valuation as a basis for the compensation to be paid to the Indian owners. Before, however, discussing this feature we wish to bring to your attention the suggestion and recommendations made by Major MacKay that a strip of land 200 feet in depth along the highway and adjacent to Skaha Lake be reserved for the general use of the Band who wish to retain it as a site for summer cottages. The area of land we wish to except is less than three acres.

Returning to the question of compensation to the Indians, they ate entitled to compensation, in our judgment, for the complete disruption of this Indian community's way of life and for the cost of re-establishing the group where the complete resumption of that way of life may be effected. Owing to their race some opposition to receiving them into available white communities will be encountered and that opposition will be reelected in the price they will have to pay for lands or properties as valuable and as useful to them as those they have been compelled to vacate and give up.

Taking these considerations into account and without making any attempt to appraise the set-back toward the assimilation of this Indian group into the economic life of the community of which they form a part, the original compensation asked and which he fixed at $28,328.00 is not in our judgment excessive even if you break it down to the actual agricultural value of the lands taken and add a generous percentage to compensate for less tangible but very definite loss to the Indian group and this administration.

If therefore you ate prepared to raise your neighborhood of $23,000.00, we will try to obtain the concurrence of the Indians affected through our local officers in British Columbia and settle this matter between us in an amicable way. Unless you are so prepared there would seem no alternative but to suggest that you resort to your right to apply for a board of arbitration and expropriate the lands you presently need and occupy.

In summary, then, without reviewing all of the evidence in detail, a fair reading of the record indicates that officials at all levels were well aware of their respective obligations and discharged them to the best of their abilities. Valid criticism might be directed to the inordinate length of time required to make payment of the compensation but I do not conceive that to be a breach of duty sufficient to invalidate the expropriation.

(c) With respect to the alleged failure of the Indian Affairs officials to disclose to the band the opinion of the Deputy Minister of Justice that Parcel B could not be expropriated, the trial judge found as follows [p.58 C.N.L.R.]:

I accept that the present Plaintiffs were not aware of that opinion until the research leading to the bringing of this action disclosed it but the evidence does not satisfy me that those at the meeting were not informed. In reporting on the meeting, the Indian Agent, Alfred W. Barber, who died in 1960, wrote, Exhibit P-49, as follows:

> I would advise that this meeting was a very difficult one and I have not the least doubt but that, if all members of the Band had been present, or should the **s**urrender be resubmitted to the Band, it will be defeated.
>
> The Indians do not understand just why they are required to surrender these parcels of land when the land has been taken from them for the past three years and they have been repeatedly told that the land had been expropriated by the Government. Also they point out very forcibly that there was no surrender submitted to them for the land taken previously. It will be realized that I was in an unfortunate position in having to ask them to agree to allow the Department to sell this land when I have for the past three years been telling them that the land was expropriated, and that there was no possibility of the land being returned to them.

That is open to a number of interpretations but, on all the evidence, Barber's consistent sympathy for the position of the Band and his outspoken advocacy of its interests is so apparent that I cannot conceive that he withheld any information from the meeting, provided he had that information himself. It is not clear that he knew of the opinion but, on the evidence, I must hold that the onus of proving the information was withheld has not been discharged.

I can only say that, in my opinion, the finding was a reasonable inference to be drawn from the known facts. Unfortunately, it was simply not possible for vive voce evidence to be adduced by Mr. Barber, who is now deceased, or from any of the Indians who were actually present at the "surrender" meeting. The best evidence is from the Barber report quoted earlier herein and referred to in the above excerpt in the reasons of the trial judge, written shortly after the meeting (the report was dated February 4, 1946). Having read and re-read Mr. Barber's many reports and his quite apparent understanding of and sympathy for the Indians, I can only conclude that he would have disclosed everything of which he was aware in respect of the requirement of a surrender. The letter from the Director of Indian Affairs, dated January 18, 1946 instructing Mr. Barber to call a meeting of the band for the purpose of considering a surrender refers to a telegram which is not part of the record. I can only assume that in order for him intelligently to discuss the necessity for the surrender, he would have been advised of the basis for the requirement. And, of course, as pointed out by the learned trial judge, the onus for proving the alleged lack of communication of the existence of the opinion, where, on a fair appraisal of the evidence, a prima facie case had been made out, that it had been, must lie with those who allege it. They have failed to discharge that onus.

Even if this were not so, since the property had already been expropriated on February 17, 1944, and since, as I have found, the expropriation of reserve lands was a valid one pursuant to s.48 of the Indian Act, 1927, the surrender was both superfluous and a nullity. I agree with the trial judge in so concluding.

Therefore, in my view, the appellants have failed in all three of their attacks alleging a breach of fiduciary duty.

Before leaving this branch of the appeal I should return to the appellants' basic criticism of the conduct of the Crown in its dealings with the reserve lands to which I adverted at the beginning of this opinion, i.e., that by resetting to expropriation, the Indians were effectively deprived of their options to refuse to sell, or to negotiate suitable lease terms or sale prices. The options remaining open to them were, it was said, to settle the compensation at a figure which might not be in accord with the value of the lands to them or to resort to resolution of the question of compensation in the Exchequer Court.

It is clear from the record that the Indians understood, both from the Indian Agent and their independent legal advisors, that court action could not only be costly but also could result in further delay in receipt of the compensation. There is no question that from the expropriations those consequences did flow.

However, from the perspective of the Crown in its Department of Transport incarnation, there were competing considerations. First: initially the requirement for an enlarged aerodrome as an emergency landing site for commercial aircraft, in a mountainous region where such sites were scarce, was important. Second: later on the more urgent requirement for an even larger aerodrome for western defence purposes in wartime was of at least equal importance.

From these considerations and facts, the Question which must be posed is, did the fact that the competing considerations were resolved in respect of both Parcels A and B, with the concurrence of the Indians, on terms which clearly were compromises, not entirely satisfactory to either of the branches of the Crown involved, result in a breach of the Crown's fiduciary duty to the Indians entitling them to the remedies sought in this action? I think not for the reasons which I have already given and for those which follow.

In essence, however unhappy they were with the payments made, they accepted them. The payments were for sums which could be substantiated by the independent valuations received by both parties and which were determined after extensive negotiations and forceful representations on the Indians' behalf by the Indian Agent and other high officials of the Indian Affairs Branch. If the submissions advanced by the appellants were to prevail, the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been, in each case, to have acceded in full to their demands or to withdraw from the transactions entirely. The competing obligations on the Crown could not permit such a result. The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected. The Governor in Council became the final arbiter. In the final analysis, however, if the appellants were so dissatisfied with the expropriations and the Crown' s offers, they could have utilized the Exchequer Court to determine the issues. For whatever reasons, they elected not to make these choices. They accepted the Crown's offers and, at least in the case of Parcel B, the offer was at the figure which they had suggested. I fail to see, then, how they could now successfully attack, after so many years, the settlements to which they agreed.

IV. The Limitations Act and Laches

Since I have concluded that none of the attacks on the impugned judgment can succeed, it is, strictly speaking, unnecessary to deal with the Crown's contention that the band's claim is barred by s.38 of the Federal Court Act R.S.C. 1970 (2nd Supp.), c.10 and the Limitation Act R.S.B.C. 1979, c.236, s.3(4) because more than six years had elapsed between the date upon which the cause of action arose and March 23, 1979, the date upon which the action was commenced. Nevertheless, I will deal briefly with the submissions which may become important should I be found to have been in error on any of the substantive issues.

The Crown conceded that no limitation provision will apply where there has been a fraudulent concealment of the existence of the cause of action until the expiry of the prescription period when, with reasonable diligence, the plaintiffs could have discovered it had there not been such a concealment, Here, however, on the hearing of the appeal, appellants' counsel advised the court that, at trial, the plea of fraudulent concealment had been abandoned, However, relying on the Guerin case as his authority, counsel for the appellants argued that the breach of duty arising from the failure to disclose the opinion of the Deputy Minister of Justice constituted an equitable fraud. It was, to employ the words quoted in Guerin by Dickson J., at p.43 [p.141 C.N.L.R,] of his reasons for judgment, from the Kitchen (v. Royal Air Force Assn., [[1958] 1 W.L.R. 563, [1958] 3 All E.R. 241 (C.A.)] case, "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other,"

I do not think that the conduct of the Crown in this case amounted to equitable fraud. As earlier held, I do not believe that the existence of the legal opinion was withheld from Mr. Barber, nor did he, in turn, withhold disclosure of its existence from the band either inadvertently or deliberately.

It would have been conduct which was completely out of character both for Mr. Barber and for those to whom he reported, to do so. The record discloses many, many instances of the complete candidness exhibited by these Indian Affairs officials with the Indians throughout the years so that it would be indeed a reversal of an established pattern of conduct for them to have withheld pertinent information at the time when the expropriation of Parcel B was so near completion. That being so I am quite unable to find any conduct by the Indian Affairs Branch officials which was so clearly unconscionable as to amount to equitable fraud.

In addition, it is important to note that there is considerable documentary evidence in the record which discloses that, well before the Crown's legal opinion became known, at least some of the band, including probably all of the locatees, had obtained advice from independent legal counsel as to their rights. It is inconceivable to me that any such counsel would have failed to consider the legality of the expropriation of the reserve lands even had he been consulted initially only with respect to the quantum of compensation desired. If he did that then he would obviously have had to consider the possibility that only a properly executed surrender would suffice. If such is the case the Indians were not taken by surprise by the disclosure in early 1946, that a surrender was required by the Crown to effectuate the transfer of the lands. If that is correct, the action in the Exchequer Court which was clearly within the contemplation of both the Indian locatees and the Indian Affairs Branch officials could have, and perhaps ought to have, been proceeded with. Instead, the Indians, however reluctantly, chose to settle. Then, some thirty-three years later, they sought to set aside the settlement alleging equitable fraud as the basis for the inapplicability of the Limitation Act. As I have said, I do not believe there was either actual or equitable fraud in the circumstances of this case. Therefore, since the action was not brought within the time limited by the applicable statute, it could have been dismissed on that ground.

In the circumstances, the question of laches need not be dealt with.

V. Damages

Counsel for the appellants advance, in his Memorandum of Fact and Law, a number of arguments based on the notion that the measure of damages to be applied in the assessment thereof in this case, would assist the court in deciding the substantive issues. Since I do not agree with any of those submissions, and in view of the fact that the appeal is to be dismissed so that damages need not be assessed, it is unnecessary to discuss the arguments under this head.

VI. Conclusion

The appellants having failed to satisfy me that the learned trial judge erred in any material way in the judgment appealed from, I would dismiss the appeal with costs.

STONE J.: I have had the advantage of reading the draft reasons for judgment prepared by Mr. Justice Urie and agree with the disposition he proposes as well as with his reasons therefor. I desire, however, to add a few words on the question of compensation for the Indian interest in Parcel B as well as on the subject of limitation of time and laches.

