CA016758/CA016820
Vancouver Registry

Court of Appeal for British Columbia

No. CA016758

BETWEEN:

THE OPETCHESAHT, an Indian Band
DANNY WATTS, suing on his own behalf and on behalf of all members of the Opetchesaht

PLAINTIFFS
(RESPONDENTS)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANT
(RESPONDENT)

AND:

BRITISH COLUMBIA HYDRO & POWER AUTHORITY

DEFENDANT
(APPELLANT)

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Before: The Honourable Mr. Justice Taylor
The Honourable Mr. Justice Wood
The Honourable Madam Justice Rowles

G. Donegan, Q.C., and R.S. Whittaker	Counsel for the Appellant H.M.T.Q. in Right of Canada
E.J. Woodward, Patricia M. Hutchings and Jane Woodward	Counsel for the Respondent The Opetchesaht
J.E. Gouge, Q.C., and P.D. Feldberg	Counsel for the Respondent British Columbia Hydro & Power Authority
Place and Date of Hearing	Vancouver, British Columbia February 14, 15 and 16, 1994
Place and Date of Judgment	Vancouver, British Columbia March 21, 1994

Written Reasons by:
The Honourable Mr. Justice Taylor

Concurred in by:
The Honourable Mr. Justice Wood
The Honourable Madam Justice Rowles

Court of Appeal for British Columbia

The Opetchesaht, an Indian Band Danny Watts, suing on his own behalf and on behalf of all members of the Opetchesaht

- v. -

Her Majesty the Queen In Right of Canada

- and -

British Columbia Hydro & Power Authority

Reasons for Judgment of the Honourable Mr. Justice Taylor

1 This appeal is concerned with the validity of a federal Crown permit granted in 1959 to a provincial government utility purporting to authorize the erection and maintenance of an electric power transmission line along a designated right-of-way on reserve lands of the respondent band near Port Alberni.

(a) The Background

2 On an application by the band for summary disposition of issues under Rule 18A, the trial court judge held the permit to be invalid for want of certainty as to its duration. The judge found that because the permit is expressed to have effect for so long as the rights granted are required by the grantee, it does not fall within s. 28(2) of the ***Indian Act***, S.C. 1951, c. 29, as amended by S.C. 1956 c. 40, s. 10, the provision under which it was purportedly issued in the name of the Crown with consent of the

band council by a senior departmental official on behalf of the minister then responsible for Indian affairs.

3 Section 28(2) authorized the granting of permits by the minister alone "for a period not exceeding one year" and by the minister with consent of the band council "for any longer period". The permit in question was granted to the British Columbia Power Commission, which is now the British Columbia Hydro & Power Authority, "for such period of time as the said right-of-way is required for the purpose of an electric power transmission line". The judge held that while s. 28(2) authorized the issuance of a permit with consent of the band council for "a specified period of years", it did not authorize the granting of a permit having effect for "a period defined in relation to events".

4 By its statement of claim the band contends that the permit is invalid for lack of statutory authorization and also that the consent of the band council was unlawfully obtained by erroneous advice and undue influence and that in issuing it the federal authorities acted to the detriment of the band and in breach of trust and fiduciary duty. The band seeks relief by way of declarations, an order for possession and damages for trespass against the authority, and declarations of breach of trust and fiduciary duty against the federal Crown. The application by the band before the trial court judge was for summary judgment under

Rule 18A solely with respect to its claim for a declaration that s. 28(2) "does not authorize the Minister of Indian Affairs to grant a right-of-way for power transmission lines over the Indian Reserve known as Kleekhoot I.R. No. 2 for an indefinite time period".

5 Counsel for the federal Crown made a careful submission before us on the history of the legislation. All parties addressed the purpose to be attributed to those sections of the Act concerned with protection and alienation of reserve lands, including amendments most recently made before the granting of the permit. Counsel for the federal Crown, supported by counsel for the power authority, applied to adduce as new evidence excerpts from the record of parliamentary committee debates on earlier proposed amendments to the Act--amendments which were not in fact adopted by Parliament--and also affidavit evidence concerning other permits granted under s. 28(2) for similar purposes. We reserved decision on that application, inviting counsel to deal fully with the material in their submissions.

