EXPROPRIATION IN RELATION TO ABORIGINAL LAND TITLE

INTRODUCTION

As a direct consequence of the arrival of European colonists in North America, there has been a persistent drive, however motivated, to acquire land to better accommodate the individual interests and aspirations of Canadian settlers and developers. The fact that the indigenous people were already in occupation of the land presented an impediment which had to be overcome to better facilitate the peaceful settlement and exploitation of the land, both of which, it was thought, could be done in good conscience once the native people had been placated. The acquisition of Indian lands and the extinguishment of their title had to be accomplished with the minimum of inconvenience and expense to the government. Little heed was paid to the Indian concept of property and their own understanding of their relationship to the land. Even less attention was paid to the probable consequences such action would have on the survival of the native people as a collective entity.

Principles of English common law governing the property rights of individuals, and international legal principles recognized by European states at the time of settlement, were, from the native perspective, arbitrarily applied not only to whittle down the property rights of indigenous Canadians, but also to justify European occupation of their lands. Any attempt on the part of native people to assertrights to the land held under their own law and custom had to fit within the framework of English common law principles before the courts would consider the merits of their case. This unfortunately left little room for the native perception of their own rights.

This paper will consider the law governing expropriation from both domestic and international viewpoints in an attempt to assess the legal implications of the method utilized by the Dominion government to acquire

Indian lands. More specifically, the question considered here is whether the alleged compulsory acquisition of Indian lands constituted an exercise by the Canadian government of an expropriating power. If so, the next question is whether compensation for such expropriation could be sought and obtained either domestically or internationally. How the native community perceive their own culture and relationship to the land since the arrival of the Europeans, and the types of political action which could be taken to resolve their problems, are matters which we cannot deal with here, and are left to organizations and agencies better qualified in these areas.

EXPROPRIATION - AN HISTORICAL SURVEY

1) Definition

A standard definition of the term "expropriation" is as follows: "The compulsory taking of land by a public authority, with compensation to be fixed by a board or court - the surrender of a claim to exclusive property."[1] The same concept is known in the United States under a different phrase - "eminent domain" - from its Latin derivation dominium emineus. Eminent domain is defined as, "a right of a government to take private property for public use by virtue of the superior dominion of the sovereign power over all lands within its jurisdiction."[2] In none of the consulted dictionary definitions of this term is mention made of compensation. In practice, however, compensation forms an essential ingredient and is a basic consideration in the excercise of this power. The amplified definition of eminent domain is the power of the sovereign to take property for public use without the owner's consent upon making just compensation.[3]

Expropriation as it is known in England is recognized under the expression "compulsory purchase and sale". The exercise of this power takes

the form of a compulsory purchase order. This is an order, usually made by a local authority and confirmed by a minister of the government, for the compulsory acquisition of land. Provisions as to compensation are largely derived from the Land Compensation Act, 1973, which will be discussed later in some detail.

In all of these definitions one can grasp the basic elements found in the exercise of the power of expropriation:

(a) The acquisition of an individual's private property

(b) By a sovereign state or its delegated authorities

(c) Under some form of compulsion

(d) Usually under statutory authority

(e) For a public purpose or utility

(f) With just compensation

2) Early History

The genesis of expropriation is shrouded in obscurity. It is claimed that the earliest known exercise of expropriation can be found in the Bible in the story of the acquisition of Naboth's vineyard by King Ahab upon the instigation of Jezebel who caused Naboth to be stoned to death because of his refusal to sell his land.[4]

In Greece it is recorded that under the Athenian constitution, a dispute between the governments of Athens and Eluesis was settled by providing, among other things:

> If any of the seceding party [i.e.: discontented Athenians] wished to take a house in Eluesis, the people would help them obtain the consent of the owners; but if they could not come to terms, they should appoint three valuers on either side, and the owner should receive whatever price they should appoint.[5]

During the time of the Roman Empire it is unclear whether there was a state policy with respect to expropriation since there is no evidence of

a general law or declaration of principles to that effect.[6] The existence of straight roads constructed throughout the Empire, as well as an extensive system of aqueducts and other large public works suggests, however, that some system of expropriation was practiced by the state. J.W. Jones in his article, "Expropriation in Roman Law",[7] discusses in some detail the evidence which gives rise to the conclusion that Rome did practice a form of compulsory purchase with consideration sometimes given to compensation.

The debate and uncertainty surrounding the question as to whether the Roman authorities had established a well defined procedure to implement expropriation and compensation, is due in part to the Roman state's peculiar approach to personal and private property. Private property was not exclusively private in the sense of exclusive ownership since it was held subject to some undefined superior right vested in the citizens of Rome which was capable of being invoked if the need arise.[8] Land might therefore be transfered, allotted or leased but it continued to belong to the community of Rome.

It was only as citizens remained in continuous occupation of land for several generations that the State's attitude toward land ownership altered. Although land could not be alienated against the State, the individual's rights of occupation and use of land could be bought and sold; possession was protected against any unauthorized acts of third parties; buildings were constructed and capital was expended. With these developments there grew up a corresponding recognition that persons dispossessed of such land should receive some measure of compensation.[9]

It is clear that little objection could be raised when land was needed by Rome for public works. Around 63 B.C. the construction of roads, bridges, aqueducts, fortifications and public baths increased, resulting

inevitably in interference with property rights of individuals. At this point all that was required procedurally was for an edict to be issued determining the lands to be affected by the construction of a public work, and it was expected that no obstacles would be placed in the way of the work.[10] Usually the Emperor was notified if any private property was affected by the expropriation,[11] but there was little or no recognition of an individual's right to raise an objection.

