Date: 20090508

Docket: T-2481-03

Citation: 2009 FC 481

BETWEEN:

LAC SEUL FIRST NATION
As represented by The Chief and Council

Plaintiff

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant

REASONS FOR JUDGMENT

O'KEEFE J.

[1] This is an action by the plaintiff, Lac Seul First Nation, as represented by the Chief and Council (LSFN or Band) against Her Majesty the Queen in Right of Canada (Canada).

[2] In its statement of claim, the plaintiff claims against the defendant for:

(a) General and aggravated damages, as yet unascertained but in any case totalling more than $50,000, details of which shall be provided before trial, as a result of breach of trust and fiduciary duties, breach of treaty and statutory obligations, and accessory liability to breach of fiduciary duties, including:

(i) the defendant's failure to secure the plaintiff's share of proceeds which were paid, or ought to have been paid, pursuant to statute, regulation, the plaintiff's surrender, and permits granted to third parties for timber harvesting on the Lac Seul Indian Reserve No. 28;

(ii) the defendant's failure to protect and manage the timber resources on Lac Seul Indian Reserve No. 28 in a reasonably prudent manner, on behalf of and to the benefit of the plaintiff; and

(iii) the loss of economic development opportunities as a result of not having access to capital that the plaintiff would have, but for the negligence, breach of trust, legal obligations or fiduciary duties of the defendant to the plaintiff;

(b) Special damages as yet unascertained, but totalling more than $50,000, details of which shall be provided before trial;

(c) Punitive damages totalling more than $40,000, details of which shall be provided before trial;

(d) Pre-judgment and post-judgment interest compounded annually at a rate that the plaintiff would have obtained through investment of monies which it should have obtained but for the failures of the defendant, as set out herein, or in the alternative, pre-judgment and post-judgment interest pursuant to statute;

(e) Costs of this action on a substantial indemnity basis; and

(f) Such further and other relief that to this Honourable Court seems just.

[3] Lac Seul First Nation is an Indian band within the meaning of the *Indian Act*, R.S. 1985, c. I-5, located in Northwestern Ontario, with approximately 2,500 band members. David Gordon is the duly elected Chief of Lac Seul and is an "Indian" within the meaning of the *Indian Act*, as are the councillors and members of the plaintiff First Nation.

[4] The plaintiff brings this action against the Crown in right of Canada in the name of Her Majesty the Queen. At all material times, the Department of Indian Affairs or Branch of Indian Affairs (Indian Affairs), as it was from time to time designated, represented and acted on behalf of the defendant.

[5] On June 9, 1874, the chiefs and councillors signed an adhesion to Treaty 3 at Lac Seul. The adhesion incorporated by reference the terms of Treaty 3 which provided that a Reserve was to be set apart for the Lac Seul First Nation. The resulting Lac Seul Indian Reserve No. 28 is a Reserve within the meaning of the *Indian Act*, above.

[6] The merchantable timber on the Reserve was surrendered to the Crown by a surrender document dated July 2, 1919. The surrender was approved by Order-in-Council PC 1666 dated August 9, 1919.

[7] The timber on the Reserve was surrendered by the Band to the Crown on the basis that the Crown was to sell the timber "Upon such terms as the Government of the Dominion of Canada may deem most conductive to our welfare and that of our people".

[8] After the Reserve timber lands were surrendered to the Crown, a timber cruise was carried out on the Reserve lands in 1919 by Henry J. Bury (Bury), an official of the department now known as Indian and Northern Affairs Canada (INCAC or the Department).

[9] Bury, as a result of his cruise, determined that the northern portion of the Reserve was too remote to be economically harvested at that time. His recommendation was that the Reserve be divided into two timber limits, the northern and the southern. He also recommended that the southern limit be sold first.

[10] When a license was granted to cut from the surrendered lands, the successful licensees were required to pay a number of amounts and fees. These were provided for in the *Indian Timber Regulations* (ITRs) of the day.

[11] Before a timber limit was tendered, the timber limit must be cruised and its value and boundaries established. The valuation was used to establish an upset price to be used in the tendering process. Generally speaking, this figure would represent the minimum value (in addition to stumpage fees which were paid as the timber was cut) of the timber. The bid price should exceed the upset price.

[12] The licensees were also charged ground rent based on the size of the timber berth. The rate in 1888 was $3 per square mile and in 1923, the rate was increased to $5 per square mile.

[13] In 1920, the Keewatin Lumber Company (Keewatin) was awarded a tender to remove the merchantable timber from the southern portion (limit) of the Reserve. The tender price was $26,000. The ground rent charged was $3 per square mile. As noted earlier, the ground rent was increased to $5 per square mile in 1923. Keewatin's ground rent remained at $3 per square mile until it completed its operations in 1949.

[14] Keewatin's license was extended for ten years in June 1923 for the period 1924 to 1934. It was extended again in 1933 for a further five years for the period 1934 to 1939 and a further ten year extension was granted for the period 1939 to 1949.

[15] In 1926, a license for the northern portion (limit) was awarded to Charles W. Cox (Cox) for a tendered bonus of $26,000 plus ground rent of $5 per square mile.

[16] The Cox license was extended for a further ten years for the period 1937 to 1947. A new license was issued for the period 1947 to 1952.

Issues

[17] The issues raised are as follows:

1. Does the defendant owe a fiduciary duty to the plaintiff in relation to the management of the Band's surrendered timber lands or resources?

2. Did the actions or omissions of the Department officials breach a fiduciary duty owed to the Band in relation to the timber resources with respect to the following:

    (a) The sale of the burnt timber from the 1907 fire?

    (b) Did Canada ignore the terms under which LSFN surrendered the timber?

        (i) By ignoring LSFN's desire for employment?

3. Did Canada fail to obtain the appropriate value for LSFN's timber limit?

    (a) Improper valuation of the timber limit and failing to correct the problem;

    (b) Failure to collect adequate ground rent;

    (c) Failure to collect adequate bonus payments.

4. Did Canada fail to re-tender the timber limits?

    (a) The Keewatin extensions;

    (b) The Cox extensions.

5. Did Canada breach the *Indian Timber Regulations* (ITRs or Regulations)?

    (a) Breaches of section 18 of the 1888 ITRs;

    (b) Breaches of section 12 of the 1888 ITRs;

    (c) Breaches of section 22 of the 1923 ITRs;

    (d) Breaches of sections 10 and 23 of the 1923 ITRs;

    (e) Breaches of sections 7 and 8 of the 1923 ITRs.