6 Because I believe the issues before us to be resolved by the clear words of the statute, as understood in their natural and ordinary sense, so that there is no ambiguity justifying resort to extrinsic evidence, I am of the view that none of the material tendered is relevant to our task, and would therefore dismiss the application to adduce new evidence.

(b) The Statutory Scheme

7 The overall purpose of the sections of the Act dealing with reserve land, as they stood at the time with which we are concerned, can in my view be shortly stated.

8 Subject to very limited exceptions, their purpose was to preserve reserve land for the exclusive use and benefit of members of the band for whom title was held by the Crown unless and until the Crown, as represented either by the minister or the Governor-in-Council, and the band, through its council or by general vote, as specified in the particular provision, should together decide to transfer title to a third party or to grant to a third party some right to occupation or use. The Act contemplates that, with the concurrence of the Crown and the band, title to or rights to occupation or use of reserve lands may be transferred to third parties. Some of the amendments enacted in 1956 show an intention on the part of Parliament that increased authority be given to band councils to speak and act for their bands with respect to various aspects of band business.

9 The fact that the federal authorities had a duty in exercising their powers over reserve land to endeavour to serve the best interests of the band for whom the land was held requires no emphasis. The existence of that important duty, which is dealt

with in ***Guerin v. The Queen***, [1984] 2 S.C.R. 335, cannot, however, assist us in construing the provisions relevant to this appeal.

10 The traditional process for granting to third parties rights to own or use reserve lands was by 'surrender'. This involved giving-up to the Crown, by vote of the membership of the band, some or all of the band's right to the benefit and use of the land, followed by a transfer by the Crown to the third party of the appropriate legal right or interest. At the time relevant to this appeal the surrender process was governed by ss. 37, 38 and 39(1), which read, in part, as follows:

> **37.** Except where this ***Act*** otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.
>
> **38**(1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.
>
> (2) A surrender may be absolute or qualified, conditional or unconditional.
>
> . . . . .
>
> **39**(1) A surrender is void unless
>
> (a) it is made to Her Majesty,
>
> (b) it is assented to by a majority of the electors of the band
>
> (i) at a general meeting of the band called by the council of the band,

> (ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed surrender, or
>
> (iii) by a referendum as provided in the regulations, and
>
> (c) it is accepted by the Governor in Council.
>
> . . . . .

The remaining provisions of s. 39 dealt with procedures to be followed in conducting a band vote or referendum.

11 An exception to the general policy I have mentioned was to be found in s. 35. This section provided for the exercise of federal or provincial expropriation powers over reserve lands by bodies having such statutory powers with the prior consent only of the Governor-in-Council. This was a departure from the general rule that rights to reserve land could only be transferred to third parties with consent of the band.

12 A third method of alienation was that created by s. 28, which the department sought to invoke in the present case. As it had stood prior to 1956, s. 28 authorized the minister, acting alone, to permit occupation or use of reserve land for up to a year, and nothing more. It read as follows:

> **28**(1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral,

> by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

In 1956 s-s. (2) was amended to give the minister authority to issue permits for periods longer than one year, but only with consent of the band council. It then read:

> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

There can be no doubt that this amendment significantly changed the pre-existing scheme. It created for the first time a general and unlimited power to grant rights of occupation and use of reserve lands to third parties without a surrender.

13 Methods of disposing of various limited rights to enjoyment of reserve lands, including those which would at common law be regarded both as "licences" and transfers of "interests in land", were provided by ss. 57 and 58, which authorized the minister, generally with approval of the band council, to grant rights to cut timber, rights to mines and minerals, leases of

agricultural or grazing land, and rights to take sand, gravel and other non-metallic substances from reserve lands.

14 It is, perhaps, notable that s. 58(3)(b) gives the minister, acting alone, authority to issue "temporary permits" for the taking of non-metallic substances, such permits to be renewed only with consent of the band council, a provision having some similarity to the amended s. 28(2).