What evidence there is of compensation being awarded is very limited. In 133 B.C., under the reforms of Tiberius Gracchus, provisions were made for state compensation for improvements and buildings upon land taken for public use.[12] However in most instances this depended upon the goodwill of the state treasury.[13] In such a case the exact amount of monetary compensation was left to agreement, arbitration or determination by a magistrate, while the exact plots of land affected were determined by the magistrates or officials in charge of the work.[14]

3) European Development

With the fall of Rome all trace of the doctrine of expropriation disappeared for centruries. During the medieval period, when demand for public improvements was small and the rights of individuals little regarded, the principles of expropriation were hardly ever applied. Under the feudal system of land tenure, which recognized the ultimate ownership of the sovereign, the construction of public works did not involve a taking in the modern sense. Only with the decline of the feudal system and the rise of the current conception of individual ownership and rights of private property in the seventeenth and eighteenth century did the principles of expropriation again receive recognition.[15]

The earliest formal authoritative expression of the concept of expropriation is found in the work of the Dutch jurist Grotius, De Jure Belli et Pacis, in 1625.

> We have elsewhere said that property of a subject is under the eminent domain of the State, so that the State or he who acts for it may use or even alienate or destroy such property not only in case of extreme necessity, in which case even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be observed that when this is done the State is bound to make good the loss to those who lose their property, and to this public purpose he who has suffered the loss must if needs be contribute.[16]

In France the Declaration of Rights of 1789 contained the following provision: "Property being an inviolable and sacred right, no one can be deprived of it unless the public necessity plainly demands it, and upon condition of a just and previous indemnity." This provision with minor alterations was incorporated into the Code Napoleon which provided that, "no one is obligated to transfer his property, unless it be for public utility, and in consideration of a just and previous indemnity."[17]

4) English Experience

Since the concept of expropriation as we know it in Canada, and the doctrine of eminent domain as it is applied in the United States, both originate in English law, a more detailed historical review of the English approach to compulsory purchase is appropriate here. In England the king had at common law the prerogative right to enter private property for the purpose of erecting defences against enemy attacks from land and sea and for erecting beacons and lighthouses, for which he did not need to pay compensation. He could also seize provisions for the use of the royal household, without the owner's consent, but in this instance he had to pay for

them at fair market value.[18]

These specific prerogatives were recognized but subsequently circumscribed by the Magna Carta and restricted further by statute during the reign of Charles II.[19] In reference to the absolute right of property inherent in English people and to the provision in the Magna Carta that no freeman shall be divested of his freehold but by the judgment of his peers or the law of the land, Blackstone said in this famous passage:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of a power, which the legislature indulges with caution, and which nothing but the legislature can perform.[20]

One early form of compulsory acquisition, apart from the prerogative rights of the Crown mentioned previously, was the inclosure movement in England during the seventeenth and eighteenth centuries. It involved the confiscation of unproductive land from private landowners by means of an inclosure application. The essence of an inclosure was "the extinction of

various rights in land, under compulsory powers, in order to make possible the reallocation of that land with a view to applying more efficient methods of farming".[21] An allotment of land or money by way of compensation was then made to all "commoners" whose land rights were expropriated.

There was little doubt as to who chiefly benefited from this procedure. Inclosure applications were primarily made by wealthy landowners who initially attempted to procure these by agreement with the parties affected. However since dissatisfaction was frequently expressed by the owners whose land was to be expropriated some form of compulsion was required to circumvent their opposition. This was achieved by resorting to Parliament which by private Act would confirm an inclosure application.[22]

With the increased industrial activity experienced in England during the late eighteenth and early nineteenth centuries, the volume of private inclosure Acts increased remarkably in number and complexity. In 1801 Parliament was determined to simplify the involved and expensive private bill procedure insofar as it concerned inclosures. The Inclosure (Consolidation) Act, 1801, established standard provisions to be included in any private Act. In 1845 the need for a private Act of Parliament was removed altogether and a statutory body of Inclosure Commissioners was established, which, on a petition for inclosure, either approved or rejected the application.[23]

In 1845 other varieties of public expropriation were brought to the point achieved by the inclosure movement, with the Inclosure (Consolidation) Act, 1801, by the passage of the Land Clauses Consolidation Act. This Act simplified procedures by enacting a standardized set of provisions which would be incorporated into each private Act enforcing an expropriating order. Therefore, unlike the 1845 Inclosure Act which abolished the need for

a private Act of Parliament, the Land Clauses Consolidation Act still required a private Act for the enforcement of an expropriation order.[24]

The Inclosure Act, 1845 and the Land Clauses Consolidation Act were mainly concerned with standardizing the method of acquisition, which tended to indicate that compensation was considered a subsidiary or minor issue. Both Acts did provide for assessment by judge, jury, arbitration or lay magistrate, but little attention was paid to the method of valuation. By the seventeenth century Parliament had realized, due to a large extent to growing disputes over property valuations, that compensation was not just one aspect of compulsory purchase but a major element in the process. This led to separate public legislation concerning itself primarily with the matter of compensation; legislation which is currently called the Land Compensation Act. The Land Clauses Act, now called the Compulsory Purchase Act, remained to deal with the procedural aspects of compulsory purchase.[25]

Despite these statutory provisions regulating the application of compulsory purchase, one must recall that a fundamental premise of English common law is the supremacy of Parliament. "The only guide to what Parliament may do is what Parliament has done."[26] Despite Blackstone's exhortations concerning the inviolability of private property, there is no constitutional rule in England embodying such a principle. Accordingly, Parliament can give itself the statutory power to expropriate any property within its territorial jurisdiction without compensation.