The record before us is replete with references of the concern felt and expressed by the local Indian agent, by his immediate superior the British Columbia Indian Commissioner, by the Director of the Indian Affairs Branch and his staff in Ottawa and by the Deputy Minister himself. It was thought by these officials that recognition had to be given for the disruption which befell the Indian people by the taking of prime agricultural land for airport purposes. After receipt of the Barnard and Key valuation made on behalf of the Indians' interest in 1943 fixing the value of Parcel B at $16,958.75, an unsuccessful attempt was made on their behalf to settle the dispute for $25,000 on the basis that compensation should include "a generous percentage" to compensate "for complete disruption of this Indian community's way of life and for the cost of re-establishing the group". This view of the amount of compensation payable changed over time as is indicated by a communication from the agent two months later in January 1944 when he informed the Commissioner that "any settlement which allows of distribution in excess of $15,000.00 plus 10% will be acceptable" and later still, in March 1945, when he expressed to the Branch the "opinion that a settlement at the proposed rate of $15,000.00 is probably more than the Indians will receive in an award by the Court...." No reasons for this change of view appears on the face of the record. On the other hand the initial view of the amount of compensation payable was formed well before the independent appraisers' opinions were received. In February 1945, a Branch official expressed concern that a court award might not "after payment of legal costs...net the claimants more than we can obtain for them out of Court".

In my judgment the matter of compensation for Parcel B resolves itself into the question whether, in the circumstances, the Branch acted properly by making the $15, 000 settlement rather than pursue the matter in the court. That figure fell somewhat short of its own valuation of $16,958.75. On the other side were the two valuations of $6, 8000 each. Rejection of the settlement negotiated, it appears, would have resulted in the matter proceeding to the Exchequer Court of Canada for final determination of the amount of compensation payable.

The doctrine of fiduciary duty enunciated by the Supreme Court of Canada in Delbert Guerin et al. V. Her Majesty The Queen and The National Indian Brotherhood (November 1, 1984) [reported at 55 N.R. 161, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120] will, of course, require elaboration and refinement on a case-by-case basis. While the courts have not yet, to my knowledge, applied the doctrine in a case like the present one, I think it is applicable even though the circumstances are quite different from those of the Guerin case. I do not take the words of Dickson J. in that case that the obligation to the Indians did not "amount to a trust in the private law sense" as meaning that it would be inappropriate here to have regard to the law governing trustees for some guidance in deciding whether the fiduciary duty was discharged by the Branch when it accepted the $15,000 amount rather than pursue the matter in the court.

The Branch did not enjoy the same freedom of action in settling the compensation payable as one who does not occupy a fiduciary position. As I see it, it was under an overriding duty to secure for the Indian people affected a sum of money that represented to them the value of their interest in the land. Nevertheless, the reasonableness of its decision to make the $15,000 settlement must be viewed in light of the circumstances. The spread between the opposing valuations amounted to some $10,000. Legal expenses would have been incurred had the matter proceeded to the court. Further delays would have resulted. The outcome of litigation was by no means assured and, particularly, there was no guarantee that a net award would have exceeded that $15,000 figure. In these circumstances I agree that the Branch acted prudently in making that settlement for the Parcel B compensation.

It has been said that in some circumstances a trustee discharges his duty by exercising a combination of prudence and common-sense. That view was expressed in the case of Buttle et al. v. Saunders et al., [1950] 2 All E.R. 193 which I find helpful here even though it was not concerned with compensation for a compulsory taking of trust property. It decided that a trustee had not exercised proper prudence when he failed to probe a higher offer while negotiating the selling price of real property belonging to a trust estate. Nevertheless, I respectfully adopt as applicable here the reasoning of Wynn-Parry J. (at p.195):

> It is true that persons who ate not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain on the sale of property, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. It redounds to the credit of a man who acts like that in such circumstances. Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: "A bird in the hand is worth two in the bush." I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer . Each case must of necessity, depend on its own facts.

The facts of the present case rather strongly suggest that the Branch officials were quite alive to their responsibility in the matter of compensation and that their decision to settle the claim was made with deliberation and upon a proper appreciation of the circumstances. I can find nothing in the record to suggest that a net award beyond the settlement figure was even a probability much less a certainty. In all of the circumstances, I am unable to criticize the Branch in its decision to settle the claim rather than opt for litigation. It discharged its duty to the Indian people concerned in my opinion.

Although I respectfully concur with Mr. Justice Urie that the Indian title in the land was validly taken end that the compensation settlements were proper, I prefer to refrain from commenting upon the questions respecting limitation of time and the doctrine of laches as it is unnecessary to do so,

HEALD J.: I have had 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 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 1 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.

One of the central issues in this appeal, as I see it, is the nature of the fiduciary duty owed by the respondent Crown to the appellants and whether the facts in this case demonstrate a breach of that fiduciary duty.

As noted by Mr. Justice Urie, the learned trial judge held that the Crown stood as a fiduciary vis-a-vis the appellants and no appeal was taken from this finding by either of the patties. Given the existence of such a duty, it is necessary to consider the nature and the parameters of that duty. I agree with my brother, Urie J. that the recent decision (November 1,1984) of the Supreme Court of Canada in the Guerin case is highly relevant and requires careful consideration. The headnote summarizes the reasons of Dickson J. (as he then was), speaking for himself, and Beetz, Chouinard and Lamer JJ. as follows:

> The Indians' interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763, by s.18(1) of the Indian Act, or by any other executive order or legislative provision. The nature of the Indians' interest is best characterized by its inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered.
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> The nature of Indian title and the framework of the statutory scheme established for disposing of Indian land place upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. Successive federal statutes including the present Indian Act provide for the general inalienability of Indian reserve land, except upon surrender to the Crown. The purpose of the surrender requirement is to interpose the Crown between the Indians and prospective purchasers or lessees of their land so as to prevent the Indians from being exploited. Through the confirmation in s.18(1) of the Indian Act of the Crown's historic responsibility to protect the interests of the Indians in transactions with third patties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests lie. Where by statute, by agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> Section 18(1) of the Indian Act confers upon the Crown a broad discretion in dealing with the surrendered land. In the present case, the document of surrender confirms this discretion in the clause conveying the land to the Crown. When, as here, an Indian band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf. The Crown's agents promised the band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms which was much less valuable. The Crown was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease.
>
> After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore these terms. Equity will not countenance unconscionable behaviour in a fiduciary whose duty is that of utmost loyalty to his principal. In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed to the band and it must make good the loss suffered in consequence.

There are some factual differences between Guerin and the case at bar which should be mentioned. In Guerin, the band had surrendered reserve lands to the Crown for lease to a golf club. The terms of the lease signed by the Crown were much less favourable then those approved by the band at the surrender meeting. In the case at bar, the lands referred to in these proceedings as Parcel A, containing some 154.3 acres was expropriated by the Crown. No surrender was obtained from the Indians prior to that expropriation or at all. The lands referred to in these proceedings as Parcel B containing an additional 120 acres was also expropriated by the Crown at a later date. A surrender was obtained from the Indians with respect to Parcel B after the expropriation. Additionally, there are some differences between s-s.18(1) of the Indian Act,

R.S.C. 1952, c.149 which was applicable in Guerin and s.19 of the Indian Act, R.S.C. 1927, c.98 which is the relevant legislation insofar as the case at bar is concerned. Subsection 18(1) of the Indian Act, R.S.C. 1952, c.149 as amended, reads:

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

Section 19 of the Indian Act, R.S.C. 1927, c.98, reads:

> 19. All reserves for Indians, or for any band of Indians, held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held heretofore, but shall be subject to the provisions of this Part.

It will be observed that the terms of s.18 of the 1952 Act are more specific than s.19 of the 1927 Act. However, I think such a difference cannot affect the applicability of what was said in Guerin to the instant case. I agree with the statement of Hall J. in the case of Calder v. Attorney -General of British Columbia, [1973] S.C.R. 313 at 390, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 where he said that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment." This view is confirmed by Mr. Justice Dickson in Guerin at page 24 [p.133 C.N.L.R.] of his reasons where, in characterizing Indian title, he said: "Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by 5.18(1) of the Indian Act, or by any other executive order or legislative provision." Accordingly, I conclude that the difference in the statutory language applicable to Guerin and to the case at bar does not impair in any way the applicability of the reasons and decision in Guerin to the instant case.

Likewise, I am of the view that the factual differences in the two cases do not detract from the persuasive value of the Guerin reasons when applied to the case at bar. In the case at bar, there were two expropriations. In one expropriation there was no surrender. In the other, the expropriation was followed by the execution of a surrender. I do not think, however, that what was said by Mr. Justice Dickson relative to the fiduciary relationship existing between the Crown and the Indians can be construed in such a way as to be authority for the proposition generally that the fiduciary relationship arises only where there is a surrender of Indian lands to the Crown. It is correct t, note, as did Mr. Justice Urie, that those comments were made by the learned Justice in the context of the facts of that case which involved a surrender of Indian lands to the Crown upon certain terms. However, Mr. Justice Dickson made the following comments at pp.41 and 42 [p.140 C.N.L.R.]:

> While the existence of the fiduciary obligation which the Crown owes to the Indians is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is both more general and more exacting than the terms of any particular surrender. In the present case the relevant aspect of the required standard of conduct is defined by principle analogous to that which underlies the doctrine of promissory or equitable estoppel. The Crown cannot promise the band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the band to alter its legal position by surrendering the land, and then simply ignore that promise to the bands detriment. See, e.g. Central London Property Trust Ltd. v. High Trees House Ltd., [1947] 1 K.B. 130; Robertson v. Minister of Pensions, [1949) 1 K.B. 227, [1948) 2 All E.R. 767 (C.A.).
>
> In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the band. It must make good the loss suffered in consequence.

Accordingly, I think it clear that the fiduciary obligation and duty being discussed in Guerin would also apply to a case such as this as well and that on the facts in this case, such a fiduciary obligation and duty was a continuing one -- that is, it arose as a consequence of the proposal to take Indian lands and continued throughout the negotiations leading to the expropriations and thereafter including the dealings between the Crown and the Indians with respect to the payment of the compensation to the Indians in respect of Parcels A and B.

What then are the parameters of this fiduciary relationship? Bearing in mind that equity will supervise the relationship by holding a fiduciary to the fiduciary's strict standard of conduct and "will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty

to his principal." (See reasons of Dickson J. at p.41 [p.140 C.N.L.R.]), I proceed now to the factual situation in this case.

The Acquisition of Parcel A

By Order-in-Council 1036 dated July 29, 1938, the Province of British Columbia conveyed to the federal Crown, Penticton Indian Reserve No.1 (of which Parcels A and B herein formed a part) "in trust for the use and benefit of the Indians". In September of 1938, the municipality of Penticton approached the Indians for a lease of some 72.56 acres of land on the Penticton Reserve No.1 for use as a municipal airport. The Indian Agent, signed a form of lease on behalf of the Indian occupants of the land in question. The Indian occupants signed for themselves as well. The municipality also signed the form of lease. The average tent was $6.50 per acre per annum together with other benefits which will be detailed later herein. The term for each lease was for five years renewable for further five year terms at the option of the municipality to a maximum of twenty-five years in total.