6. Did Canada fail to prudently manage the licensees?

7. Did Canada fail to levy appropriate stumpage dues?

(a) Canada keeps stumpage dues low for Cox and Keewatin;

(b) Comparison with Ontario's stumpage fees;

(c) Exemption from export fees;

(d) Canada failed to correct an error in the best interests of the beneficiary.

[18] **Issue 1**

General Law with respect to fiduciary duties owed by the Crown

The jurisprudence is clear that the Crown can be liable in damages to Aboriginal peoples for breach of fiduciary duties owed to them (see *Guerin v. The Queen*, [1984] 2 S.C.R. 335).

[19] The Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 stated at paragraph 85:

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below.

The Supreme Court also stated at paragraph 81:

> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

And at paragraph 83:

> . . . but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

The Court's mind must be directed to the particular interests at issue in each case in order to decide whether a fiduciary duty exists.

[20] In the present case, the issue to be dealt with deals with timber on reserve lands which have been surrendered to the Crown. This is an interest that fiduciary law will protect. The Supreme Court of Canada in *Guerin* above, at paragraphs 84 and 85 stated:

> 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 upon 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. . . .

[21] It is settled law that breach of the Crown's fiduciary duties can lead to damages. In *Guerin* above, at paragraph 102, the Court stated:

> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, 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.

[22] Where band lands or resources are surrendered to the Crown in the language of a trust, a trust-like relationship is created. In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 (*Blueberry River*), the Supreme Court stated as follows about the relationship at paragraphs 12 and 13:

> 12. Although the "revocation-resurrender" description offered by Stone J.A. is one plausible construction of the 1945 agreement, I think that the true nature of the 1945 dealings can best be characterized as a variation of a trust in Indian land. In 1940, the Band transferred the mineral rights in I.R. 172 to the Crown in trust, requiring the Crown to lease those rights for the benefit of the Band. The 1945 agreement was also framed as a trust, in which the Band surrendered all of its rights over I.R. 172 to the Crown "to sell or lease". The 1945 agreement subsumed the 1940 agreement, and expanded upon it in two ways: first, while the 1940 surrender concerned mineral rights only, the 1945 surrender covered all rights in I.R. 172, including both mineral rights and surface rights; and second, while the 1940 surrender constituted a trust for "lease", the 1945 surrender gave the Crown, as trustee, the discretion "to sell or lease". This two-pronged variation of the 1940 trust agreement afforded the Crown considerably greater power to act as a fiduciary on behalf of the Band. Of course, under the terms of the trust, and because of the Crown's fiduciary role in the dealings, the DIA was required to exercise its enlarged powers in the best interests of the Band.

> 13. I should add that my reasons should not be interpreted to equate a trust in Indian land with a common law trust. I am well aware that this issue was not resolved in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, and I do not wish to pronounce upon it in this case. However, this Court did recognize in Guerin that "trust-like" obligations and principles would be relevant to the analysis of a surrender of Indian lands. In this case, both the 1940 and 1945 surrenders were framed as trusts, and the parties therefore intended to create a trust-like relationship. Thus, for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land.

[23] The obligations of the Crown's fiduciary relationships were stated as follows in *Wewaykum* above, at paragraph 86:

> . . .
>
> 2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
>
> 3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.
>
> . . .

Also at paragraph 116 of *Blueberry River* above, the Court put it this way:

> The DIA's duty was the usual duty of a fiduciary to act with reasonable diligence with respect to the Indians' interest. . . .

[24] The plaintiff, in its written submissions, at paragraph 18 stated:

> Therefore, according to *Blueberry River*, when reserve land is surrendered in trust for private purposes, as a fiduciary the Crown must:
>
> a. Remember its role as trustee and act only in the best interests of the beneficiary;
>
> b. Exercise any enlarged rights and powers on behalf of the beneficiary;
>
> c. Have the utmost loyalty to the beneficiary;
>
> d. Intervene between the beneficiary and third parties who wish to make exploitative bargains;
>
> e. Act in the manner of a "man of ordinary prudence in managing his own affairs";
>
> f. Correct an error in the best interests of the beneficiary.

Having reviewed *Blueberry River* above, I would slightly change a and c to read:

> c. Have the utmost loyalty to the beneficiary;
>
> a. Remember its role as trustee and act only in the best interests of the beneficiary;

Otherwise, I agree with the plaintiff's statement.

[25] In summary, I am of the opinion that the defendant did owe a fiduciary duty to the plaintiff.

[26] **Issue 2**

Did the actions or omissions of the Department officials breach a fiduciary duty owed to the Band in relation to timber resources with respect to the following:

(a) The sale of the burnt timber from the 1907 fire?

There was a fire on the Reserve in 1907 which destroyed timber. This was prior to the surrender by the Band to the Crown. The Crown relied on section 48 of the *Indian Act*, R.S.C. 1906, c. 81 which states:

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

This section of the Act gave discretionary control over the disposition of the burnt timber to Canada. There did not have to be a release or surrender by the Band.

[27] Accordingly, Canada awarded a tender to Eastern Construction in December 1907 to harvest the burnt timber. The tender requirements were:

> a. That the wood had to be removed within two years;
>
> b. That a $500 security deposit had to be put down which would be forfeited if the licensee failed to carry out the tender's terms; and
>
> c. That "sworn returns of the number of ties and posts taken out will be required, and also the pieces and sizes of Red Pine logs and the prices tendered shall be paid thereon prior to the removal of the timber from the reserve.

(Taken from paragraph 40 of the plaintiff's written submissions).

[28] The defendant's inspector estimated that there would be 56,000 ties available for salvage and 407 of this number would be number 1 ties. In the end, the company reported that it had harvested 12,132 ties and 1,000 "cull" (inferior ties). The company had been awarded the tender in 1907 but did not report the number of ties until 1913. It did not pay for the ties until 1916.

[29] Eastern Construction did not provide to the defendant a sworn return to show the amount of ties harvested as was required by the tender.

[30] At this stage, the issue is whether the defendant breached the fiduciary duty it owed to the plaintiff.

[31] In my view, the defendant did not act with reasonable diligence in its dealings with Eastern Construction. It failed to obtain a sworn statement from Eastern Construction as to the number of ties removed. I have taken into account the fact that Eastern Construction, after the tender was awarded, informed the defendant that there were less ties than estimated. It would seem to me that since Eastern Construction claimed it only cut 12,132 ties and 1,000 cull ties as opposed to the estimated quantity of 56,000 ties, this would have been a most appropriate case for the Crown to demand the required sworn statement. It did not.

[32] I therefore conclude that the defendant breached the fiduciary duty it owed to the plaintiff by failing to require a sworn statement from Eastern Construction as to the amount of timber actually harvested.