5) United States Experience

The power of expropriation when exercised in the United States is circumscribed by the American Constitution. The Fifth Amendment declares that private property shall not be taken for public use without just compensation. Likewise, the Fourteenth Amendment contains a clause to the

effect that a state cannot deprive a citizen of his property "without due process of law."

Eminent domain, as it is called in the United States, is vested in the legislature which may delegate the exercise of this right to individuals or corporations. Such a delegation must however be clear. If therefore the object of the exercise of eminent domain is a public purpose, as it should be, the judiciary can be consulted in instances where the constitutionality of an action is brought into question on the basis that the acquisition was in reality for a private purpose. The constitutional safeguards in the U.S. ensure that the judiciary have ultimate power to review any legislation authorizing the exercise of eminent domain.[27]

6) Canadian Experience

Insofar as Canada is concerned, several cases on expropriation have been decided in light of English jurisprudence. "The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England..."[28] Quebec expropriation cases have also made some reference to English authorities.[29] In addition, reference has been made to American authorities in analogous case situations primarily because their jurisprudence in the area is so extensive that it has resulted in a detailed code of law. However these cases, both American and English, are merely of persuasive authority, but are not binding in law.[30]

Apart from the Crown prerogative, the right to expropriate in Canada, being an extraordinary right, must be based on the express words of a statute because that right is never implied.[31] The interpretation of these statutes is based upon strict construction.[32] Furthermore, when a statute is applied all the formalities must be strictly fulfilled before the power can be exercised.[33]

The statutory law on expropriation is quite extensive in Canada based not only on English precedents but also due to the unique federal and provincial powers to legislate on this matter under the British North America Act, 1867. At Confederation there was a division of powers between the federal and provincial governments, as enumerated under sections 91 and 92 of the B.N.A. Act. The provincial legislatures could authorize expropriation for the purposes within their jurisdiction under s. 92 and the Dominion likewise under s. 91. In case of conflict between federal and provincial legislation, Dominion legislation previals if the matter dealt with by provincial legislation is substantially the same as that covered by federal legislation, but where provincial legislation is only incidental or ancillary to federal legislation and is also within their jurisdiction under s. 92 and the field is clear, provincial legislation would be valid in the absence of federal legislation.34

The constitutional complication sets in where the field is not clear, in the sense that both powers feel they have jurisdiction over the matter, and both federal and provincial legislation exists on the subject. This has primarily occurred in the past in the field of railway and telephone companies legislation. As an example, the province under s. 92(10) has jurisdiction over intra-provincial railways and telephones because they are "local works and undertakings"; whereas the federal government has exclusive jurisdiction over these undertakings if they connect or involve other provinces. The courts have resolved this overlapping of jurisdiction by holding that the federal government has full power to authorize the use of provincial Crown land for the purpose of a national railway since it only incidentally affects provincial rights.[35] This approach also applies to other interprovincial undertakings such as highways,

telephones and telecommunications.

The right of the federal government to gain access to provincial property for interprovincial undertakings does not, however, give the Dominion the right to appropriate all the beneficial interest of the site of the work, such as minerals.[36] Nor can they, under section 91(24), appropriate a tract of provincial Crown land for the purpose of an Indian reserve without the consent of the province.[37] Therefore the Dominion Parliament, except in cases of national emergency, has only limited powers to encroach upon any class of subject exclusively assigned to the provinces under s. 92.[38] Only when there is an overlapping of jurisdiction in relation to a subject matter can there be incidental encroachment upon the jurisdiction of the other power.

Bearing this constitutional situation in mind, one can more readily comprehend the parallel legislative development of the law of expropriation in Canada. The Public Works Act, 1841, later revised in 1867, was the forerunner of the first Dominion Expropriation Act enacted in 1886 and revised in 1889. It applied to all compulsory takings of land for Dominion public works. Compensation was awarded by official arbitrators and later by the Exchequer Court. Quebec, and its predecessor Lower Canada, enacted their own expropriation statutes, which were modelled after the French Civil Code, with some reference to English law. These subsequently became part of the current Civil Code of Quebec.[39]

Today federal legislation concerning expropriation is contained in such statutes as the Expropriation Act, the National Energy Board Act, the Dominion Water Power Act, the War Measures Act and various Crown Corporations Acts. The Indian Act also deals with the subject of expropriation where reserve lands or mineral resources are concerned.[40]

Each of the Provinces have their own individual enactments under their provincial authority to expropriate for local works and undertakings. These statutes are far too numberous to list for the purpose of this paper but, like the federal statutes, they all outline the purposes for which the property is to be expropriated, how this is to be administered, and what the measure of compensation should be.