These leases were not approved by the Indian Affairs Branch in Ottawa because of the intervening requirement of the Department of Transport to acquire the land for airport purposes. By letter dated December 6, 1939, the Deputy Minister of Transport advised the Director of Indian Affairs, Ottawa, that additional land would be needed because a larger airport involving longer runways was envisaged by Transport. This larger parcel, eventually comprising 154.3 acres is known as Parcel A. In that letter it is significant to observe that it was stated (Vol.I, A.B. p.100):

> I should be obliged if you would advise me whether arrangements can be made to take over this site either by lease or by purchase from the Indians who, I understand, at present own it. (Emphasis added)

On February 2, 940, Indian Agent Barber, after discussing the matter with the Indian occupants of Parcel A, reported to the Indian Commissioner for British Columbia (Major MacKay) that some of the occupants did not agree to the new proposal to enlarge the area being taken. He pointed out that one of the occupants strenuously objected because he would be deprived of feeding and grazing ground for his herd of 350 cattle and he would also have to remove his slaughter-house and stock yards to some other place. On June 27, 1940, Agent Barber advised the District Airways Engineer, Department of Transport at Vancouver as follows (Vol.I, A.B. p.104):

> I have interviewed the Indians concerned and in view of the fact that the area of the site as now shown is so much larger than that to which they concluded an agreement, they are not favourable to commencement of work until they are satisfied as to compensation to be paid to them, also the term of lease and other necessary particulars.

On the same date (June 27, 1940), Mr. Barber reported to his superior in Vancouver, Major MacKay, as follows (Vol.I, A.B. p.105):

> On the 21st and 22nd instant I interviewed the Indians concerned with the exception of one who was away, and their attitude was not favourable to leasing the acreage now desired and they also desire to have some definite information as to the amount per acre to be paid them in compensation for the land.
>
> I would point out that I am not in a position to discuss the matter fully until I am advised by the Department as to the nature and term of the lease or whether it is to be a sale requiring a surrender of the Band as a whole. Naturally the matter of cash rental or compensation is the main concern of the Indians affected and until they are satisfied in this regard they will not agree to allow work to proceed.
>
> I would appreciate being advised by the Department as to just what is required by the Department of Transport and would also suggest that an official of that Department visit Penticton and interview the Indians with myself in order that conditions may be properly explained and understood and the term of an agreement made and amount of compensation strived at.

On June 28, 1940, Major MacKay wrote to the Indian Affairs Branch in Ottawa as follows (Vol.I, A.B. p.106):

> It is presumed the Department of Transport desire to lease the acreage involved for a term of years with right of renewal and that outright purchase of the property is not at this time

contemplated. In the absence of definite information on this point I have instructed Mr. Barber to meet the Indian owners concerned immediately and secure the necessary agreements as to rentals and other conditions, and forward same to the Department at the earliest possible date.

On July 5, 1940, Mr. Barber was successful in having the Indian occupants of Parcel A execute a surrender for leasing purposes on the basis that the lease be for a term of ten years at an annual rental of $10.00 per acre. This surrender was forwarded by Mr. Barber to Major MacKay by letter dated July 8, 1940. In that letter he said (Vol.I, A.B. p.108):

> I had considerable difficulty in getting the Indians to agree to surrender for leasing the increased area now desired, as this now takes in much of their hay and meadow land and also there has been so much talk of this airport that they are now not interested and not at all anxious to lease for this purpose, and therefore will not even consider a rental of less than ten dollars per acre, which amount is rather high, considering that a large part of the area is nothing but sand, however, it must be considered that the area in question takes in some of the best land on the reserve, and that this is all these people possess, and they are entitled to adequate compensation.

On the same date (July 8, 1940), Mr. Barber reported to the Indian Affairs Branch, Ottawa, as follows (Vol.I, A.B. pp.109 and 110):

> With reference to the site required by the Department of Transport for the above purpose, I now beg to advise that I spent the 25th, 26 and 27th instants at Penticton interviewing the Indians concerned, with the result that finally all agreed to surrender the acreage required for the Airport, to be leased for a period of ten years at Ten dollars an acre, and have signed the surrender hereto attached, in order that the lease may now be entered into by the Superintendent General if the terms are approved by the Department.
>
> It will be noted that the lease is to cover all the conditions set out in the agreement entered into by the Indians with the Corporation of the District of Penticton on October 15th 1939, and is to be effective from that date.
> . . .
>
> The increased area takes in much of the hay and meadow land owned by these Indians, which accounts for them not being agreeable to accept a less rental than Ten dollars per acre they also state that they are not desirous of leasing their land for this purpose, and have wasted too much time talking about it already, the whole matter being of continuous discussion for nearly two years, and not having yet received the rental paid by the City of Penticton in October last.
>
> I have promised the Indians that should the amount of rental be agreeable to the Department, I would advise them as early as possible, and would also request the Department to forward the amount of rental for the first year, to be paid to the individual Indian as soon as the lease is arranged.
>
> I trust that the form of surrender hereto attach will be acceptable to the Department, and allow of an official lease being entered into. I would advise that this was taken in preference to a long detailed agreement being drawn up, the Indians already having signed two and are now not very eager to sign anymore agreements in connection with the airport, and it will probably be difficult if I should have to again approach them with further changes in the site.

On July 11, 1940, Major MacKay wrote to the Indian Affairs Branch, Ottawa, as follows (Vol.I, A.B. p.111):

> It will be observed that no provision has been made for renewal of the lease, as in the original agreements with the Corporation of the District of Penticton, but I would suggest that these could be inserted in the final documents presented for the Indians' signatures, the Agent's attention being called to same, having him delete them if unacceptable.
>
> I do not consider the rental required as excessive, notwithstanding the Indian Agent's statement that "a large part of the area is nothing but sand" as some levelling operations undertaken by the Corporation showed that the sand was largely surface drift, the underlying soil being quite good at a depth of four or

five inches.

I would recommend that the Department of Transport be requested to complete their application as soon as possible, as the various delays in this matter have left the Indians in a somewhat antagonistic attitude towards the application.

On August 13, 1940, Order-in-Council, P.C. 3801, was passed whereunder authority was granted pursuant to the Expropriation Act and s-s.48(1) of the Indian Act to expropriate the bulk of Parcel A. The recommendation to Council from the Minister of Munitions and Supply, concurred in by the Deputy Minister of Transport, reads, in part, as follows (Vol.III, A.B· p.439):

The Committee of the Privy Council have had before them a report, dated August 8th, 1940, from the Minister of Munitions and Supply, representing that it is advisable to undertake the construction of an airport at Penticton, British Columbia, on the route of the Trans-Canada Air lines, and in connection with this work it is necessary to acquire certain parcels of land, totalling 153.8 acres in all, forming part of the Indian Reserve at that place;

That negotiations have been carried on with the assistance of the Indian Affairs Branch of the Department of Mines and Resources for the lease of the lands required, but the negotiations have not been successful owing to the excessive rental asked by the Indians, and on the advice of the Deputy Minister of Justice, it is now proposed to take proceedings to expropriate the said lands under the provisions of the Expropriation Act, Chapter 64, Revised Statutes of Canada, 1927;

On August 22, 1940, Dr. McGill, Director, Indian Affairs, Ottawa, wrote to Major MacKay in Vancouver as follows (Vol.I, A.B. p.114 and 115):

Referring to your letter of July 11th last, in regard to the above subject, I may state that the Department of Transport has notified this Branch that authority of the Governor in Council has been obtained to expropriate the lands required and that immediate possession will be taken by this particular Department, the matter of compensation to the Indian owners to be later determined.

You are aware that, early last year, the Corporation of the District of Penticton entered into various leasing agreements with the Indians of this Band for a similar purpose and the rental terms set forth in these agreements provided for payment of an annual rental of between five and six dollars for stated periods. In view, however, of the fact that this airfield proposition was taken over by the Department of Transport, those leasing agreements were not approved, and subsequently application was made by the Department of Transport for a lease covering an area differing considerably from that described in the agreements first obtained by the Municipality. Recently, as you know, the Indians concerned, through Agent Barber, advised the Department that, in so fat as the Department of Transport application was concerned, they would require payment of an annual rental of ten dollars per acre, coveting a period of ten years. Had the Indians agreed to accept terms similar to those set out in the agreements entered into with the Municipality, I believe that the situation could have been satisfactorily arranged without resorting to expropriation. The Department of Transport, however, considered that a rental of ten dollars an acre was excessive, and Agent Barber in his letter of July 8th intimated that these Indians were not in the mood to negotiate further. As the construction of this airfield was a matter of some urgency, the Department of Transport proceeded to initiate expropriation.

. . .

The Deputy Minister of Transport in a letter dated August 20th, advising of the proposed expropriation of these lands, intimated that he would be prepared to recommend the payment of compensation to the Indians whose lands were affected at the rate of one hundred dollars per acre. Should this offer not be acceptable, then I presume the matter would be referred to the Exchequer Court for definite and final decision. I should like to see this matter arranged on a leasing rather then a sale basis and I am of the opinion that, if the several Indians concerned would agree to accept an annual rental of, say, not mote than five dollars per acre for a twenty-one year lease, renewable, such proposition might be accepted by the Department of Transport. Such an arrangement I believe preferable, mainly for the reason that the Indians of the Band would still retain ownership of those lands and that, over such a period of years, the rental would amount to a very considerable sum eventually representing a much larger compensation than could possibly be obtained on a purchase basis. You should, therefore, take this matter up at once with the local Agent and

instruct him to present the existing situation as clearly as possible to the Indians of the Band and report their decision without delay, as the Department of Transport intends to proceed with development and settlement immediately.

A copy of that letter was provided by Major MacKay to Agent Barber who called a meeting of the Indians concerned on August 27, 1940. The relevant portions of the Minutes of that meeting read as follows (Vol.I, A.B. p.117):

> This meeting called for the express purpose of discussing the matter of the proposed Airport on the Reserve with those Indians concerned and in particular to the contents of Departmental letter No. 13164-182, dated August 22nd, addressed to Major MacKay, Indian Commissioner, regarding expropriation proceedings taken by the Department of Transport.
> . . .
>
> The matter thoroughly and minutely explained and the above letter of Dr. McGill's explained and interpreted in detail. Many questions being answered and different angles of the question explained.
>
> William Kruger:- There is our land it is where we get out grub stake all the time and if they take it away what shall we do. I tell you I quit right now, I am not going to give my land. I don't even want the surveyors in there any more. (Kruger walked out of the meeting.)
>
> George Lassard:- I am off this thing and I have always been against this airport and I won't agree now to let my land go for an airport. That's all I have to say about it.
>
> Joe Cawston:- I am quite agreeable to accept a settlement of $100.00 per acre in full payment.
>
> Narcisse Gabriel:- I at first agreed in the first agreement to a low rental but the last time when this included our good land I wanted $10.00 an acre tent B year and I think that is quite fair as we lose the use of that land, but if they will not pay that amount, then I am through with it and do not agree to let them have my land at all.
>
> Victor Gabriel:- If they will not agree to pay the rental of $10.00 per acre, then I will have nothing to do with it. We lose our land and get little in return. We have had many meetings about this and I now will not agree to let my land go for less than $10.00 an acre rental. We do not want the airport on the Reserve.
>
> Sam Gabriel:- I think $10.00 an acre a year is a fair rental for the land they want and if they cannot agree to pay that I refuse to let my land go for an airport. We can make more than $10.00 an acre a year out of it ourselves.
>
> Michael Jack:- The rental asked is small enough. Our Reserve is all we have and if they cannot pay the $10.00 per acre rental then I am with the other people and refuse to let my land go.
>
> The people did not wish to talk further in regard to this business and leave to attend the haying, etc.