[33] **Issue 2**

(b) Did Canada ignore the terms under which LSFN surrendered the timber?

(i) By ignoring LSFN's desire for employment?

The plaintiff submitted that Canada ignored the terms under which the surrender took place as it did not provide for employment of the Band members by the successful contractor nor did it provide for the provision of cheap lumber to the Band members. The plaintiff stated that these were the reasons behind their desire to surrender the timber.

[34] In August 1918, Indian agent R. S. McKenzie confirmed to his superiors that the Chief of Lac Seul shared his earlier opinion that he sent to his superiors that "the Indians would reap quite a benefit from the operation as they would get employment in the lumber camps".

[35] Mr. McKenzie's August 1918 letter to his superiors stated in part as follows:

> Chief John Ackewance arrived here today and states that his band are very anxious to surrender the timber on their Reserve to the Department, and that a portion of it should be sold now to Mr. Farlinger or others, so that they could have work during the winter to make a living.

Mr. McKenzie also attached a header of a petition from Chief Ackewance with the names of 106 members of the Lac Seul Band which read:

> We the undersigned members of the Band of Indian Reserve number 28 herewith petition you, being desirous that a portion of the timber on the Reserve be sold, in order that the members of our Band may have employment cutting the timber and also secure cheaper lumber for the construction of our houses, as well as securing some revenue for the timber located on the Reserve. We pray that you may favourably consider our petition, and arrange for the sale of a portion of the timber.

[36] In my view, this shows that the Band was surrendering its merchantable timber at least in part, so that Band members could obtain employment, secure cheap lumber and some revenue.

[37] In *Blueberry River* above, the Supreme Court made the following statements at paragraph 6 concerning the interpretation of surrenders:

> . . . For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members' intention should be given legal effect.

And at paragraph 7:

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between

> aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.

[38] The ITRs gave authority for the defendant to impose conditions on the sale of the timber limits. As well, Cox's renewed license for the Gull Bay Reserve required him to employ LSFN members from the Reserve in his timber harvesting operations.

[39] It is my finding that the defendant breached the fiduciary duty it owed to the Band in not protecting the Band's employment interests and the Band's desire to have cheaper lumber to build houses on the Reserve.

[40] **Issue 3**

Did Canada fail to obtain the appropriate value for LSFN's timber limit?

(a) Improper valuation of the timber limit and failing to correct the problem

The plaintiff submitted that the defendant did not receive a proper return for the Lac Seul's timber. In *Alexander Band No. 134 v. Canada (Minister of Indian Affairs and Northern Development)*, [1991] 2 F.C. 3 (F.C.T.D.) at page 14, the Court stated:

> With respect to the first point, having regard to the historical relationship between the Crown and Indians, I believe the fiduciary's duty of "utmost loyalty to his principal" would in general oblige the Crown to seek to achieve as good a return from the property of the beneficiary of the fiduciary obligation as could reasonably and lawfully be achieved. . . .

[41] A similar comment was expressed in *Blueberry River* above, at paragraph 104 where the Supreme Court stated:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

[42] It was a requirement of the ITRs that the timber limit had to be valued in order to determine the amount of the upset price for the tendering process. The upset price would represent the minimum amount of the bid which would be accepted by the Department of Indian Affairs (DIA). The Band, of course, would also be paid stumpage fees.

[43] Mr. Bury, the defendant's timber inspector, set the size of the Reserve at 49,000 acres which was the same size set by Mr. Vaughan in 1882 when Mr. Vaughan was calculating the size of the Reserve for treaty purposes. The actual size of the Reserve was 66,000 acres. According to the evidence, Mr. Bury did not spend a lot of time in valuating the Reserve.

[44] The Crown was told of the error in the size of the Reserve by the Surveyor General of Ontario in February 1929. The new acreage was accepted by the Crown.

[45] The mistake in the size of the Reserve would result in a lower bonus price for the sale of the timber berths and, as I will address later, a decreased amount of ground rent.

[46] In my view, this conduct by the defendant was another breach of the fiduciary duty owed to the Band by the defendant.

[47] The conduct of the defendant does not meet the standard stated in *Alexander Band No. 134* above, and *Blueberry River* above.

[48] **Issue 3**

(b) Failure to collect adequate ground rent

The defendant collected ground rent from Mr. Cox on the northern limit of the Reserve based on the incorrect size of 31 square miles. The correct size was 59 square miles. When Mr. Cox received the tender for the northern limit in 1926, he only paid ground rent for 31 square miles. The Crown found out in February 1929 that ground rent should be charged on 59 square miles but did not correct the amount of ground rent to be paid by Mr. Cox. The Crown did not correct the amount of ground rent until October 1940 and then it only increased the amount of the ground rent for the time frame from 1940 onward. There was no collection of the additional ground rent from 1926 to 1940.

[49] In *Blueberry River* above, Madam Justice McLachlin found that section 64 of the *Indian Act* created a fiduciary duty "to rectify errors prejudicing the interests of the Indians". She stated at paragraph 115:

> In my view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians. The fiduciary duty associated with the administration of Indian lands may have terminated with the sale of the lands in 1948. However, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64. That section gave the DIA the power to revoke erroneous grants of land, even as against *bona fide* purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: *Frame v. Smith, supra*, per Wilson J.; and *Hodgkinson v. Simms, supra*. Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band's minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.

I believe that the Crown breached its fiduciary duty to the Band when it failed to even attempt to rectify the problem until it was notified of the problem for a second time in October 1940 and then only for the period 1940 forward. I would note that Mr. Cox's license was extended for the period 1937 to 1947.

[50] The plaintiff alleges that inadequate ground rent was collected from Keewatin as the ground rent set by the Regulations increased to $5 per square mile from $3 per square mile in

1888. The increase was never passed on to Keewatin despite extensions or renewals to its contract or license.

[51] Applying the principles outlined in *Blueberry River* above, I am of the opinion that the Crown breached its fiduciary duty to the Band in this respect also.

[52] **Issue 3**

(c) Failure to collect adequate bonus payments

The value of the timber on the northern portion of the Reserve was lowered because in June 1926, Mr. Bury claimed a fire destroyed approximately seven square miles of timber. This represented less than 12% of the 59 square miles contained in this part of the Reserve. In addition, Mr. Bury had stated in April 1926 that no fires had been reported on the Reserve since he cruised the Reserve forest land in 1919.

[53] As a result of alleged damage from the 1923 fire, Mr. Bury made a 60% reduction in his assessment of red and white pine, made a reduction in jack pine from six million to four million F.b.M. and spruce and balsam from eight million down to six million F.b.M. If there was a fire in this area at all in 1923, these are large deductions for damage that covered up to12% of the Reserve.