Since expropriation, whether exercised by the Dominion or the province, should be for a public purpose, an understanding of what this encompasses is an important consideration. A general definition of the term means "a use concerning the whole community as distinguished from particular individuals. But each and every member of society need not be equally interested in such use, or be personally and directly affected by it; if the object is to satisfy a great public want or exigency, that is sufficient. The use must be a needful one for the public, which cannot be surrendered without obvious general loss and inconvenience."[41]

The statutory definition of the term "public work", whether in federal or provincial legislation, is much more specific in its scope. Under the federal Expropriation Act it means and includes,

> 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-locks, fortifications and other works of defences, and all other property, which now belongs to Canada...[42]

A similar provision with respect to provincial "public works" is contained in The Public Works Act of Ontario[43] and Quebec.[44] In Saskatchewan the term is defined as encompassing any buildings or related facilities which are acquired for use by a public agency,[45] but the Minister

of Government Services may also declare other works acquired at public expense to be public works.[46]

EXPROPRIATION AND INDIAN LANDS

1) Applicability in Canada

Having discussed in some detail the evolution of the law of expropriation and considered some of its more fundamental elements, we can now turn our attention to the question at hand. Is such a theory applicable in the context of the acquisition of Indian lands by the Canadian government? At first blush one might observe that many of the basic principles of expropriation appear to apply. An element of compulsion was involved in treaty negotiations and scrip distributions, both of which were intended to extinguish the property rights of native peoples; the public purpose involved was arguably the peaceful settlement of the territories; and some measure of compensation was made, although its adequacy is still in question.

Looking more critically at this whole question, however, it is difficult to see how the concept of expropriation in relation to Indian lands would find support in Canadian law, in view of past legal approaches, both in Canada and the United States, to the whole question of aboriginal title and its possible extinguishment by treaty or scrip. Without considering, at this point, the larger question, whether compensation would be payable in the case of an effective taking of Indian land apart from treaty or scrip, the government might point to a number of factors which demonstrate that an act of expropriation was not involved in the taking of Indian lands in areas covered by treaty or scrip. First, the suggestion that compulsion was involved in these transactions would probably be rejected by the

government and courts, although it is clear that the native peoples often had little choice but to accept the terms outlined by the Commissioners. Presumably the surrender process was conducted on the basis of negotiation not force, the result of which was mutually satisfactory to the parties concerned. Secondly, the transactions involved were contractual types of arrangements. Accordingly, the Canadian courts have considered the whole question of the extinguishment of aboriginal title by treaty or scrip primarily from the viewpoint of contract law. What these contractual obligations entail has been the subject of considerable judicial debate; debates which vary in their interpretation of what the terms of the obligations are and the extent to which the government is obligated to fulfill them.[47] Thirdly, and perhaps more importantly, the taking of Indian lands through negotiated surrender was presumably an exercise of the prerogative power of the Crown. It was not a statutorily authorized expropriation of these lands for compensation. In other words, at the time treaties were negotiated and scrip distributed, there was no federal statute which specifically authorized the expropriation of Indian and Metis lands.[48] Accordingly, no Canadian case has considered whether an act of expropriation, strictly speaking, was involved in the extinguishment of aboriginal title. It was only after the treaties were signed and reserves established that provisions for the expropriation of Indian lands were incorporated into federal legislation.[49]

The only notable case which has discussed the application of expropriation law in relation to the acquisition of Indian title is Tee-Hit-Ton v. United States, decided by the United States Supreme Court in 1954.[50] In that case the Tee-Hit-Ton Indians, a group of American Indians belonging to the Tlingit Tribe of Alaskan Indians, claimed compensation

under the Fifth Amendment of the U.S. constitution for the taking by the U.S. of certain timber from Alaskan lands allegedly belonging to them. The Indians contended that their tribal ancestors had continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well developed social order which included a concept of property ownership which was not interfered with by Russia; and that Congress had by subsequent legislation confirmed and recognized the Indians' right to occupy the land permanently. They argued that unlike the situation of the Indians in the southern states, their ownership constituted ownership rights to land which were compensable when expropriated.

The majority of the Supreme Court dismissed the Tee-Hit-Ton contention that they possessed permanent ownership rights to the land. They held that the Tee-Hit-Ton Indians' use of the lands was similar to that practiced by the nomadic tribes of the States Indians. Accordingly, based on their interpretation of the existing law,[51] the nature of Indian title to land was merely a right of occupancy which the sovereign State granted to Indians after discovery and conquest, not a permanent property right.[52] This right of occupancy could be "terminated and fully disposed of without any legally enforceable obligation to compensate the Indians."[53] Therefore the court felt that Indian occupation of land, without Congressional recognition of ownership, created no rights against taking or extinction by the United States which was protected by the Fifth Amendment.