(c) The Permit in Issue

15 The permit in question, issued on July 8, 1959, for the stated consideration of $983.75, granted "the right to construct, operate and maintain an electric power transmission line" over a 7.87-acre "right-of-way" on the reserve, as shown on a plan filed in the departmental survey records.

16 The permit is expressed to be subject to the following "stipulations, provisos and conditions":

> 1. That the rights hereby granted may be exercised by the Permittee for such period of time as the said right-of-way is required for the purpose of an electric power transmission line.
>
> 2. That the Permittee shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable

or be expressed to be due and payable in respect of the said electric power transmission line or the use by the Permittee of the said lands.

3. That the Permittee shall not assign the right hereby granted without the written consent of the Minister.

4. That it shall be lawful for the Minister or any person thereunto authorized by him at all reasonable times to enter upon the said lands for the purpose of examining the condition thereof.

5. That the said lands shall be used for the purpose aforesaid and for no other purpose.

6. That the Permittee, its servants, employees, and workmen shall have and enjoy the right to unload and store material on the said lands for the erection, operation and maintenance of the said electric power transmission line and to roll and unroll wire thereon, and to do all such other acts and things as may be necessary or requisite for the purpose of properly erecting, operating, maintaining and patrolling the said electric power transmission line.

7. That the Permittee will not fence the said lands or any part thereof and Her Majesty is to be allowed free access to and use of the said lands except for building purposes and except insofar as it may be necessary for the Permittee to use the same for the purpose of contracting, operating, maintaining and patrolling the electric power transmission line.

8. That the Permittee will at all times hereafter indemnify and keep Her Majesty indemnified against all actions, claims and demands that may be lawfully brought or made against Her Majesty by reason of any act or omission by the Permittee in

> the exercise or purported exercise of the rights hereby granted.
>
> 9. That the Permittee may cut down any trees standing outside the said lands which in its opinion might in falling or otherwise endanger the conductors, wires, structures, equipment or other plant of the Commission, paying to the Minister reasonable compensation for the value of any trees so cut down.

The permit is executed for the minister by the Acting Director, Indian Affairs, and by the Commission, and recites that it was approved a year earlier by resolution of the band council.

17 The permit may, I think, properly be characterized for the present purpose as a grant by the Crown federal to a provincial Crown entity of a utility right-of-way, including for the stated purpose a right to occupation of portions of the surface where poles were erected and of that part of the air space where wires were strung, and to use of the remainder of the land designated in common with the band, together with restrictions on the use to which the remainder of that land could be put by the band. The rights and restrictions are to be enjoyed by the grantee for the stated purpose only and only for so long as required for that purpose, and the grantee agrees to be liable for such charges as may be imposed on it from time to time during that period in respect of the line and its use of the land.

18 For reasons which I shall later state, it is not in my view strictly necessary for us to determine whether the permit, if validly made between private parties, would have been characterized at common law as a "licence", creating "personal" rights in respect of land, or a grant of what would at common law constitute "an interest in land" corporeal or incorporeal.

19 I would say only that the rights granted have much in common with an easement, but that there are factors, including restraint on assignment, which seem inconsistent with that sort of interest, and consistent rather with a licence.

(d) The Trial Court Decision

20 The trial court judge noted that there were two "sub-issues" before him: "(a) whether s. 28(2) of the ***Indian Act*** authorizes a permit for an indefinite period of time, and, in the alternative, (b) whether s. 28(2) authorizes a right-of-way for transmission lines".

21 Having resolved the first of these in favour of the band, the judge found it unnecessary to deal with the second. Before us counsel for the band expressly declined to advance any argument on the second "sub-issue" to support the decision under appeal. The argument before us was not, however, restricted to the question

whether a permit of this sort can be validly granted under s. 28(2) if stated to have effect for what is described as "an indefinite period of time". Also argued before us was the question--to which I have already alluded--of whether those rights capable of being the subject of a grant under s. 28 are limited to common law rights which may be granted by "licence", or include also "interests in land", and, if only the former, whether the rights granted by this permit fall within that class.