Thereafter, on August 28, 1940, Major MacKay reported to the Indian Affairs Branch, Ottawa, as follows (Vol.I, A.B, pp.119, 120 and 121):

> Replying to your letter of the 22nd instant advising that the Department of Transport have taken expropriation proceedings against the Penticton Band of Indians for 153.8 acres of land at a rate of $100.00 per acre.
>
> It is stated in your letter that had the Indians agreed to accept similar terms from the Department of Transport as those made by them with the Corporation of the District of Penticton, viz. five to six dollars per acre, that the situation could have been satisfactorily arranged without resorting to expropriation proceedings.
>
> From this it would appear that some misunderstanding has arisen in respect to the terms of the proposed lease with the Corporation of Penticton. Reference to the lease and the Indian Agent' s letter dated March 14, 1939, will show that the amount of land involved was 72.56 acres at an annual rental of $465.00, which averages about $6.50 per acre. In

addition to the payment of rental an important consideration was the fact that the Corporation undertook to clear, level and seed the land to a suitable hay and permit the Indians to crop the land. The seeding item is set out In the Agent's letter of May 4, 1939. From this it will be observed that the Indians not only received a rental but secured improvements in addition to continued use of the property with very little inconvenience as at that time it was not contemplated that the project would be more than a small municipal airport.

The proposal of the Department of Transport is on an entirely different basis to that originally made with the Corporation. Whereas the Municipal Airport covered only about 72 acres and did not materially affect the hay meadows of the Indian cattlemen, leaving them with land outside of the airport, the new proposition by the Department of Transport requiring some 153 acres from the use of which they will be entirely excluded, will practically cover the entire useful portion of the land of some of these men and seriously impair their means of livelihood. Consequently, the rental of ten dollars is much less favorable than the $6.50 asked from the Corporation.

In respect to the value of the land, I would point out that it was valued by Mr. Indian Agent Ball about 1920 for the Kettle Valley Railroad, which forms the westerly boundary of the airport, at $200 per acre if I remember correctly. This Company later, in 1932, paid $300 per acre for similar land in the vicinity. Some adjoining land was taken by the Dominion Department of Public Works for Okanagan River improvement about 1936 at somewhere about $75.00 per acre for unimproved bush land, but I have no files on these matters. Inferior land to that taken by the Provincial Department of Public Works in this vicinity, being the highway just south of same, was valued in 1929 at $250.00 per acre and in 1932 at a higher price. I enclose sketch showing location of these areas in relation to the proposed airport. At the time of the application of the Corporation it was considered that the land was mostly very sandy soil, but some levelling of the land subsequently disclosed that the sand was a superficial layer of about three or four inches underlaid by very good soil, mostly sub-irrigated sufficiently to grow good hay crops. Attached sketch will show part of the locality and various prices paid for land in the vicinity.

I would point out that the Okanagan River, which forms the east boundary of the Reserve, about equally divides this locality, the land on the east under white ownership being exactly similar, and available to the Department of Transport at a fair market price, but proximity to Penticton has given it and this portion of the Reserve an added value to that of mere farm land.

The matter was submitted to the Indian Agent. I enclose herewith his report dated 29th instant, together with minutes of a meeting held with the interested Indians on the 27th instant. It will be observed that a further report on land valuations is to follow. The Indians of this Reserve have been very contentious since they lost 14,000 acres in the 1913 cut off and probably would not hesitate to oppose expropriation with legal assistance.

From the foregoing it is my opinion that the $10.00 per acre rate asked by them could not be considered excessive under the circumstances.

On October 26, 1940, Agent Barber wrote to Major MacKay. The relevant portion of that letter reads (Vol.I, A.B. pp.123 and 124):

In acknowledgment of your letter No.33/10/8456 of the 24th instant in which you quote telegram received from the Department asking as to what price per acre for 153 acres you would consider fair, I beg to advise that construction of the Airport has now started on the site in question and the Indians are very much disgruntled about the whole thing and are now wondering if they will be paid anything at all or if this will be another cut-off deal.

I really do not feel that anything can be accomplished by consulting the Indians collectively again in this matter unless I have something definite to put before them.

I, of course, have discussed the matter with the Indians concerned, both individually and collectively, many times -- in fact, every time I visit Penticton I have to discuss the matter and endeavour to explain why I am not able to prevent procedure of the work until a settlement is made with the Indians and the situation is now that Joe Cawston, and Gabriel Brothers have expressed their willingness to accept the sum of $100.00 per acre in full settlement, this sum to be paid in full to them without deduction of the Band equity of the

usual 5% to 10%. Michel Jack has not definitely committed himself, but there is no doubt but that he would accept this sum also. William Kruger, a really shrewd, business man has definitely refused to discuss the matter further and will not attend meetings to do so, but, I feel sure, he too will accept this sum when he knows the other parties are doing so.

George Lessard, who owns 19.95 acres is the most difficult to deal with and will have nothing further to do with the matter, and states he will not accept any money from the whites for his land.

However, possibly he would change his mind if offered a cheque for $1,995.00 in full settlement.

I would submit that se Cawston and the Gabriel Brothers have agreed to accept $100.00 per acre for their lands required for the Airport and as their lands art without doubt better than the area owned by Michel Jack or Lessard, that this sum be considered fair for these lands also including the land owned by Kruger which is of the same class as Cawston's and on which he cuts hay.

I would respectfully suggest that if settlement could be made with the Department of Transport on the basis of $110.00, this would allow the payment of the full sum of $100.00 per acre being paid the individuals and the Band equity of 10% being paid into the Band funds.

On November 16r 1940, Order-in-Council, P.C. 6594 was passed expropriating .52 of an acre, being the balance of Parcel A not previously expropriated.

On January 26, 1941, Order-in-Council, P.C. 659, and subsequent amending Orders-in-Council authorized payment to the Indians of compensation for the land contained in Parcel A at the rate of $115.00 per acre. The recommendation to Council said to be by the Acting Minister of Munitions and Supply, on the advice of the Director of Air Services, concurred in by the Assistant Deputy Minister of Transport, recites that the Indians concerned have agreed to accept compensation at that rate.

As noted by Mr. Justice Urie, the viva voce evidence at the trial was not of much assistance in establishing the factual context of the taking of Parcels A and B. I agree that the relevant facts must be obtained largely from the documentary evidence. I have related supra the documentary evidence relating to the acquisition of Parcel A which I consider to be relevant. From that evidence, I make the following deductions and draw the following inferences:

1. The original negotiations between the Indians and Penticton in 1938 were for a lease of 72.56 acres for a maximum of 25 years.

2. When the Department of Transport became interested in December of 1939, they contemplated acquisition either by lease or purchase. They also contemplated a larger parcel (153.8 acres).

3. During negotiations conducted with the Indians by Agent Barber, it was assumed by Barber and his B,C. superior, Major MacKay, that the Department of Transport wished to lease subject property.

4. In July, 1940, the Indians reluctantly agreed to a lease of the subject 153.8 acres (Parcel A) for a term of ten years at an annual rental of $10.00 per acre and signed a surrender on this basis. In recommending that the Department of Transport agree to this proposal, Major MacKay, the Director of Indian Affairs for British Columbia, said, inter alia: "...I do not consider the rental required as excessive,..."

5. On August 13, 1940, an Order-in-Council was passed granting authority to expropriate Parcel A on the recommendation of the Minister of Munitions and Supply, concurred in by the Deputy Minister of Transport. That Order-in-Council stated, inter alia:

“That negotiations have been carried on with the assistance of Indian Affairs Branch of the Department of Mines and Resources for the lease of the lands required, but the negotiations have not been successful owing to the excessive rental asked by the
Indians….”

6. On about August 22, 1940, the Department of Transport, through the Department of Indian Affairs, offered $100.00 per acre for Parcel A, but suggesting at the same time as a possible alter native, a 21-year lease with an annual rental of $5.00 per acre.

7. On August 27, 1940, Agent Barber presented this proposal to the Indians concerned. Of the eight Indians at the meeting, only one agreed to accept the offer of $100.00 per acre. All of the others were adamant in their refusal to accept this proposal. The alternative lease proposal does not appear to have been canvassed at the meeting.

8. On August 28, 1940, Major MacKay presented the Indians' case to his superiors in Ottawa. in his letter he made the following points:

> (a) Under the proposed lease to the municipality of Penticton at $6.50 per acre, the municipality undertook to clear, level and seed the land to suitable hay and allowed the Indians to crop the land as well. This represented a very substantial benefit to the Indians in addition to the annual rental to be paid.
>
> (b) The expropriation is for 153 acres whereas the Penticton lease was only for 72 acres, leaving the hay meadows of the Indian cattlemen. The 153 acres of Parcel A expropriated by the Department of Transport almost covers the entire useful portion of the land of some of the Indian occupants, thereby seriously impairing their means of livelihood.
>
> (c) As to valuations for Parcel A - In 1920, Indian Agent Ball valued it at $200.00 per acre; in 1932 the Kettle Valley Railroad paid $300,00 per acre for similar land in the vicinity; the Provincial Department of Public Works took inferior land for the highway contiguous to Parcel A for $250.00 per acre in 1929 and for a higher price in 1932.
>
> (d) While Parcel A was originally thought to comprise mostly sandy soil, it was later established that the sand was superficial layer of about three or four inches underlaid by very good soil, mostly sub-irrigated sufficiently to grow good hay crops.
>
> (e) Proximity to the City of Penticton has given Parcel A an added value to that of mere farm land.

9. In October of 1940, as a result of further negotiations with the Indians, Agent Barber reported that some of them would now settle at $100.00 per acre and he recommended that an offer of $110.00 per acre be made to them.

10. The January 26, 1941 Order-in-Council and subsequent Orders-in-Council authorized settlement for Parcel A at $115.00 per acre.

Bearing in mind that it is the Crown which owes the fiduciary duty to the Indians, the facts of this case clearly raise the issue of conflict of interest, in my view. It seems evident that two departments of the Government of Canada were in conflict concerning the manner in which the Indian occupants of Parcel A should be dealt with. The evidence seems to unquestionably establish that the officials of the Indian Affairs Branch were diligent in their efforts to represent the best interests of the Indian occupants. On the other hand, the Department of Transport was anxious to acquire the additional lands in the interests of air transport. This situation resulted in competing considerations. Accordingly, the federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians. The law is clear that "one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "Equity fashioned the rule that no man map allow his duty to conflict with his interest." On this basis, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of government.