On the point of the government's recognition of Indian ownership rights, the Supreme Court held that neither the statutes (the Organic Act of Alaska of May 17, 1884 or the Act of June 6, 1900) nor pertinent legislative history indicated any intention by Congress to grant to Indians any permanent rights to the lands of Alaska. Congress merely upheld the status quo which recognized rights of Indians to occupy the land, not their rights to permanently occupy the land.[54]

Should a similar case arise in Canada, there is a good chance that the courts would approach the question in a different manner. In areas of Canada already covered by treaties and scrip, where an expressed extinguishment of aboriginal title is accepted, a situation which Tee-hit-ton did not address, the only question that would remain to be debated is the adequacy of the compensation received. In areas, however, where treaties have never been signed or where treaties and scrip are not accepted as having validly extinguished the aboriginal title of the Indian, half-breed and Metis people, the question of compensation might be litigated. In that case the constitutional framework under which Tee-hit-ton was decided would not apply in Canada. The British North America Act, 1867 has no similar Fifth Amendment protections. There is no doubt that Parliament has the authority to pass legislation which explicitly expropriates without compensation.[55] But where the Government expropriates the private rights of individuals under its prerogative powers or where legislation merely authorizes a taking without mentioning the question of compensation or where the taking affects, in some way, the aboriginal rights of the native people, the question of compensation is open and the courts could apply the common law presumption that compensation is payable.[56]

2) International Remedies

Perhaps the question of securing aboriginal title and the adequacy of compensation is not merely an internal domestic concern but falls within the realm of public international law. There is some support in the law of nations for the proposition that compensation can be sought where there has been inadequate compensation for property acquired by a sovereign.[57] B.A. Worthley, a distinguished authority on international law, explains this possibility by considering the distinction between sovereignty and ownership.

> By international custom, a State is certainly master of its own territory, but territorial sovereignty is not the same thing as ownership. Because a sovereign State may control and expropriate property in its territory, this does not mean that it can, at will, disregard the claims made, by virtue of public international law, to restitution or to just compensation, or that it may always insist on its own conception of private property.[58]

Recognizing and applying this principle, Marshall, C.J., of the United States Supreme Court, in the case of U.S. v. Perchman, stated:

> It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country... The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.[59]

Marshall, C.J., it should be pointed out, was speaking in the contextual framework of private property rights of the conquered vis-a-vis the conquering sovereign. This principle was evident, of course, in the accepted attitude of the British regarding the property rights of the French in Canada upon conquest; property rights which were, by and large, left undisturbed after conquest. Both Worthley and Marshall recognize that in international law a dispossessed people should be adequately compensated.

Another argument which has some merit is that the proprietary interests of native peoples, whatever their nature, form the basis of a trust responsibility which the Canadian government assumed by virtue of their legal relationship with the native inhabitants. The aboriginal title of the Indian people might be considered an equitable interest, as opposed to the legal interest which is vested in the Crown, which the Canadian government, as trustee, must protect from unjust interference or appropriation to the detriment of their beneficiaries. Related to this matter, Mr. Worthley states:

> The interests of a beneficiary or equitable owner in a trust property situated abroad may need to be protected by English court proceedings directed against the trustee who is within the jurisdiction, and whose conscience is affected by the trust he accepted; it will be by no means always a defence to him to say that by the lex situs of the property he is the sole legal owner and that the situs does not recognize trusts. The beneficial owners under a trust may not be recognized by the lex situs, but his situs and interest in the trust property may be protected by the English court whenever it can make its decree effective; this it may do by compelling the defendant legal owner affected by the trust to execute an assurance, valid by the lex situs, to those entitled to the trust property when the trust comes to an end, or by compelling the defendant trustee to pay damages by way of compensation for breach of trust; for a breach of trust is the ignoring of the claims of the equitable owners.[60]

The difficulty with this position is that initially a trust relationship would need to be proved and established as between the Crown, the native peoples and their land. Secondly, that a breach of this trust had occurred when the native peoples were dispossessed of their lands; a breach which disregarded their equitable interests. Thirdly, that the breach had involved either an unjustified termination of their property rights or inadequate compensation; either of which was so unconscionable that it aroused the sensibilities of the international community. This latter point would have to be established, since a state has, as a matter of domestic jurisdiction, the power to take property in its control for securing the common good of the state. This is the common law principle of expropriation. When this action is taken and the state does so by providing adequate compensation no wrong, or harm will have been done -- at any rate, no international wrong will have been committed.[61]

Should it be established, however, through whatever action is taken, that a trust responsibility existed with regard to Indian lands between the Crown and the native people; that a breach of trust occurred

which resulted in a significant injustice to the native people, then perhaps an appeal could be made to the international community.

The International Court of Justice in The Hague only receives the power to render a decision on the merits, or substance, of a case which is placed before it by the consent of the States concerned. Before the court can deal with the interests of a private individual, the native people in this case, the individual's government would have to take the case up and make it an international claim vis-a-vis another government. This, of course, leaves no room for the Court to adjudicate internal disputes between individuals and their state.[62] It would therefore appear that the International Court of Justice would not entertain an action brought by the native community unless a state, recognized by the Court, took up the native cause, had an interest in it and made it an international claim as against the Canadian government. Conceivably England could take this course of action since the extinguishment of aboriginal title by treaty or scrip was arranged with the Queen's representatives, signed in her name, and the Canadian government acting as trustee assumed those obligations outlined in these transactions. It is unlikely, however, that Canada would consent to an action of this nature and even more unlikely that England would interfere in what they might consider an internal Canadian problem, particularly considering the international implications such an action would have on the relations between the two countries.