[54] There was a further problem with the calculation of the upset price for the northern portion of the Reserve. Mr. Bury stated that there were only 13,000 railway ties available. The

jack pine saw logs that were on the northern portion of the Reserve would have converted to 130,000 railway ties worth six cents each, amounting to a total value of $7,800. Mr. Bury, however, used the figure of 13,000 ties making a value of $780. This resulted in Mr. Bury calculating an upset price of $20,380 instead of $27,400.

[55] The tender offers received by the defendant were $21,500 and $26,000, neither of which would have been above the upset price, calculated correctly.

[56] It is interesting to note the following statement contained in an investigation into the matter in 1938:

> [t]he valuation of the timber as submitted to the Department for bonus purposes amounted to $20,380.00. In this valuation the estimated number of jack pine ties was 13,000. This should have read 130,000, and at a value of 6 cents each would have increased the cash value of the timber by $7,020.00 or the total valuation would have read $27,400.00 instead of $20,380.00.

[57] The defendant submitted that the Crown took reasonable steps from 1907 to 1926 to ensure that the Band received fair value for its timber. The defendant stated that the DIA surveyed both portions of the Reserve and held public tenders.

[58] Based on the evidence, including the fact that the Crown found out in 1938 about Mr. Bury's error but yet did nothing to rectify the matter, I cannot agree that the Crown did not breach its fiduciary duty to the Band. There was a $7,020 error in the upset price which was not corrected.

[59] **Issue 4**

Did Canada fail to re-tender the timber limits?

The process used to tender the timber limits was that the tenderor would submit a tender to remove timber, let's say for a period of four years. The successful tenderor would then have to apply annually to have the yearly license renewed. The tender submitted would have to be at least as much as the upset price set by the DIA. In addition, the successful tenderor would pay additional fees set in the ITRs, i.e. ground rent and stumpage fees.

[60] When applying for the annual renewal, the license holders were supposed to have paid all the applicable fees. The ITRs also required the applicant to work the limit each year or give an explanation under oath as to why the limit had not been worked. This was provided for in section 12 of the Regulations which states:

> No renewal of any license shall be granted unless the limit covered thereby has been properly worked during the preceding season, or sufficient reason be given under oath, and the same be satisfactory to the Superintendent General of Indian Affairs, for the non-working of the limit, and unless or until the ground rent and all costs of survey, and all dues to the Crown on timber, saw-logs or other lumber cut under and by virtue of any license, other than the last preceding, shall have been first paid.

[61] **Issue 4**

(a) The Keewatin extensions

In the present case, Keewatin won its tender in 1920 for a period of four years. It was given three extensions, without any retendering, i.e. 1924 to 1934, 1934 to 1939 and 1939 to 1949. The ground rent remained the same at $3 per square mile although the ITRs had increased

the ground rent from $3 to $5 per square mile in 1923. No new bonus price was set and there was no public tender or auction.

[62] **Issue 4**

(b) The Cox extensions

Charles Cox won his first tender in 1926 to harvest the timber on the northern portion of the Lac Seul Reserve. The term was ten years. In 1936, Cox's license was renewed for a further 10 years without tender until 1946. In 1947, Mr. Cox was given new harvesting rights for an additional five years until 1952. These extensions were given without any public auction or tender and without obtaining any new bonus price.

[63] In the surrender, the timber was referred to as merchantable timber. At the time of the surrender, it was accepted that merchantable timber was timber ten inches or more in diameter as specified in the ITRs. As time went on, the ITRs were amended to allow cutting of timber smaller than ten inches in diameter. In fact, Mr. Cox's license allowed him to harvest timber six inches and more in size.

[64] As well, the growth of trees provides a larger supply of merchantable timber over a period of time.

[65] As a result of not retendering the limits, no new bonuses were collected for the benefit of the Band. If, at the end of the tender period, a new tender process had been initiated instead of

simply extending the timber operators' harvesting rights, a new bonus or upset price would have been established, thus providing more revenue to the Band. This would also have the effect of the operators having to pay for the growth in the timber over the preceeding years.

[66] In addition, the evidence establishes that harvesting periods were extended when the dues from previous years were not paid and no sworn declarations were given as to why the limit had not been worked in the previous year.

[67] The evidence also shows that the defendant's own Indian agent had concerns. Agent Frank Edwards wrote to Ottawa concerning the decision to allow Keewatin to defer harvesting its limit for the seventh year in a row. His letter stated as follows:

> Replying to your letter #30130-6 of 24th ulto re operation by the Keewatin Lumber Company on the southern portion of Lac Seul Reserve.
>
> The Company could not do very much on the Reserve, and ship to their mill at Kenora, until a railway was put in, but pulpwood and ties could be cut and shipped to the mills at Fort William and **I would respectfully suggest that if the Company do not operate themselves next winter they should at least permit the Indians to cut some ties or pulpwood themselves for sale, and so give them some occupation instead of tying up the resources for such a long period.**
>
> In my opinion it will be several years before a railway is in operation, on which they could ship the timber to Kenora. I understand they have had surveyors out, but the exact route is not yet definitely decided on**, and no construction has been started even from Kenora, they have not yet started to clear the right-of-way.** The Company is reliable, and I do not wish to be unreasonable to them, as they have always, in my opinion been kind to the Indians, but it appears to me some operation should be

> insisted on for next winter, as it is impossible to complete the Railway by then.
>
> (Emphasis added)

[68] In my view, the Crown did not act in a prudent manner and in the best interests of the Band. It did not sell the timber rights "upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people." as stated in the surrender document.

[69] By failing to retender the limits, the Crown did not meet its fiduciary duty "to seek to achieve as good a return from the property of the beneficiary . . . as could reasonably and lawfully be achieved".

[70] I do not agree with the defendant's submissions with respect to the extension of licenses or more specifically, harvesting periods. These submissions are contained in paragraphs 206 and 207 of the defendant's aid to argument. This approach would allow the timber limit to be tied up for many years; in the case of Keewatin, there were no new tenders being called from 1920 to 1949. The Band would lose the financial benefit of having new upset prices calculated to account for the growth in the timber and the increase in the harvested amounts due to the lowering of the diameter of the timber that could be cut from ten inches to six inches in diameter.

[71] I am of the opinion that the Crown breached the fiduciary duty it owed to the Band by not retendering the timber limits.

[72] **Issue 5**

Did Canada breach the *Indian Timber Regulations*?