It also seems clear that, "provided the trust beneficiary acts with full knowledge of the trust affairs, a sale by him of his interest to a trustee is a valid contract." However, in these circumstances "the onus of proof is on the trustee or fiduciary to show that the beneficiary did indeed have all the relevant information known to the trustee," (if there is relevant information known to neither the trustee not the beneficiary, presumably this is of no significance) "and the Courts are scrupulous in ensuring that no advantage could have been taken of the beneficiary."

Based on the above stated principles, and applying them to the facts in this case, I am unable to conclude that the federal Crown acted "exclusively for the benefit" of the Indians in the acquisition of Parcel A. The Indians were unwilling to part with any of their land, other than the 72

acres which they had originally agreed to lease to the municipality of Penticton. Their reasons were logical and reasonable. However, they finally and reluctantly agreed to a ten year lease. The officials in Indian Affairs recommended this lease. This advice was ignored. The reason given was that the amount of rental being asked by the Indians was unreasonable. The Department of Transport produced no evidence that the annual rental was unreasonable. As a matter of fact, all of the evidence on the record is to the contrary. The situation is the same with respect to the final settlement at $115.00 per acre which deprived the Indians of their total interest in these lands. No appraisals were produced to support this figure. On the other hand, there was evidence of sales of comparable property many years earlier at prices of $200.00 to $300.00 per acre.

In my view, the unmistakable inference to be drawn from this record is that, in the final decision-making process by the Governor in Council, the views of the Department of Transport prevailed over the views and representations of the Department of Indian Affaire. Undoubtedly, the Department of Transport had good and sufficient reason for requiring subject lands at an early date for its purposes but that circumstance did not relieve the federal Crown of its fiduciary duty to the Indians. Accordingly, I have no difficulty in concluding that the federal Crown has not discharged the onus cast upon it to show that no advantage was taken of the Indians in the transaction.

It follows, in my view, that there was a breach of fiduciary duty in respect of the acquisition of Parcel A.

The Acquisition of Parcel B

In early July of 1942 the Department of National Defence for Air approved a proposal the Department of Transport for further development of the Penticton Airport, to serve as an emergency Landing field for the west coast defence system. It is significant to note that the amount estimated by National Defence for acquisition cost of the needed land (120 acres) was $6,000.00 or $50.00 per acre (Vol.III, A.B. p.366 and p,368). This 120 acres is hereafter referred to as Parcel B.

On July 24, 1942, the Assistant Secretary of the Department of Transport wrote to Dr. McGill, Director, Indian Affairs Branch, Ottawa, advising him that it had been found necessary to enlarge the Penticton Airport which would involve the acquisition of additional land from the Indian reserve. That letter goes on to state (Vol.III, A.B. p·372):

> I enclose a print showing, outlined in red, land now required, located both north and south of the present field. I do not know just how much of this land is within the Indian Reserve but, relying upon your concurrence, plan is being forwarded to out Western Agent, instructing him to contact the Indian Agent at Penticton so that arrangements can be made for him to interview the individual Indians.

On July 30, 1942, Indian Agent Barber was advised by the Indian Affairs Branch, Ottawa, as follows (Vol.III, A.B. p.373):

> This office has just now been advised by the Department of Transport that additional lands both north and south of the present airfield are required on the Penticton Indian Reserve. With our approval the Department's Western Agent has, I understand, been instructed to take the matter up with you for the purpose of ascertaining under what terms and conditions these further areas could be acquired. This Agent has been supplied with a plan on which these parcels ate indicated.
>
> It is our desire to offer the fullest co-operation possible in the matter in view of the purpose for which these lands are required, but we do not wish to enter into any definite agreement pending full consideration of the local situation by the Indians of the Penticton Band. The matter will be held in abeyance for the time being and I would ask you to submit your report without avoidable delay.

On September 4. 1942, Dr. McGill sent the following telegram to B.C. Commissioner MacKay (Vol.III, A.B. p.374):

> I UNDERSTAND DIFFICULTIES HAVE ARISEN BETWEEN AGENT BARBER AND OFFICER DEPARTMENT OF TRANSPORT REGARDING FURTHER LANDS ON PENTICTON RESERVE REQUIRED FOR AIRPORT PURPOSES STOP PLEASE

INVESTIGATE AT ONCE AND REPLY BY TELEGRAM STOP IN VIEW OF URGENCY OF SITUATION FULLEST POSSIBLE COOPERATION SEEMS ADVISABLE

On same date, Commissioner MacKay wrote to Agent Barber as follows (Vol.III, A.B. p.375):

> I beg to advise I am in receipt of a telegram from the Director advising that he understands that difficulties have arisen between yourself and the Officers of the Department of Transport regarding the acquisition of further lands on Penticton Reserve, required for airport purposes.
>
> The Director has requested that in view of the urgency of the situation that I investigate the matter at once and report back to him by telegram. He further states that the situation is such that the fullest possible co-operation seems advisable. It would be appreciated if you would kindly furnish me with a report on the matter by return mail, as I have no information on the subject.
>
> It is hard to understand what could have arisen to create difficulties in this matter if the Indians were reasonable in their demands, and the Department of Transport prepared to pay a fair price for the lands to be taken.
>
> I agree with the Director that under existing circumstances this is a matter requiring out fullest co-operation and it would be greatly appreciated if you would use your best efforts to smooth out any difficulties that may arise in this connection.

On September 8, 1942, Major MacKay reported by telegram to his superiors in Ottawa as follows (Vol.III, A.B. p.376):

> RETEL FOURTH INSTANT REGARDING ADDITIONAL LANDS REQUIRED BY DEPARTMENT OF TRANSPORT PENTICTON INDIAN RESERVE STOP AGENT BARBER REPORTS WORK NOW PROCEEDING ON AREAS REQUIRED STOP NO FURTHER DIFFICULTY ANTICIPATED AGENTS REPORT FOLLOWING

On November 3, 1942, Agent Barber wrote to Indian Affairs in Ottawa as follows (Vol.III, A.B. p.379):

> Will the Department kindly advise as to progress in regard to a settlement with the Department of Transport for the additional areas of Indian land being required for airport purposes at Penticton Indian Reserve?
>
> Some clearing and drainage is now being done on the new areas and the Indians are enquiring as to compensation for the areas and in order to avoid any unnecessary difficulties I would wish to be in a position to advise them in this regard before any actual construction is stated. I believe a survey of the areas was completed some time ago. However, I have received no information or instructions since my report to the Department of September 8th last.

On November 24, 1942, Agent Barber directed another inquiry to his Ottawa headquarters which reads (Vol.III, A.B. p.380):

> I beg to advise that work is proceeding on the addition to the Airport on the Penticton Indian Reserve which areas have not as yet been acquired by the Department of Transport from this Department as far as I am aware and I have not been advised in regard to what compensation is to be paid to the Indians.
>
> Will the Department kindly instruct as to whether a settlement has been arrived at and if the authority for the work to proceed has been granted?

Indian Affairs in Ottawa passed on Mr. Barber's request to Transport in the following memorandum dated November 26, 1942 (Vol.III, A.B. p.381):

> A communication was recently received from Mr. Barber the Indian Agent at Vernon, B.C., advising that the Indians of the Penticton Indian Reserve are enquiring as to the amount of compensation they are to receive for the additional area of the Reserve that is required for airport purposes.

> According to Mr. Barber's report clearing and drainage is being proceeded with and it would be greatly appreciated if settlement could be arranged with the Indians concerned at an early date, if possible before construction is proceeded with.

In December of 1942, the Indians were inquiring of Mr. Barber as to when they would receive their compensation in respect of the airport extension since Transport were in the process of fencing the extension in. They wanted some funds for Christmas, and if the compensation was not forthcoming immediately, they inquired of the possibility of a bank loan to tide them over. Agent Barber advised that the compensation would not be payable before Christmas and that he was not able to assist them in obtaining a bank loan. Further requests for the compensation were made by the Indians in February of 1943 but without success.

On May 16 of 1943, the Deputy Minister of Transport forwarded to the Deputy Minister of Mines and Resources (who had responsibility for the Indian Affairs Branch) two appraisals in respect of Parcel B. The appraisals were said to be independent appraisals. One valuation set the value of Parcel B at $6,831.10 (the MacKay appraisal). The other appraisal established a valuation of $6,810.60 (the Burtch appraisal).

Following receipt of these valuations, Indian Affairs engaged their own appraisers, Messrs. Barnard and Ray of Penticton, residents of Penticton for 35 years. During much of that time, they were farmers in the area. Their valuations were reported to the Department of Transport, Ottawa, in a letter dated November 12, 1943. The relevant portions of that letter state (Vol.I, A.B. pp.154 and 155):

> They should, in out opinion, be competent to judge the actual agricultural value of the lands taken, which they fix at $16,958.75. We have had a comparative statement of the various valuations made up and are enclosing a copy for such value as it may have to you.
>
> Neither our Indian Agent at Vernon, not our Indian Commissioner at Vancouver are satisfied to accept this valuation as a basis for the compensation to be paid to the Indian owners. Before, however, discussing this feature we wish to bring to your attention the suggestion and recommendations made by Major MacKay that a strip of land 200 feet in depth along the highway and adjacent to Skaha Lake be reserved for the general use of the Band who wish to retain it as a site for summer cottages. The area of land we wish to except is lees than three acres.
>
> Returning to the question of compensation to the Indians, they are entitled to compensation, in our judgment, for the complete disruption of this Indian community's way of life and for the cost of re-establishing the group where the complete resumption of that way of life may be effected. Owing to their race some opposition to receiving them into available white communities will be encountered and that opposition will be reflected in the price they will have to pay for lands or properties as valuable and as useful to them as those they have been compelled to vacate and give up.
>
> Taking these considerations into account and without making any attempt to appraise the cost of administration and the set-back toward the assimilation of this Indian group into the economic life of the community of which they form a part, the original compensation asked by our informed and competent Indian Agent, Mr. A.H. Barber, and which he fixed at $28,328.00, is not in our judgment excessive even if you break it down to the actual agricultural value of the lands taken and add a generous percentage to compensate for less tangible but very definite loss to the Indian group and this administration.
>
> If therefore you are prepared to raise your bid somewhere in the neighbourhood of $25,000.00, we will try to obtain the concurrence of the Indians affected through out local officers in British Columbia and settle this matter between us in an amicable way. Unless you are so prepared there would seem no alternative but to suggest that you resort to your right to apply for a board of arbitration and expropriate the lands you presently need and occupy.

The Deputy Minister of Transport responded to the Deputy Minister of Mines and Resources by memorandum dated December 4, 1943, as follows (Vol.III, A.B. p.395):

> With further reference to your file 13164-182, in connection with the extension of the airfield at Penticton, B.C.; it is noted that the independent valuation which you obtained is

for an amount of $16,958.75, but that you are not prepared to accept this sum in settlement, suggesting a sum neighbourhood of $25,000.00.