If the native grievance, in relation to the land, is a question of the denial of human rights or their protection, then the United Nations could be approached directly.[63] Dr. Ian Brownlie, another respected authority on the law of nations, in his consideration of the Dene and Inuit rights to self-determination suggests that the use of compulsion which results in the displacement of a community is a denial of a right to

self-determination; a basic human right which Canada has pledged to recognize and support.[64]

Having endorsed the United Nations Charter and the Declaration of Human Rights, Canada has not only undertaken to honor the principles of human rights recognized in these documents but having attested to the International Covenant of Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights, as of August 19, 1976, the Canadian government has bound itself to recognize the right to self-determination as a basic human right.[65]

Although Canada has endorsed these documents, at an international level, there has to be domestic implementation of the Covenants which would require legislation to meet the obligations imposed upon them. To avoid conflicting federal-provincial legislation, since the Covenants deal with matters within both federal and provincial legislative jurisdiction, it is suggested that a body be formed by federal-provincial agreement with power to oversee compliance with the Covenants.[66] The courts would probably recognize such delegation of powers.[67]

Should domestic avenues of resolution prove unsuccessful the individual can bring forth a grievance to the United Nations itself by way of direct petition to the Commission on Human Rights.[68] Unfortunately only petitions which "... appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms" are considered.[69] Moreover, without the consent of the State against whom the complaint is made, the Commission can only study the complaint and make a recommendation to the Economic and Social Council. An investigation into the merits of the grievance would only be possible with the consent of the

state concerned.[70] In addition, individual petitions alleging violations of human rights have been systematically avoided by the United Nations since 1945.[71] It seems to be preoccupied, when it comes to consideration of human rights violations, with apartheid in South Africa, to the exclusion of other valid international claims.

Despite these procedural considerations and possible obstacles to face in seeking redress, the Canadian government has pledged to uphold and implement mechanisms by which human rights will be honoured. Bearing this in mind the arguments put forward by Dr. Brownlie take on added significance not only in relation to the rights of self-determination of the Inuit and Dene but to past and current denials of those rights to other native peoples.

> The use of compulsion, even if it occurs in accordance with the law in force domestically, to displace the whole or part of an ethnic group from its traditional communal base or homeland may properly be classified as deportation. (This would certainly be a crime against humanity)... any extensive displacement or destablisation of a community, either contrary to its wishes, or in ignorance of its aspirations, amounts to a denial of the right of self-determination. This concept consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.
>
> The outcome of extensive displacement or compulsory disturbance of a community, as in the case of deportation, will probably be a number of irreversible changes and a serious risk of a loss of cultural and linguistic identity.
>
> No doubt the Canadian authorities would disclaim any intention to cause an expulsion of Inuit and Dene people from their homelands. However, it is a trite proposition of law that responsibility extends to the natural consequences of deliberate courses of action.[72]

Thus the acquisition of territory belonging to an indigenous people, <u>whether</u> through compulsion or negotiation, if it results, to a large extent, in "any extensive displacement or destablisation of a community", contrary

to its wishes and disregarding its aspirations, in effect amounts to a denial of a fundamental human right to self-determination and survival as an ethnic minority.

The distinctive nature of native culture can hardly be denied should it be argued that they are not a community recognized in international law. There is little doubt that the indigenous people of Canada fall within the concept of an ethnic and linguistic group as recognized in contemporary international law. Dr. Brownlie states that the primary indicators of this fact are the distinctiveness of the native people based upon a combination of (1) consciousness by the group of themselves as a distinct ethnic or cultural entity; and (2) 'objective' indicators of a distinctive culture, normally ethnic and linguistic in character.[73]

On this point the International Court of Justice, in an advisory opinion on the Western Sahara, stated that as one of the characteristics of such a people was,

> its own well defined characteristics, made up of autonomous tribes, independent of any external authority, these people lived in a well defined area and had developed an organization and system of life in common, on the basis of collective self-awareness and mutual solidarity.[74]

An argument might be put forward to the effect that an extension of the right of self-determination to native people would only cause national disruption by fragmenting the already fragile unity of the country. The U.N. Assembly also recognized this possibility. In a 1960 resolution the Assembly spoke of the principles of equal rights and self-determination of all peoples but stressed, at the same time, national unity and the territorial integrity of a country. Article 6 of the Resolution stated: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes

and principles of the Charter of the U.N."[75]

This position assumes that any action towards recognition of the rights of the indigenous people to self-determination would consequently disunify the country. Self-determination does not necessarily entail a cultural and political detachment or isolation of an ethnic community from the dominant society. The right of self-determination, properly exercised, would allow the native peoples of Canada to freely and responsibly develop their own cultural identity which would ensure their own ethnic survival within the Canadian context and be in accordance with the multilateral conventions signed on human rights. This could be achieved with some political concessions on the part of the federal government which would enable the native people to develop and administer their own political, legal and economic institutions. This is by no means an easy solution, both economically and politically, but a step in the right direction needs to be made if the grievances related to Indian lands are to be met.