(a) Breaches of section 18 of the 1888 ITRs;

(b) Breaches of section 12 of the 1888 ITRs;

(c) Breaches of section 22 of the 1923 ITRs;

(d) Breaches of sections 10 and 23 of the 1923 ITRs;

(e) Breaches of sections 7 and 8 of the 1923 ITRs.

At paragraph 236 of the plaintiff's written submissions, the plaintiff submits that Canada failed to meet the standards set out in the ITRs in the following respects:

> a. Failed to obtain security bonds from licensees in contradiction of s. 18 of the *Regulations*;
>
> b. Granted yearly license renewals despite the fact that license-holders often did not provide the proper paper work required by s. 12 of the *Regulations*;
>
> c. Allowed hazardous harvesting practices on the Reserve in contradiction of s. 22 of the *Regulations*;
>
> d. Allowed for timber dues to be sent in without a licensed scaler checking the amounts and kinds of timber cut, as well as allowing timber operators to neglect or mark their timber in contradiction to s. 23 and s. 10 of the 1923 *Timber Regulations*;
>
> e. Allowed license renewals regardless of dues being paid on time in contradiction of s. 7 of the *Regulations*; and
>
> f. Allowed license renewals despite receiving repeatedly late applications for renewal in contravention of s. 8 of the *Regulations*.

The evidence presented in this trial proves that these types of breaches did occur. The issue is whether this conduct amounts to breaches of the fiduciary duty owed to the Band by the Crown. I

have come to the conclusion that these ITRs are in place to assist with the proper management of the timber limits after they have been tendered. By way of example, the requirement to mark the timber provides a way in which the timber taken from the Reserve can be identified. There was a problem in the present case as certain timber was not marked and as a result, it could not be determined whether it came from Reserve lands or from other lands.

[73] I have come to the conclusion that following the Regulations would allow for proper management of the timber limits after they were tendered. The Crown breached its fiduciary duty owed to the Band when it did not comply with the ITRs.

[74] **Issue 6**

Did Canada fail to prudently manage the licensees?

At paragraph 290 of its written submissions, the plaintiff alleges that the defendant also breached its fiduciary duty to prudently manage the plaintiff's resources by:

> a. Not recovering the proper ground rent for the timber limit;
>
> b. Failing to make sure that the operator of the timber limit was working the limit;
>
> c. Failing to collect timber dues in a consistent manner;
>
> d. Failing to monitor or penalize the practices of license-holders.

I have dealt with these matters previously but I would like to note the following in relation to d. The plaintiff's historical expert, James Morrison stated at paragraph 358 of his expert's report:

> Timber scaler George Hynes sent the Department another letter on 4 May 1931, in response to the headquarters letter of 14 April which had only just reached him. Mr. Hynes argued that the kind of check scale he had just carried out was basically useless. The only way to ensure proper supervision of Indian Reserve timber, he said, was to scale every piece taken off by a licensee:
>
> . . .
>
> I also wish to mention that what I think is a check scale will get you no where. In the first place who are you to check? There is only one right way to check scale on the woods operations carried out on the Indian Reserves, and that is to make a complete piece scale of everything taken out by the licensees. I consider that I did the work in a much shorter time than the Department of Lands & Forests Prov of Ontario would wish a scaler to do it in, but as the winter was beginning to show signs of a very early break up I had to work hard and at that work on Sundays to catch up with my scale. I regret indeed that the delay in sending in my report caused you to remind me, but I assure you the delay was unavoidable.

I am satisfied that the Crown breached its fiduciary duty to the Band by failing to properly manage the timber limits once tendered.

[75] **Issue 7**

Canada's failure to levy appropriate stumpage fees

(a) Canada keeps stumpage dues low for Cox and Keewatin

There were three different timber tariff rates in the relevant time frame. These are summarized in Schedule 2 to the June 30, 2008 expert report of Price Waterhouse Coopers LLP (Exhibit D-4):

Summary of Canada's Timber Tariff Rates

	1909 Rates October 13, 1909	1923 Rates May 1, 1923	1926 Rates October 12, 1926
Red Pine (per Mfbm)	$2.50	$2.60	$2.50
White Pine (per Mfbm)	$2.50	$2.50	$2.50
Jack Pine (per Mfbm)	$2.50	$2.50	$2.60
Spruce (per Mfbm)	$1.25	$1.50	$1.50
Balsam (per Mfbm)	$0.80	$1.00	$1.50
Poplar (per Mfbm)	$0.80	$1.00	$1.50
Pulpwood (per cord)	$0.40	$0.40	$1.50 (Spruce) $0.75 (Balsam)
Ties (per tie)	$0.04	$0.04	$0.10

[76] I have reviewed the relevant legislation and the form of license prescribed by the Regulations. It is important to note that the term of each license is for one year only and can be renewed only if dues and any rent for the previous years cutting has been paid and the limit was worked the previous season or satisfactory sworn evidence to show why the limit was not worked was presented (section 7 of the 1923 ITR).

[77] A perusal of the Orders-in-Council changing the tariff of dues shows that each time the tariff was changed, the original tariff was rescinded. There was no provision in either the tender notice, the license or the ITRs that indicated that the tariff of dues in force at the date the first yearly license was issued, or the date of the award of the tender, would be the dues tariff to apply until the contractors ceased their operations on the Band lands (note paragraph 79 in relation to the first four years of the Keewatin operations).

[78] If the only tariff of dues that exist when the new license is issued are the new rates, then it is my conclusion that the new rates must be used at that time.

[79] The documentary evidence contains the tender notice for the Keewatin berth and the specific rates are stated in the notice itself. Hence, I believe that the rates as specifically stated in the tender notice should be applicable until the first extension, i.e. the first four years.

[80] In the present case, Keewatin would pay the 1909 rates up until and including the renewal for 1923 to 1924. For the renewals of 1924 to 1925 and 1925 to 1926, the 1923 dues rates would apply. For subsequent renewals, the 1926 rates would apply.

[81] For Mr. Cox, the 1923 rate would apply for the 1926 to 1927 time frame. For subsequent renewals for his first license, the 1926 rates would apply. With respect to his second license, the 1926 rates would also apply. I would note that although he agreed to pay $10 per M.f.b. for saw lumber for his second license, the evidence shows that he was not cutting saw logs at that time but was in fact cutting pulpwood which he was paying stumpage at $1.00 per 128 cubic feet when the actual stumpage rate set by the tariff was $1.50 per 128 cubic feet or cord (see GWS Reports, Exhibit P-5 at page 61).

[82] In *Booth v. Canada* (1915), 51 S.C.R. 20, the Supreme Court, when commenting on a similar type of license under the then *Indian Act*, R.S.C., 1886, ch. 43, stated at page 24:

> It is conceded that the respondent at the expiration of any single year could insist upon raising the amount of stumpage dues to become payable in the future.