As we cannot justify this expenditure a recommendation is being made to Council for authority to expropriate the land in question and if we are not able to arrive at an amicable settlement for the matter to be referred to arbitration.

This was followed by Order-in-Council, P.C. 9696, on December 20, 1943, which granted authority for the expropriation of Parcel B. The relevant portion of Order-in-Council, P.C. 9696, reads (Vol.III, A.B. pp.448 and 449):

WHEREAS, under authority of Order in Council, P.C. 3801 of August 13, 1940, 153.8 acres of land included in the Indian Reserve at Penticton, British Columbia, was Duly expropriated in connection with the development of the airfield at that place, and subsequently this land was paid for at the rate of $115.00 per acre, which although considered exhorbitant was agreed to as a compromise;

AND WHEREAS the Minister or Munitions and Supply reports that it is necessary, for the purposes of the said Airfield, to acquire 120 additional acres of the said Indian Reserve land, but although protracted negotiations have been carried on with the Department of Mines and Resources, Indian Affairs Branch, it has been found impossible to arrive at an amicable settlement;

That the Lands Branch of the Canadian National Railways, acting for and on behalf of the Department of Transport, valued this additional land at $50.00 per acre, which would make the purchase price $6,000.00, but, in view of the above mentioned previous settlement, the Department offered to pay on the same basis of $115.00 per acre, which would mean a purchase price of $13,747.10; That the Department of Mines and Resources however, placed a value of $30,050.00 on the property, and the Department of Transport then obtained two independent valuations, one of $6,810.60 and the other of $6,831.10;

That, when copies of these valuations were furnished the Department of Mines and Resources, that Department obtained another independent valuation, amount to $16,958.75;

That, in advising of the independent valuation obtained by it, the Department of Mines and Resources advises that it is not prepared to accept the same and states that, if the Department of Transport is willing to pay approximately $25,000,00, it will try to obtain the concurrence of the Indians affected, and that otherwise there would seem although to be no alternative but to resort to arbitration; and

That, in these circumstances, it is proposed to take proceedings to expropriate the said land under the provisions of the Expropriation Act, Chapter 64 of the Revised Statutes of Canada, 1927.

On January 20, 1944, Agent Barber reported to Major MacKay as follows (Vol.I, A.B. p.156):

Further to my attached report in regard to the Penticton Air-port, according to Departmental letter No.13164-182 of December 13, 1943, it would appear that the matter of any settlement is now at a stalemate with the possibility of a settlement at $15,000.00, although it is not mentioned whether or not your suggestion of a compromise settlement at $21,628.10 was taken up with the Department of Transport. The figure mentioned in the Deputy Minister's letter to the Department of Transport is $25,000.00. I expect their refusal was in regard to this figure.

Regarding your suggestion, I would say that any settlement at your figures would have been very satisfactory, excepting that Salen Timoyakin's property, which lies between Baptiste George's and Michele Jack's should have the same valuation as Baptiste George’s.

You can understand the difficult position I am in having to go back to the Indians and explain the reason for the delay and that such a large deduction in the price they demanded and the smaller figures I asked for have to be made.

These people have been very patient and appear to have trusted ms to make a settlement that would be fair to them and they do, I think, realize that everything possible will be done,

but to sum it up, they want this money and would accept ridiculously low price if they were offered cheques in immediate settlement and this is hardly a fair situation for an official to be placed in.

The situation really is that the Indians have agreed to accept the figures I have submitted, but, rather than wait another eighteen months, for a settlement they would accept $15,000.00 if 10% to cover the equity of the Band in the property was added.

I would like a settlement made if at all possible at the figure shown in my report and if this is made at an early date, I believe the Indians will not be too disgruntled, However, if this is not possible, then any settlement, which allows of distribution in excess of $15,000.00, plus 10% will be acceptable.

It is possible that in the event of arbitration or Court proceedings the Indians, if not awarded their full claim, may be assessed costs which may be high and if these were not paid by the Department, it would reduce the Indians' share considerably.

On January 28, 1944, Major MacKay reported to Indian Affairs, Ottawa, as follows (Vol.I, A.B. pp.158 and 159):

With reference to the matter of compensation for lands taken by the Department of Transport for airport purposes on Penticton Indian Reserve No. 1 , I enclose herewith two letters dated the 20th instant received from Mr. Indian Agent Barber asking if it would be possible to make an immediate disposal of the matter by payment of $18,237.60 but that if it is likely that payment of any reasonable compensation would be long delayed that it would be better to accept $15,000.00 plus 10% or $16,500.00.

These suggestions are born of sheer desperation, the Indians having been deprived of their livelihood for the past year while the Department of Transport by threat of long delayed arbitration proceedings tied up any possibility of settlement other than on their terms. No one, including the C.P.R., West Kootenay Power d Light Company, Dominion and Provincial Departments of Public Works, had previously questioned valuations of this Property a mounting in some cases as high as $400.00 per acre, $250.00 to $300.00 being a common price. Page 701 of the Report of the Royal Commission of Indian Affairs published in 1916 places a valuation on 1540 acres, which includes the area in question, of $200.00 per acre, a considerable increase in values having occurred since then due to intensive development of the district as orchard property. An effort should be made to Salvage the lake shore frontage if we are forced to accept these lower valuations.

The niggardly attitude of the Department of Transport in this case will undoubtedly create future administrative difficulties for the Crown in this Agency out of all proportion to the amount involved.

This case illustrates very clearly the great importance of making every possible effort to safeguard the interests of the Indians by securing a definite agreement with respect to the price to be paid for Indian lands and other important conditions before the applicant is permitted right of entry and use.

On March 9, 1944, Order-in-Council, P.C. 1560, was passed authorizing the payment of an advance of $6,500.00 in respect of Parcel B.

On March 22, 1944, Indian Affairs advised Major MacKay as follows (Vol.III, A.B. p.397):

May I refer you to Your letter of January 28th, your file 33-10-9961, in connection with lands taken by the Department of Transport for the Penticton airfield. We are enclosing for your information a copy of P.C./1560 dated March 9th, dealing with the matter.

To bring you up to date in this matter, we found it impossible to reach a settlement with the Department of Transport in connection with compensation with the result that the said Department has instituted expropriation proceedings as a consequence of which the whole question of compensation will be settled by the Exchequer Court. Enquiries lead us to believe that it may be a year before the matter will be finally disposed of and the amount due to the Indians as compensation made available to them.

In order to mitigate in so far as possible the distress to the Indians which such delay would cause, we have succeeded in persuading the Department of Transport to make an interim payment, which is of course based on the report they have as to the value of the property from their own valuator. As you will recall they have a valuation fixed by their own appraisers at $6800.00 or thereabouts.

Accepting this amount as a minimum below which the Exchequer Court is not likely to go the Department of Transport has agreed to pay us $6500.00 on account of the compensation which we are permitted to distribute as rateably as possible among the Indians affected, on the understanding that it is a payment on account and that any difference between the amount so paid and the ultimate award will be paid to the Indians on conclusion of the matter.

On May 9, 1944, Agent Barber reported to Major MacKay on a meeting with the Indians which was held on May 4, 1944, as follows (Vol.I, A.B, pp.160 and 161):

The meeting was poorly attended, only eighteen male, adult Indians being present, of a male adult membership of fifty-one. Therefore no resolution was obtained as to the ownership of the lands taken for air-field purposes by the Department of Transport. However, I would advise that there will be no difficulty in obtaining the confirmation of ownership by resolution of the Band whenever a majority meeting of the Band is obtained.

Present at the meeting were the following Indians concerned in this matter, whom I met also prior to the general meeting:- Michele Jack, Antoine Gabriel, William Kruger, Baptiste George, Julia Manuel and Selina Timoyakin.

Absent were Francis Phillip, and Tomar Alex having died on January 17, 1944.

The whole situation regarding the difficulty of securing a settlement in this matter was carefully explained to the Indians and the fact that it was now to go to the Exchequer Court was carefully gone into, also the fact that the Department had secured an interim payment of $6,500.00 on account of the compensation, which sum is now available for distribution.

After a discussion lasting from 2:00 p.m. to 6:00 p.m. during which much was said against the unfortunate Indian Agent for having allowed the lands to be taken before a settlement as to compensation was made, William Kruger stated as follows:

> I say that I won't sign any papers now and I want the amount per acre that I first claimed and I will not accept any money until the whole matter is settled.

Michel Jack stated: "I am the same".

Antoine Gabriel - "I am the same. I want to know what I am getting and will wait until it is settled in Court."

Baptiste George "I am the same and will wait."

Seline Timoyakin - "I am the same as the men."

Julia Manuel - "I am the same as the men."

With the above the majority of the people left and the meeting was adjourned at 6:30 p.m.

In view of the above I do not see that any more can be done until the matter goes to the Exchequer Court. I, however, do expect that the Indians concerned will obtain legal counsel to act for them, as this was mentioned among themselves at the meeting, and I mentioned that they must be prepared to pay heavy costs if they did.

On February 24, 1945, Indian Affairs, Ottawa, wrote to Agent Barber as follows (Vol.III, A.B. pp.401 & 402):

In connection with the suggestions made in our letters of November 23rd and 25th relative to a settlement with the Department of Transport with respect to the eight Indian claims, we ate this morning advised by the Department of Transport that they are preparing their submission to the Exchequer Court of Canada with a view to effecting settlement of this

outstanding claim. In such reference they will not of course offer any sum nearly so substantial as the $15,000.00 discussed in our letters, but will offer something in the neighbourhood of $7,000.00 or $8,000.00. The writer is still confident, however, that we can get $15,000.00 for an amicable settlement; otherwise the matter will be referred to the Exchequer Court and we will have to abide by the conclusion reached by the Judge, which of course may be mote or less than the $15,000.00 we can take without litigation.

The evidence we have on our file from the three different valuators does not indicate to us that we are likely to get an award which, after payment of legal costs, will net the claimants more than we can obtain for them out of Court. However, this decision tests with the claimants,

Transport have agreed with the writer to hold their application to the Exchequer Court up for a few days in the hope that we may be able in the meantime to obtain either an acceptance or a rejection of the proposals we have placed before you. Unless, therefore, you can get the Indians together and teach a conclusion within the next few days, it will be too late as once the matter is referred to the Exchequer Court, the door will be closed to any amicable settlement. As the representatives of Transport put it, they would rather pay a few extra dollars to the Indians than incur litigation costs.

Please let this office know by return airmail whether or not there is any possibility of effecting a settlement, as unless there is we will have no alternative but to advise Transport to go ahead with their reference to the Exchequer Court. You people on the ground will know better than we whether or not there is a likelihood of the Indians obtaining a better settlement than the one suggested.