SUMMARY

The Canadian governments, whether federal or provincial, might pause to consider that when they acquire land from the indigenous people, whether through compulsory expropriation or negotiated settlement, they are possibly indirectly contributing to the gradual extinction of an indigenous community. This is a trend evident from the past. Not only would this be a denial of a people's right to self-determination and ethnic survival but it would be a crime against humanity, to use the admonition of Dr. Brownlie. The government could well take note of the observations made by U.N. delegates at a Seminar on the Multinational Society held at Ljubljana, Yugoslavia in 1965. The following comments were made during the debate on the rights of groups to develop their own traditions and

character autonomously:

> It was generally argued that the right of autonomous action to ensure the preservation and continuity of a group's traditions and characteristics formed an integral part of its way of life and provided the surest means of protecting its collective identity. Any attempt to impose a uniform cultural pattern led to monotony and blandness, while encouragement of variety helped the assurance of harmonious coexistence between a country's varying ethnic, religious, linguistic and national groups, giving to each a sense of contribution to the national heritage. Some speakers recalled, in this connection, how past attempts to attribute to one single group a monopoly of virtue, by reason of its alleged racial or historical superiority, had revealed the dangers inherent in a misdirected, centrally inspired, unity of purpose.[76]

ENDNOTES

1. Mozley & Whiteley's Law Dictionary, 1977, Butterworth & Co. (Publishers) Ltd.

2. Webster's New Collegiate Dictionary, 1977, G. & C. Merriam Co.

3. J.L. Sackman, Nichols on Eminent Domain, Vol. 1, 1976, Matthew Bender, at pp. 1-8. Some have argued that this definition includes only an obligation to make compensation not a requirement to make just compensation upon exercise of the power -- see C.F. Randolph, "The Eminent Domain," (1887) 3 L.Q.R. 314 at p. 314.

4. I Kings XXI.

5. Sackman, Nichols on Eminent Domain, supra, pp. 1-56.

6. C.F. Randolph, supra, see note 3, at p. 315.

7. J.W. Jones, "Expropriation in Roman Law", 45 L.Q.R. 512.

8. Ibid., p. 514.

9. Ibid., p. 515.

10. Ibid., p. 522.

11. Ibid., p. 524.

12. Ibid., p. 516.

13. Ibid., p. 525.

14. Ibid., p. 526.

15. Sackman, Nichols on Eminent Domain, supra, pp. 1-56, 1-58.

16. C.F. Randolph, supra, see note 3, at p. 316.

17. Sackman, Nichols on Eminent Domain, supra, p. 1-58. A similar provision is embodied in Article 407 of the Quebec Civil Code.)

18. Ibid., p. 1-59.

19. Ibid., p.1-59, see: Magna Charta, s.28. The prerogative rights of the English Crown, in general, were restricted by the Bill of Rights, 1688 and the growth of responsible government with the establishment of a constitutional monarchy over the eighteenth and mid-nineteenth century. See: Wade and Phillips, Constitutional and administrative law, 9th ed., 1977, Longman Group Ltd., Lond, at pp. 97-102, 231-241.

20. Keith Davies, Law of Compulsory Purchase and Compensation, 1975, Butterworth & Co. (Publishers) Ltd., at p. 7.

21. Ibid., p. 8.

22. Ibid., p. 10. Note: It should be pointed out that since an inclosure application was made by the land owners, which required Parliamentary confirmation for the purposes of enforcement, an application which was not initiated by Parliament, there is some question as to whether Parliament, in this matter, was really acting in the interest of the public good.

23. Ibid., pp. 11-14.

24. Ibid., p. 15.

25. Ibid., p. 18.

26. C.F. Randolph, supra, at p. 323.

27. Ibid., pp. 318-21.

28. Dunedin, L.J. in Cedaro v. Lacoste [1914] A.C. 569, at p. 576.

29. G.S. Challies, The Law of Expropriation (2nd), 1963, Wilson & Lafleur, Ltd. at pp. 9-11.

30. Webb v. Outrim [1907] A.C. 81, at p. 88 per Earl of Holsbury, "We are not... bound by the decisions of the Supreme Court of the United States... though... those decisions may be regarded as a most welcome aid and assistance in any analogous case."

31. Kingston & Pembroke Railway v. Murphy (1888) 17 S.C.R. 482.

32. Western Counties Railway v. Windsor & Annapolis Railway (1881-82), 7 A.C. 178; Metropolitan Asylum District v. Hill (1880-81), 6 A.C. 193; Thomson v. Halifax Power Co. (1914) 16 D.L.R. 424; Hydro Commission v. County of Grey (1924) 55 O.L.R. 399.

33. Kings Asbestos v. South Thetford (1909), 41 S.C.R. 585; R. v. Lee (1918), 16 Ex.C.R. 424; Roberge v. Auger (1938), 77 S.C.R. 197.

34. G.S. Challies, supra, p. 16.

35. A.G. for B.C. v. C.P.R., [1906] A.C. 204; A.G. for Province of Quebec v. Nipissing Central Railway Co., [1926] A.C. 715.

36. Reference re Water Powers, [1929] S.C.R. 200.

37. Ontario Mining Co. v. Seybold, [1903] A.C. 73.

38. Challis, supra, pp. 17-22.

39. Ibid., pp. 4-8.

40. Indian Act, R.S.C. 1971, c. I-6, ss. 18(2), 23, 35.

41. Black's Law Dictionary.

42. Expropriation of Lands Act, R.S.C. 1952, c. 106, s. 2(g).

43. The Public Works Act, R.S.O. 1960, c. 338, s. 1(i).

44. The Public Works Department Act, R.S.Q. 1941, c. 148, s. 11.

45. Public Works Act, R.S.S. 1978, c. P-46, s. 2(i).

46. Ibid., s. 11.

47. Cayuga Indians Claim (Cayuga Indians (Great Britain) v. U.S.) Arbitral Tribunal (G.B. v. U.S.), (1926) 6 U.N.R.I.A.A. 173; R. v. Syliboy, [1929] 1 D.L.R. 307; A.-G. for Canada v. A.-G. for Ontario, [1897] A.C. 199 P.C.); R. v. Sikyea (1964), 46 W.W.R. 65; Francis v. R., [1956] S.C.R. 618; R. v. Wesley, [1932] 2 W.W.R. 337; Dreaver v. R., unreported decision of the Exchequer Court of Canada cited in R. v. Johnston (1966), 56 D.L.R. 2d at p. 754.