And at page 25:

> In short it seems to me that to give any legal effect to this section 5 of the regulations in the way the appellant claims would be to give him a licence in perpetuity which certainly would be quite inadmissible, even for Parliament to attempt if regard is had to the trust deposed in it by the transactions leading to Canadian control over the subject-matter of these Indians and their lands so called.

[83] As noted, that case involved a license under the *Indian Act* which was a yearly license which could be renewed. The license holder, under the Regulations made pursuant to the *Indian Act*, was entitled to have the license renewed if all existing Regulations were complied with. The license renewal was denied and the licensee claimed that he was entitled to the renewal under the Regulations despite the fact that the Act said licenses were for only one year. In essence, the Court ruled that the discretion given to the Superintendent General to grant a license could not be changed by the Regulation dealing with renewals.

[84] It would not be in the best interests of the Band not to apply the increases in stumpage fees to the next license period (with the first four years of the Keewatin operations being exempted). The Crown was not acting as a prudent person in this respect and was in breach of its fiduciary duty to the Band.

[85] **Issue 7**

(b) Comparison with Ontario's stumpage fees

As I understand the plaintiff's argument under this issue, it is that the defendant should have increased its tariff of dues more frequently than it did so that the tariff would be more in line with that of Ontario. Because they did not do this, the Crown breached its fiduciary duty owed to the Band.

[86] I do not agree with the plaintiff's position. In my view, the Crown was only obligated to properly apply the tariff rates that were provided for under the ITRs.

[87] If the plaintiff is suggesting that the Department should have applied a premium dues rate which was above the dues set by the tariff, my answer would be the same as above.

[88] I find that there was no breach of fiduciary duty in relation to the rates in this respect.

[89] **Issue 7**

(c) Exemption from export fees

The plaintiff submits that when an exemption from export fees on unmanufactured pulpwood was granted to Cox and Keewatin, the defendant should have increased the dues payable. This exemption was granted in order to encourage Cox and Keewatin to harvest timber on the far shore of Lac Seul. When this was not accomplished, the defendant then tried to have it

harvested by unemployed workers as part of a make-work program. The plaintiff states that Cox and Keewatin were still allowed to sell this timber without incurring any harvesting costs.

[90] When neither of the measures worked fully, the timber was flooded and Cox and Keewatin were paid by the defendant for loss of opportunity to harvest the flooded timber. No dues were paid to the Band for the flooded timber.

[91] I cannot see any fiduciary duty owed by the Crown to the Band in these respects. These were matters between the Crown and its contractors. In any event, even if a fiduciary duty did exist, there was no breach of that duty.

[92] **Issue 7**

(d) Canada failed to correct an error in the best interests of the beneficiary

The issues raised under this heading have been dealt with in earlier parts of the decision with the exception of the Cox lawsuit which pertains only to the time frame of 1947 to 1952. The lawsuit is relevant, only because the plaintiff has claimed as part of its historic damages the amount of $1,428.34 for legal expenses charged against the Band for the conduct of the Court case.

[93] If a licensee does not pay his dues, the Crown can sue him and have recourse to any judgment obtained. In the present case, there were no more licenses to be issued to Cox so this could not be held over his head to induce payment.

[94] On the facts of this case, I am of the opinion that it is not only correct but fair to deduct the amount of the legal fees from any money received from Cox.

[95] As a result of this conclusion, I find that the legal fees cannot form a portion of the plaintiff's historic damages. There is no reason to hold the Crown responsible for these fees. They resulted from the Crown's effort to attempt to recover the Band's money.

Doctrine of Laches

[96] There is no doubt that the doctrine of laches can bar the claim of an Indian band. In *Wewaykum* above, the Supreme Court stated at paragraph 110:

> The doctrine of laches is applicable to bar the claims of an Indian Band in appropriate circumstances . . .

[97] In order for laches to apply and bar an aboriginal claim, the applicant must have knowledge of the disputed transaction or as stated by the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 at paragraph 300:

> The motions judge refused to apply the defence of laches on the ground that there was no evidence that the Chippewas had knowledge of the actual terms of the Cameron transaction and that "[i]t is clear from *Guerin* that laches cannot bar an aboriginal claim unless the claimant has knowledge of the actual terms of the disputed transaction." The relevant passage from Dickson J.'s judgment in *Guerin* appears at p. 390 S.C.R.:
>
> > Little need be said about the Crown's alternative contention that the Band's claim is barred by laches. Since the conduct of the Indian Affairs Branch

> personnel amounted to equitable fraud; since the Band did not have actual or constructive knowledge of the actual terms of the golf club lease until March 1970; and since the Crown was not prejudiced by reason of the delay between March 1970 until suit was filed in December 1975, there is no ground for application of the equitable doctrine of laches.

[98] I am not satisfied that the Band had knowledge of the necessary facts which ground their cause of action.

[99] Firstly, it must be remembered that the plaintiff and the defendant were in a fiduciary relationship. The defendant had complete control as to how the dealings were carried out with the timber contractors. The defendant exercised its discretion without consulting the plaintiff.

[100] As to the documents the claim is based on the defendant's historical expert, Dr. Betsey Baldwin, who testified as follows:

> . . . At tab 1400, so the first tab, there's a document entitled "Lac Seul Band Trust Funds, timber-Related Entries".
>
> Now I understand, Dr. Baldwin, that you put together this document?
>
> A Yes.
>
> Q Could you tell the Court how you went about doing so?
>
> A This document is based on the trust fund accounts for the Lac Seul Band and those trust fund accounts are pages that, are documents that we retrieved from Indian and Northern Affairs Canada's main records office. And I looked through each of those documents carefully and identified timber-related transactions in the documents.

The trust fund accounts have a section for a description of the transaction and so my identification of relevance was based on that description of the transaction.

And for each document that was relevant, I transcribed that transaction in full, the amount of the transaction and its date and its description as written and other information. In later years there's a code that's used for identifying document transaction subject matter.

And I transcribed all of those identified timber-related transactions into an MS Excel document and this is the print off of that Microsoft Excel document.

Q This timber ledger has been referred to by a number of experts already and is generally relied upon by the other experts.

Now just getting back to the joint document collection, could you tell us roughly how many documents are in the joint collection?

A I believe there are 3,263. I may be wrong, but my understanding is that there's approximately 3,200 documents in that collection.

Q In your report you refer to extant or existing copies of the Keewatin and Cox timber licences for certain years. How were you able to locate these documents?