That letter was answered by Mr. Barber under date of March 14, 1945, as follows (Vol.III, A.B. pp.403 and 404):

Further to my letter of February 27th ultimo and with reference to Departmental letter of February 24th ultimo, File No.13164-182, I now report that I visited Penticton on the 9th instant and the Penticton Indian Reserve on the 10th and found that the following Indians, who ate concerned in the matter of the Airport lands, were still away in the United States:- Julia Manuel, Antoine Gabriel, Francis Phillip, and with the exception of William Kruger the others would not discuss the matter unless Antoine Gabriel was present. I then proceeded to Oroville, Wash., and contacted Gabriel at his place of employment and arranged to call on him the following morning, Sunday, which I did, again going into the proposal contained in your letter of the 24th ultimo regarding settlement in the sum of $15,000.00 and strongly urging that he return to Penticton with me and I undertook to get him back the following day, in order that the matter could be discussed with all concerned, and that I recommend acceptance of this proposal. However, Gabriel was emphatic that he would not agree to accept the proposal and that his lawyer would get a satisfactory settlement even if the matter went to Court. He refused to return to Penticton until his job is finished, now said to be about the end of the month. I returned to Penticton and on the 13th interviewed Michel Jack, William Kruger and Baptiste George. However, Michel Jack refused to discuss the matter stating he will await the matter being settled in Court. This man was quite hostile and is almost impossible to deal with. Salena Timoyakin was not seen as she had left Penticton that morning to go to Oroville to work.

William Kruger, who is not included with the other seven, who have retained Mr. H. Castillou, of Vancouver, advised me that he is agreeable to accept settlement for his claim at the figure which he would receive if a settlement of the whole affair was effected at $15,000.00 - that is, he to receive $2,923.20 as shown in the memorandum dated at the Department November 25, 1944.

Baptiste George is also prepared to accept a settlement on this basis. However, he will not do so unless Gabriel and the others agree.

As the matter now stands, I find it impossible to get these people together at a meeting and will not be able to do anything with them collectively until those that are away return home and even then in view of the attitude of Michel Jack and Antoine Gabriel do not think any satisfactory understanding will be arrived at.

It would therefore seem that if the Department of Transport make their submission to the Exchequer Court, it will have to proceed as I have made strenuous effort to arrive at an

understanding with the Indians and urged them to accept the present proposal, bur without making any progress whatever., except in the case of Kruger.

Should Transport not proceed immediately with their submission to the Court, I will, if an opportunity occurs, again take up the patter with the Indians, should those now in the United States return at the end of the month, although, whilst I am of the opinion that a settlement at the proposed rate of $15,000.00 is probably more than the Indians will receive in an award by the Court, I do not expect for one moment that I can convince the Indians of this, as they are of the opinion that their lawyer will obtain a figure more in line with my first valuation.

I think that possibly if Mr. Castillou, barrister of Vancouver, who was retained by a number of these Indians in November last, was advised of the situation, he might recommend the acceptance of this proposal by the Indians. However, it is for the Department to instruct in this regard and I might add that I have only received one letter from him in the matter, this on December 1, 1944, in reply to which I referred him to the Indian Commissioner at Vancouver.

I shall await further instruction in this matter before taking further action.

On January 9, 1946, Agent Barber wrote to his Ottawa Headquarters as follows (Vol.III, A.B. p.406):

I now advise that at the request of the Indians concerned I held a meeting at Penticton Reserve on the 7th instant, and the outcome of a long and at times heated discussion is to the effect that the Indians concerned have agreed to accept a settlement on the basis of the $15,000.00 mentioned as being obtainable without recourse to litigation. However, the Indians state that they agree to this only on condition an immediate settlement is available.

Indian Affairs in Ottawa accordingly advised Transport that the Indians would accept a cash settlement of $15,000,00 provided payment was made at the earliest possible date. Transport replied that they were recommending settlement on that basis and stated in their letter to Indian Affairs dated January 14, 1946: “It is presumed that you will arrange for whatever surrender is necessary from the Indian Band.”

On February 4, 1946, Agent Barber reported to Indian Affairs, Ottawa, as follows (Vol.II, A.B. pp.190 and 191):

Immediately on receipt of the surrender documents from the Department, I arranged for a meeting of the Penticton Band for the purpose of submitting the surrender to the Indians. I visited the reserve, meeting a number of the Indians to whom the purpose of the meeting was explained; notices were posted and left with the Indians on the 23rd January calling the meeting for February 1st at 2 p.m.

On February 1st instant, I presided at the said meeting , Alphonse Louie acting as Interpreter. There were present 28 Indians of "It is the Band eligible to vote, end as will be noted on the attached list of voters, there were 18 Indians absent. Of these absentees, there are ten who are away in the United States. An effort to get as many as possible to come up for the meeting was made when I journeyed to Oroville on the evening of January 26th and saw three Indians of the Agency and advised them accordingly and urged them to tell any other Indians from Penticton to attend the meeting, several of whom did so. At least five Indians on the voters list have been in the United States for several years and only make occasional visits to Penticton reserve.

A summary of the vote taken, as shown on the voters list, is as follows:

Total number eligible to vote	46
Present at Meeting	28
Absentees (including 10 in U.S.)	18
Voted for the Surrender	18
Voted against the Surrender	9

Majority of Indians present at meeting in favour of Surrender – (9) Nine.

It will, therefore, be seen that the vote in favour of surrender, whilst a majority of the meeting, also a majority of the Indians who were resident or in the district, does not constitute a majority of the voting strength of the Band if all were available. However, in view of the fact that ten Indians were out of the country and two others were not available, as their whereabouts are unknown at this time , I deemed it advisable to proceed with the surrender and complete all documents and leave the matter to the discretion of the Superintendent General.

I, therefore, submit the documents duly completed and certified, before P.E. Knowles J.P., Penticton, B.C., and trust same will be found satisfactory.

I would advise that this meeting was a very difficult one and I have not the least doubt but that, if all members of the Band had been present, or should the surrender be re-submitted to the Band, it will be defeated.

The Indians do not understand just why they are required to surrender these parcels of land when the land has been taken from them for the past three years and they have been repeatedly told that the land had been expropriated by the Government, Also they point out very forcibly that there was no surrender submitted to them for the land taken previously. It will be realized that I was in an unfortunate position in having to ask them to agree to allow the Department to sell this land when I have for the past three years been telling them that the land was expropriated, and that there was no possibility of the land being returned to them.

This Letter was written and signed prior to the Order-in-Council requiring the surrender and fixing the compensation. That Order-in-Council is dated February 5, 1946, and the relevant portion thereof reads (Vol.II, AIB. p.175):

That, when the Deputy Minister of Justice was requested to submit the matter to the Exchequer Court for settlement, he advised that the interest of the Indians in this land could not be taken by proceedings under the Expropriation Act and that the transfer of the land could be made only by a surrender duly made at a proper meeting of the Indian band and accepted by Your Excellency in Council;

That, as a result of further negotiations which have been carried on, the Department of Mines and Resources have now advised that they have succeeded in persuading the Indians concerned to accept the sum of $15,000.00 as the compensation for the 119.54 acres of land involved and the easement above referred to;

Based on the above documentary evidence relating to the acquisition of Parcel B, I draw the following inferences and teach the following conclusions:

1. In July of 1942, the Department of National Defence decided to expand the Penticton Airport thus enabling it to serve as an emergency landing field for the West Coast defence system. For this purpose, it was decided to take an additional 120 acres (Parcel B) from the Penticton Indians. The land acquisition coat for Parcel B was estimated at $50.00 per acre by National Defence.

2. National Defence end/or Transport asked the Department of Indian Affairs to approach the Indians with respect to the acquisition of Parcel B, Indian Affaire agreed to offer "the fullest co-operation possible" while at the sane tire giving full consideration to the interests of the Indians.

3. Without expropriation procedures being instituted and without a surrender of any kind and without any authority from the Indians, Transport commenced work on Parcel B in September of 1942. Meanwhile the officials of Indian Affairs were systematically inquiring of Transport as to when the Indians could expect a settlement in respect of Parcel B. Inquiries were made of Transport in November of 1942 to no avail. In December of 1942, the Indians were anxious to receive at least an advance for Christmas. This request likewise fell on deaf eats.

4. Finally in May of 1943, Transport submitted two appraisals concerning Parcel B. These appraisals both valued Parcel B at approximately $6,800.00.

5. In November of 1943, Indian Affairs obtained an appraisal of Parcel B which valued it at $16,958.75. However, the officials of Indian Affairs were not prepared to accept this figure. They pointed out that the Indians were entitled to compensation for complete disruption of their way of life and for the cost of re-establishing the group elsewhere. On this basis, Agent Barber fixed a

valuation of Parcel B at $28,328.00 with the senior officials suggesting a compromise offer of $25,000.00.

6. The proposal vas summarily dismissed on December 4, 1943, by Transport with the comment: "As we cannot justify this expenditure a recommendation is being made to Council for authority to expropriate the land in question and if we are not able to arrive at an amicable settlement for the matter to be referred to arbitration." The Order-in-Council authorizing expropriation was passed on December 20, 1943.

7. On January 28, 1944, the Indian Commissioner for British Columbia, in reporting to his Ottawa headquarters, suggested possible settlement in the area of from $16,000.00 to $18,000.00. He went on to add: "These suggestions are born of sheer desperation, the Indians having been deprived of their livelihood for the past year while the Department of Transport by threat of long delayed arbitration proceedings tied up any possibility of settlement other than on their terms." He went on to observe that: "No one, including C.P.R., West Kootenay Power d Light Company, Dominion and Provincial Departments of Public Works, had previously questioned valuations of this property amounting in some cases as high as $400.00 per acre, $250.00 to $300.00 being a common price." He also makes reference to "the niggardly attitude of the Department of Transport". He also observes that the situation with respect to Parcel B clearly illustrates the value of obtaining a firm agreement on price before allowing the taking party the right of entry and use.

8. On March 9, 1944, some 18 months after Transport took possession of Parcel B and commenced construction thereon, an advance on compensation in the sum of $6,500.00 was finally paid,

9. On May 4, 1944, Agent Barber held a meeting with the Indians where the Indians were very critical of Barber and the Indian Affairs Department for "allowing the lands to be taken before a settlement as to compensation was made"

10. On February 24, 1945, Indian Affairs, Ottawa, wrote to Agent Barber expressing the view that Transport would likely pay $15,000.00 for an amicable settlement but if the matter was referred to the Exchequer Court they (Transport) would not offer any such sum "but will offer something in the neighbourhood of $7,000.00 to $8,000.00." Barber was asked to ascertain the Indians' reaction to a $15,000.00 settlement.

11. Barber replied under date of March 14, 1945, after meeting with the Indians. He reported that seven of the Indian occupants had retained a Vancouver lawyer and they were depending on him to obtain a larger compensation figure as a result of the pending proceedings in the Exchequer Court. Mr. Kruger, the eighth claimant, advised he was prepared to settle on the basis of a total figure of $15,000.00 for Parcel B.

12. On January 7, 1946, the Indians, at a meeting on the reserve, after "a long and at times heated discussion", agreed to settle for $15,000.00 provided settlement was made expeditiously.