48. Provisions under the Manitoba Act, 1870 and the Dominion Lands Act, 1879 authorized the allotment of land to halfbreed and Metis "towards the extinguishment of their Indian title". These provisions, however, did not authorize the expropriation of their land for which compensation was to be made.

49. Indian Act, R.S.C. 1971, c. I-6, ss. 18(s), 23, 35.

50. Tee-Hit-Ton v. U.S. (1954), 348 U.S. 272. On the issue of compensation in the U.S. see also United States v. Alcea Band of Tillimooks (1946), 329 U.S. 40; United States v. Alcea Band of Tillamooks (1951), 341 U.S. 48.

51. Worcester v. Georgia, 6 Pet. 515; Johnson v. McIntosh, 8 Wheat. 543; Beecher v. Wetherby, 95 U.S. 517; U.S. v. Santa Fe Pacific Railway Co., 314 U.S. 339.

52. Tee-Hit-Ton v. U.S., supra, p. 278. It was on this point that the case was bitterly criticized by Prof. Youngblood Henderson of University of Berkeley in his article, "Unravelling the Riddle of Aboriginal Title". It is his contention that the Court misunderstood the classic cases on Indian title and in effect developed a new theory of aboriginal title. "In short, the Court inaugurated a new judicial test of aboriginal property: the legal theory that Congress has sole right to delegate to the Indian tribes their rights to aboriginal titles. Aboriginal title did not exist, then, because of the tribes' "original natural rights as the undisputed possessors of the soil from time immemorial," as stated in Worcester. Rather, under the Court's new theory of aboriginal title, it was vested in Contress' This is a juridical fiction that is completely refuted by all classic cases of Indian law, grounded as they are in the notion of inherent title rather than in recognized or delegated aboriginal title.", at p. 112-113.

53. Ibid., p. 279.

54. Ibid., p. 278-9.

55. Calder v. A.-G. of British Columbia (1973), 34 D.L.R. (3d) 145, at p. 173.

56. Calder v. A.-G. of British Columbia (1973), 34 D.L.R. (3d) 145, dicta of Hall, J. at p. 173; Newcastle Breweries Ltd. v. The King,, [1920] 1 K.B. 854; The Hamlet of Baker Lake v. The Minister of Indian Affairs and Northern Development, [1979] unrep. (F.C.T.D.) at pp. 51-63.

57. B.A. Worthley, Expropriation in Public International Law, 1959, Cambridge University Press.

58. Ibid., p. 12.

59. U.S. v. Perchman (1833), 7 Peters 51, at p. 86.

60. B.A. Worthley, supra, pp. 5-6.

61. Ibid., p. 23. On the question fo trust responsibilities see also judgment of Marceau, J. in Pawis v. R., [1979] 2 C.N.L.R. 52 at pp. 63-65 (F.C.T.D.).

62. Shabtai Rosenne, The World Court, What It is and How It Works, 1973, Oceana Publications Inc.

63. J.P. Humphrey, "Human Rights and World Law", prepared for Abidjan World Conference on World Peace Through Law, August 26-31, 1973.

64. Dr. Ian Brownlie, "Considerations of Public International Law Concerning the Rights of the Dene", prepared for the Indian Brotherhood of the North West Territories, March 24, 1976, Dene Rights, Vol. 1, Paper 8.

65. Alex Petrenko, "The Human Rights Provisions of the United Nations Charter", (1978) 9 Man.L.J. 53, No. 1, at p. 78.

66. Hugo Fisher, "The Human Rights Covenants and Canadian Law", (1977) 15 Can. Year Book Int. Law 42, at p. 72.

67. P.E.I. Marketing Board v. H.B. Willis, Inc., [1952] 2 S.C.R. 392.

68. Presumably this was the approach taken recently by Sandra Lovelace, a New Brunswick Indian woman, whose grievance was that she lost her status upon marriage to a non-Indian. The grounds were discrimination on the basis of sex. No apparent action has been taken by the Commission on this petition.

69. ECOSOC Res. 1503 (XLVIII), May 27, 1970.

70. Alex Petrenko, supra, p. 80.

71. In 1967, Iran's representative to the United Nations, Mr. Ganjii claimed that 250,000 communications alleging violations of human rights had been received and effectively ignored since 1945.

72. Dr. Ian Brownlie, supra, pp. 209-223.

73. Ibid., p. 213.

74. Western Sahara, Advisory Opinion, [1975] I.C.J. Rep., 12, p. 62, quoted in article by Hugo Fisher, see note 66, at p. 49.

75. General Assembly Resolution 1514 (XV), of December 14, 1960.

76. Dr. Ian Brownlie, supra, at p. 254.