A Those documents were found at the Library and Archives Canada and I found those documents - - they were not in the Indian Affairs files, in the main files related to this case for Indian Affairs, but they were in other files at Library and Archives Canada, within the historic records of the Department of Forestry in one case and in another case within the historic records of the Department of Labour.

This was because the Department of Labour was involved in Depression Era initiatives regarding timber in northwestern Ontario and so they had a copy of that document.

And also amongst the personal papers of Andrew McNaughton, who was a public servant who was related to the Department of Labour and National Defence initiatives around

labour during the Depression Era, and his personal papers included a copy of the Cox licence as well.

Q And do these licences form part of the joint document collection?

A Yes, they do.

(Transcript of evidence, Volume 8, pages 997 to 999)

Q I'm not asking you about public availability. That you deal with as well in footnote 1. I'm just asking you about the answer that you gave to your client, Canada. You said the key documents are these, okay? Maybe those are, in fact, important documents, I'm not suggesting otherwise.

A H'mn, h'mn.

Q But you, as a historian, went well beyond that, didn't you?

A Yes.

Q And Mr. Morrison went well beyond that, didn't he?

A Yes.

Q And anyone who was researching this claim, to figure out whether or not there was a basis for an action against the Crown, would do - - any professional person would do what you and Mr. Morrison did, they would go well beyond these nine key - -

A Yes, I believe so.

Q - - you say key timber files?

A Yes.

Q And didn't we hear, in fact, that some of the licences, Mr. Morrison told us, were not in the correct files - -

A Yes, that's correct.

Q - - they were in other files? And haven't you considered those other files, particularly in relation to flooding? If I look at page 3, you have considered many, many files that were created for the purpose of assessing the flooding claim, correct?

A Yes, that's correct.

Q So that if you're saying to some band member on Lac Seul Reserve in 1970 or 1980 or 1990 or 2000 or today, as you were hired I think in 2006 or 2005 - -

A 2005, yes, yes.

Q - - where do you go, and your answer is right in front of us. It's Appendix C and it considers a lot more documents than those you referred to in your first footnote?

A That's correct.

Q That's correct, isn't it?

And in fact, you bring to that exercise the expertise of a historian?

A Yes.

Q As does Mr. Morrison?

A Yes.

Q And that's expertise. It has been accepted as expertise by this Court. You are a historian, professional historian. We call you Dr. Baldwin. You have got a PhD and there's a reason for that, because you have accumulated education, knowledge and experience and you have expertise.

A Yes.

Q And I want to suggest to you that a person that wanted to do the work that you did would have to have similar expertise, correct?

A I agree. I think that those nine files would tell a portion of the key story, but I do agree that all of this extra research that has

> been done, that's a - - that adds extra value and understanding to the story.
>
> Q That's your work product - -
>
> A Yes.
>
> Q - - as an expert?
>
> A Yes.

(Transcript of evidence, Volume 8, pages 114 to 116)

[101] Another example of the Band's lack of knowledge as to what was transpiring is contained in a letter from Chief Ackewance to Alfred McCue asking him to raise certain issues at the meeting of the Grand General Indian Council. The letter was dated June 13, 1922 and reads in part as follows:

> […] $4. The last question we would ask is the important one to us, as it touches everyone of our people on the reserve. What is done with the money that is got by the sale of timber on an Indian reserve. To make this matter clear to you I will tell you the facts of the case. We were told by our Indian agent that there was some lumber companys in the market for the timber on our reserve. That is the Frenchman's Head Reserve. We held a meeting and agree to sell the timber. We never heard anything more about it. Then I wrote to the Indian Agent asking him if anything had been done in regards to the sale of the timber. He wrote and told me that the timber had been sold to the Keewatin Lumber Company of Kenora. But he did not tell me what the price was. I got busy and found out from another man that the timber had been sold for $50,000.00. We have never received on cent of that money yet, and the sale has been made over a year now. One of my Councillors wrote to the Indian Agent last summer and asked for a team of horses to be used on the reserve. He was told that he could not get them as there was no money coming to the band. Now Sir. I will not take up any more of your valuable time as I know you must be very busy. And I am sorry to tell you that it will be

> impossible for me to attend the meeting, as there are many thing I would like to speak about. For one thing we have no schools or hospital for our children or sick and many more things in the same line. We will have our treaty soon and we may get some more information on the points that are troubling us.

(Exhibit P-2, Morrison Report, paragraph 102)

[102] The Band's lack of knowledge of the contracts for the sale of their timber is evidenced by a letter from Kenneth MacDougall to the Deputy Minister of Indian Affairs dated June 30, 1930 which reads in part as follows:

> I have been asked by the Indians for the Frenchmans Head Indian reservation to write you **to obtain full particulars for them of the contracts entered into selling their timber to C. W. Cox Esq and to the Keewatin Lumber Co Ltd.** . . .
> (Emphasis added)

(Exhibit P-2, Morrison Report, paragraph 322)

[103] The reply from the Department stated:

> In reply to your letter of the 5th inst. making inquiry on behalf of the Lac Seul Indians, regarding timber matters, I have to state that the local Indian agent, Mr. Frank Edwards, at Kenora, has full information on this subject, and is in a position to explain all details pertaining to the Lac Seul timber, to the interested Indians. **I need hardly assure you that the Indian interest is being fully protected.**
>
> (Emphasis added)

(Exhibit J-1, Volume 5, tab 486)

It would seem to me that this exchange would lead the Band to believe that all was well and no action needed to be taken by them.

[104] The defendant's relationship with the timber operator was governed by the ITRs. The Band did not know the contents of these Regulations, hence, it could not know what if any breaches had been made by the defendant.

[105] Although the Band did complain about not getting paid, there were assurances by the Department that "the Indian interest is being fully protected".

[106] In *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, Mr. Justice La Forest provided the following summary of doctrine of laches at pages 76 to 79:

> 96. Historically, statutes of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of these, but the more important development was the defence of laches. While laches must be considered here as in any delayed equitable claim, in my view it does not afford the respondent redress.
>
> 97. The leading authority on laches would appear to be *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, in which the doctrine is explained as follows, at pp. 239-40:
>
> > ... the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that

> defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

This explanation was approved by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218 (H.L.), where, after quoting the above passage, he comments, at pp. 1279-80:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

In turn, this formulation has been applied by this Court; see *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300; *Blundon v. Storm*, [1972] S.C.R. 135.

98. The rule developed in *Lindsay* is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of laches in general is found in *Meagher, Gummow and Lehane, supra*, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant

> to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb....

Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

99. In this case, there is no question of the respondent's "altering his position" because of the appellant's delay. Such considerations obviously do not arise in a case such as this. Further, there is nothing about the delay's here rendering further prosecution of the case unreasonable. Therefore, if laches is to bar the appellant's claim, it must be because of acquiescence, the first branch of the *Lindsay* rule.

100. Acquiesence is a fluid term, susceptible to various meanings depending upon the context in which it is used. *Meagher, Gummow and Lehane, supra*, at pp. 765-66, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches -- after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.

101. As the primary and secondary definitions of acquiescence suggest, an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured

> by an [page79] objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.
>
> 102. It is interesting to observe that in practical terms the inquiry under the heading of acquiescence comes very close to the approach one takes to the reasonable discoverability rule in tort. As we have seen, the latter focuses on more than mere knowledge of the tortious acts -- the plaintiff must also know of the wrongfulness of those acts. This is essentially the same as knowing that a legal claim is possible. That the considerations under law and equity are similar is hardly surprising, and is a laudable development given the similar policy imperatives that drive both inquiries.

[107] In the present case, the plaintiff certainly did not acquiesce in the defendant's conduct as the plaintiff did not have knowledge of the existence of the documents related to the defendant's conduct. Any time the plaintiff complained, it was assured that its interests were being looked after by the defendant. For example, the plaintiff did not know that the timber dues had been increased or that the defendant failed to retender when it extended the terms of the license nor that it did not require new bonuses when it extended the terms of the license. The defendant also did not inform the plaintiff that merchantable timber for Mr. Cox was six inches in diameter and larger.

[108] As noted by Mr. Justice La Forest, the plaintiff must have knowledge of its rights. For ease of reference I will requote what he stated:

> It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: . . .

[109] I am of the view that the plaintiff did not have knowledge of the facts that supported its claim until it received the report of historian Mark Kuhlberg in July 2003.

[110] The plaintiff has not caused the defendant to alter its position in reasonable reliance on the plaintiff's acceptance of the status quo or allowed a situation to arise which it would be unjust to disturb. The defendant mentions that it might have been able to third party Cox but Cox went bankrupt in 1955.

[111] One further matter concerns the Band's knowledge that Cox did not pay his dues around 1949 to 1950 and its desire to have the defendant collect the dues. The Department, through Indian agent Swartman, informed the plaintiff that an action had been taken in the Exchequer Court to enforce payment from Cox. This only dealt with Cox's overdue dues and did not deal with the various issues under the ITRs such as the applicable dues or the extensions of licenses. It should also be noted that the present action is an action against the defendant for breach of its fiduciary duties to the Band.

[112] The defendant only asserted the defence of laches with respect to Cox.

[113] In conclusion, I am of the view that the doctrine of laches does not apply so as to bar the plaintiff's claim.

Collateral Attack and Issue Estoppel

[114] In essence, the defendant argues that any claim concerning the period of the second license is barred because the Exchequer Court gave judgment against Cox for amounts owing during this period after referring the matter for an accounting of all timber, pulpwood, ties and other products of wood cut or cut and removed or otherwise disposed of by Cox, his servants, workmen, agents, employees or contractors from Cox's timber limit on the Lac Seul Reserve.

[115] In *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46, Mr. Justice Binnie, speaking for the Court stated at pagraphs 20, 24 and 25:

> 20. The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.
> . . .
>
> 24. Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle, supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell, supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle, supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25. The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[116] The question to be decided in the present case is not the same question that was decided in the Exchequer Court case against Cox. That case dealt with the amount of timber cut and the dues owing on the timber that was cut for the period 1945 to 1952. The present case deals with other matters for this period such as what stumpage fee rates should have been charged. Since the defendant was in control of the contents of the claim against Cox, the plaintiff still has the right to say that the defendant did not claim all that it should have in the claim and hence, it breached its fiduciary duty owed to the plaintiff. To find otherwise would allow a trustee to avoid its liability by merely obtaining a judgment for part of what was due to the plaintiff.

[117] Because of my finding that the same question is not at issue, I will not deal with the other preconditions for the operation of issue estoppel.

[118] Neither will I deal with the collateral attack argument as the plaintiff is not challenging the judgment of the Exchequer Court with respect to Cox. The plaintiff states its action is against the defendant, not Cox. The Exchequer Court's ruling would mitigate any damages the defendant may owe the plaintiff in its action for breach of fiduciary duty against the defendant.

[119] With respect to the evaluation of expert testimony, I have reviewed the comments contained in paragraphs 43 to 47 of the defendant's aid to argument and I am in general agreement with the comments.

[120] The two experts in the historical area were James Morrison on behalf of the plaintiff and Dr. Betsey Baldwin on behalf of the defendant. The factual determinations of both experts were generally in agreement. However, in the area of whether the Band members were promised cheap lumber for housing, Dr. Baldwin testified that she did not agree that the Band was promised cheap lumber for housing. However, at paragraph 32 of the Morrison Report, the Report references the petition of the Lac Seul Band dated August 24, 1918 in which the Band members stated they wanted to sell a portion of the timber so that they could secure cheaper lumber for the construction of their houses.

[121] Where there is a conflict in the expert testimony, I would give more weight to the evidence of James Morrison. He has considerable experience in the subject matter and he provided a detailed historical report. I have noted the defendant's statement that Mr. Morrison did not demonstrate that he was "moderate, fair and strictly professional" due to his remarks about Mr. Cox. I have reviewed the remarks and I would note that the historical evidence presented by Mr. Morrison still remains valid and hence, I would not find that he was not "moderate, fair and strictly professional" with respect to this evidence.

[122] This is my decision with respect to liability. My decision with respect to damages will follow after I have met with counsel for the parties as I believe it is necessary that I discuss certain matters relating to damages with counsel for the parties before rendering my decision on damages.

[123] The issue relating to whether laches should reduce the quantum of damages will be dealt with in the reasons relating to damages.

[124] I will deal with the issue of punitive or aggravated damages in my reasons relating to damages.

[125] Costs will be dealt with in the reasons relating to damages.

[126] I retain jurisdiction to deal with the issues of damages, laches decreasing damages, punitive (aggravated) damages, costs and any other issue which I may have overlooked in these reasons.

"John A. O'Keefe"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2481-03
STYLE OF CAUSE:	LAC SEUL FIRST NATION As represented by The Chief and Council - and - HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	September 3, 4, 9, 10, 11, 30 October 2, 3, 7, 8, 9, 21, 22, 23, 24, 2008
REASONS FOR JUDGMENT OF:	O'KEEFE J.
DATED:	May 8, 2009

APPEARANCES:

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Michael Roach Jennifer Francis	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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