13, Thereupon, Transport agreed and requested Indian Affairs to arrange for the necessary surrender from the Indian band.

14. Accordingly, a further meeting was held by Barber with the band on February 1, 1946, to obtain such a surrender. After much discussion and dissent, 18 members voted in favour and 9 members voted against the execution of a surrender. Mr. Barber observed that while a majority of the members present at the meeting voted in favour of surrender, it still did not constitute a majority of the voting strength of the band since 46 members were eligible to vote. He observed further that if all members of the band had been present at the meeting, he had "not the least doubt" that the surrender would have been defeated. According to Barber, much of the Indians' dissatisfaction arose because they didn't understand why a surrender was necessary in respect of Parcel B when it had not been required in respect of Parcel A. Also they couldn't understand why any surrenders were necessary when they had been dispossessed for the past 3 years and repeatedly advised that the government had expropriated the land.

15. On February 5, 1946, an Order-in-Council was passed requiring the surrender and fixing the compensation. In that Order-in-Council, it was for the first time mentioned that the Deputy Minister of Justice gave advice to the effect that the Indians' land could not be taken under the Expropriation Act but that transfer could only be effected by a duly executed surrender. It is clear, in my view, that the conflict of interest between two departments of the Government of Canada

which was so apparent in the dealings with respect to Parcel A is equally apparent when the dealings concerning the acquisition of Parcel B are scrutinized. Indian Affairs attempted valiantly to represent the Indians' best interests. On the other hand, National Defence and Transport were anxious to acquire Parcel B and enlarge the airport. An indication of their seeming indifference to the plight of the Indians is shown by the initial valuation -- only $50.00 per acre; by the fact that they had possession for some 18 months without paying the Indians anything on account of compensation; by their rather leisurely approach to negotiations for compensation as compared to their great haste in taking possession and depriving the Indians of their means of livelihood. It seems clear from the evidence that Transport chose to ignore the considered opinions of officials of the Department of Indian Affairs as to value and made little effort to seriously negotiated settlement. Theft only answer was to expropriate first and then negotiate thereafter. Commissioner MacKay described their tactics most eloquently when he said that his suggestions for settlement were "born of sheer desperation" because of Transport's tactics of delay which frustrated a fair settlement. He also characterized Transport's attitude as "niggardly". Thus, after being out of possession of Parcel B for more than 3 1/2 years, being deprived of their living therefrom, and having received only $5,500.00 on account of compensation, a minority of the Indians entitled to vote approved the surrender.

On these facts, can it be concluded that, in these negotiations culminating with the acquisition of Parcel B, and settlement of compensation therefor, the Federal Crown can be said to have been acting exclusively for the benefit of the Indians? I think not.

Likewise I am not satisfied that there was full disclosure to the Indians of all relevant facts. The evidence establishes that they were kept in the dark for very large periods of time. Their land was taken from them, no offers of compensation were forthcoming in a timely fashion. One can understand their confusion at the way these matters were being handled. They were told that their land was expropriated, then they were told that, notwithstanding the expropriation, they would have to execute a surrender in respect of Parcel B but not in respect of Parcel A. Bearing in mind that the onus is on the Crown to establish that the Indians were in possession of all the relevant information known to it, I have no hesitation in concluding that the Crown has not discharged that onus on these facts. Characteristic of a lack of disclosure, in my view, is the non-disclosure of the opinion of the Deputy Minister of Justice referred to supra given to other officials of the Crown that the Indians' interest in the land could be taken only by surrender and not by expropriation. In view of my agreement with my brother Urie J. that the expropriations were legally correct, I do not cite this non-disclosure as a legal impediment to the Crown's actions per se but I think it indicative of the attitude of the Crown's servants outside the Indian Affairs Branch. Their attitude seemed to be that they were not concerned in any way with the welfare of the Indians and were leaving protection of the Indian interests to the Department of Indian Affairs. That may have been a defensible posture for the officials of other departments to adopt , given their own urgent priorities in wartime. However, the Governor in Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations. If there was evidence in the record to indicate that careful consideration and due weight had been given to the pleas and representations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations had been made, I would have viewed the matter differently. Absent such evidence, I conclude that, as in the case of Parcel A, there was also a breach of fiduciary duty in respect of the acquisition of Parcel B.

Limitation of Action and Laches

In my view the breach of fiduciary duty occurred in respect of Parcel A, at the very latest, in approximately January of 1941, when the Orders-in-Council were passed authorizing settlement for Parcel A at $115.00 per acre. In respect of Parcel B, the breach of fiduciary duty occurred, at the very latest, in approximately March and April of 1946, when the compensation of $15,000.00 for Parcel B was paid to the Indians. The within statement of claim was filed on March 23, 1979, 38 years and 33 years respectively after the causes of action arose.

Subsection 38(1) of the Federal Court Act provides that "the laws relating to. . .the limitation of actions in force in any province...apply to any proceedings in the Court in respect of any cause of action arising in such province...." Subsection 38(2) provides that: "the laws relating to...the limitation of actions referred to in subsection (1) apply to any proceedings brought by Or against the Crown."

Accordingly, it is necessary to consider the law of British Columbia respecting limitation of actions, at the relevant times. The applicable Limitation of Actions Act in 1941 and 1946, when these

causes of action arose, was R.S.B. C. 1936, c.159. Under that statute, the limitation period for actions relating to real property was stated to be twenty years. However s.38 of that Act provides:

> In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or out of which he, or any person through whom he claims, map have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered....

Unlike the Guerin case, the causes of action in the instant case could have been discovered if the appellants had exercised reasonable diligence at the same time the causes of action arose. Putting the appellants' case at its very highest, the effective dates under this section would be, in the case of Parcel A, January of 1941, and in the case of Parcel B, February of 1946. In both cases then, the limitation period would have expired long before this action was commenced, if the British Columbia Limitation of Actions Act of 1936 is applied.

However, there is a restriction placed upon the operation of the 1936 Limitation of Actions Act by s.83 of the Trustee Act, R.S.B.C. 1936, c.292. Said s.83 reads:

> 83.(1) In any action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or any action or other proceeding trustee or any person claiming previously received by the trustee and converted to his use, the following provisions shall apply:
>
> > (a) All tights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.
> >
> > (b) if the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him sail be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding, in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the Statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.
>
> (2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.
>
> (3) This section shall apply only to actions or other proceedings commenced after the first day of January, 1906, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.

The effect of that section, and the common law is to provide that in cases where the claim (1) is founded upon any fraud or fraudulent breach of trust or (2) is to recover trust property, there is no limitation period for actions by beneficiaries against trustees.

There may be some doubt as to whether the British Columbia Trustee Act applies to the federal Crown in light of the views expressed in Guerin that the federal government was not a trustee but that it had fiduciary obligations which imposed trust-like duties. However, in Guerin the question of a constructive trust did not arise since there was no unjust enrichment insofar as the Crown was concerned. In the case at bar, on my view of the facts, there was unjust enrichment to another emanation of the federal Crown which might well give rise to a constructive trust in this case. As constructive trustees are defined se trustees in the British Columbia Act, I assume, for the purposes of this discussion, that the federal Crown can be considered as a "trustee" within the meaning of s.83. The next question to be answered is whether the appellants' claim comes within either of the two classes noted supra. Insofar as the first category is concerned, the trial judge said in his reasons [p.57 C.N.C.R.] (Vol.I, A,B. p.42) that: "The plaintiffs, at trial, expressly

abandoned reliance on all pleadings alleging fraudulent conduct. Accordingly, the appellants are not able to bring themselves within the first category referred to supra. The second category relates to actions to recover trust property. In their statement of claim, the appellants have asked for recovery of the property, and, in the alternative, compensation for breach of a fiduciary duty. Since, as noted supra, I have the view that the validity of the expropriation procedures herein ate beyond question, the appellants have no basis for an action to recover possession of the trust property itself. That leaves the question as to whether the appellants' alternative claim for compensation can be said to be an action for "the recovery of trust property" within the meaning of s.83. This question vas considered by the Supreme Court of Ontario in the case of McLellan v. Milne & Magee [1937] 3 D.L.R. 659 at 671, per McTague J., where it was held in relation to a limitation section of the Ontario Act containing almost identical language to s.83, that an action requiring a solicitor to make compensation to his client for a breach of his duty arising out of a fiduciary relationship was not an action to recover truer property. Such a claim is very similar to the alternative claim in this case. I share the view of McTague J. and, accordingly, have concluded that the appellants' alternative claim for compensation cannot be characterized a an action for "the recovery of trust property". For all of the above reasons, it is my view that the 1936 B.C. Limitation or Actions Act, qualified by the 1936 Trustee Act, did not entitle the appellants to commence their action in 1979.

However, even if I am in error in the conclusion reached supra that the provisions of s.83 of the 1936 Trustee Act of British Columbia do not operate so as to prevent the commencement of any limitation period, I think that, having regard to the transitional provisions of the Limitation Act of British Columbia of 1975 [R.S.B.C. 1979, c.236] force in 1979 when the action was commenced, the appellants' claim is statute barred, in any event. That statute came into force on July 1, l975. Subsection 14(3) thereof provides:

> (3) If, with respect to a cause of action that a to se before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed the cause of action, and will expire on or before July 1, 1977, the limitation period governing that cause of action shall be the shorter of
>
> (a) 2 years from July 1, 1975; or
> (b) the limitation period that formerly governed the cause of action.

Assuming the applicability of the 1936 Trustee Act and assuming that there was no limitation period thereunder applicable to this claim, it would appear, applying s-s.14(3) of the 1975 Act, that the shorter period mentioned in subparagraph (a) thereof would apply in this case. Thus, if s-s.14(3) of the 1975 Act applies, the limitation period would have expired on July 1, 1977, almost two years prior to this claim being filed.

If, on the other hand, the transitional provisions of the 1975 Limitation Act do not apply, then it is likely that the provisions of sec. 8 and 9 of that Act would operate so as to bat the within action. Subsection 8(1) is referred to as an "ultimate limitation" section and provides that:

> 8.(1) Subject to subsection 3(3), but notwithstanding … a postponement or suspension of the running of time under section 6, … no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose....

(Section 6 of the said 1975 Limitation Act is similar to s.38 of the 1936 Trustee Act.) Since I do not think the exceptions mentioned in s-s.3(3) apply here (given the validity of the expropriations, this is not a case of trespass), and as at least thirty-three years have passed between the time the cause of action arose and the statement of claim was filed, I accordingly conclude that, pursuant to s-s.8(1) of the governing Limitation Act at the time the action was commenced, the within cause of action is statute barred. Additionally, s-s.9(1) of the 1975 Act provides that on the expiration of the limitation period fixed by the Act, the cause of action is extinguished.

For all the above reasons, it is my reluctant opinion that the appellants' causes of action herein ate stature barred. Because of this conclusion, it is unnecessary to consider the defence of laches raised by the respondent.

On this basis, it necessarily follows, in my view, that the appeal should be dismissed with costs.