22 On the question of the meaning of "period" in the present context the judge mentioned three cases: ***Ouimet v. The Queen***, [1978] 1 F.C. 672, a decision of the Federal Court Trial Division cited for the band; ***Mackenzie v. Laird***, [1959] S.C. 266, a decision of the Court of Session of Scotland, and ***B.C. Telephone Co. v. District of West Vancouver*** (1953), 9 W.W.R. (N.S.) 468 (B.C.S.C.), the latter two having been cited for the respondents before him. He stated his conclusion in the following passage:

> The submission of the plaintiffs that the word "period" in s. 28(2) of the ***Indian Act*** should be interpreted to mean a <u>defined</u> period of time and that it cannot mean an indefinite time is, in my opinion, logically persuasive.
>
> The issue here for the Court to determine is whether "for such period of time as required" falls within the exception for authorizations greater than one year in length. The question is whether this description, as formed the basis of the agreement, denotes a period of time as authorized by s. 28(2).

> The defendant B.C. Hydro suggests that "period" in s. 28(2) must be given its common sense meaning. I take the defendant's point that "period" can, in appropriate instances, denote a period of time defined in relation to events and is not restricted to a term of years alone.
>
> However, I am persuaded by the plaintiffs' position that this "common sense" meaning must be determined from the context of 28(2). That "period" must take its content from the expression "one year or any longer period." I accept the plaintiffs' submission that the plain meaning of this phrase is a specified period of years.

While the judge uses the expression "one year or any longer period", it was pointed out to us that this phrase does not, in fact, appear in s. 28(2). The subsection speaks of "a period not exceeding one year" and "any longer period".

23 The subsection makes no specific mention of the granting of rights for a year, or for any other "calendrical unit"; it says only that where the period for which rights are granted exceeds a year, consent of the council is required.

(e) Rights Capable of Section 28 Grant

24 The question posed in this case does not, in my view, involve drawing a line between, on the one hand, rights of occupation or use capable of being granted under s. 28, and, on the

other, those capable of being transferred by the expropriation or surrender processes, provided for by ss. 35 and 37.

25 I have reached this conclusion because I do not think the wording of s. 28 capable of such construction as would limit its scope to the granting of what in the common law provinces would as between private parties be regarded as a "licence", so as to require that ss. 35 and 37 be resorted to wherever there is need for the transfer of what would be described under our system as "an interest in land". Quite apart from the fact that the statute is to be applied under both systems of land law, the distinction is, in my view, one which cannot be justified by the words Parliament has chosen. The rights which the minister is empowered to grant under s. 28 must be regarded as statutory, rather than common law rights of occupation or use, and the words used by Parliament contain no limitation. There is nothing in the words of the section, given their ordinary meaning, to suggest that it refers only to those rights of occupation and use which would fall at common law into the one category and not to those falling into the other, and nothing said in argument persuades me that the words of the section ought to be given any other meaning.

26 Having in mind that s. 28 empowers the minister to make grants on behalf of the Crown on which the grantees and others must thereafter rely, a court ought not, in my view, to conclude that

Parliament intended to impose any restriction on its scope which is not apparent from the plain meaning of the section, unless such restriction clearly arises by implication from a fair reading of the whole of the statute.

27 I find myself unable to accept the submission made by counsel for the band that sections of the Act dealing with the granting of rights of occupation and use of reserve lands to third parties should be strictly construed so as to limit narrowly the circumstances under which it is possible to erode the "land base" held for the use and benefit of the band. That would in my view certainly be inappropriate in the case of those sections which permit such grants to be made only with the concurrence of the band. ***The Queen v. Devereux*** (1965), 51 D.L.R. (2d) 546 (S.C.C.) was cited in this regard for the band, and particularly the proposition stated by Mr. Justice Judson (at p. 550):

> The scheme of the ***Indian Act*** is to maintain intact for bands of Indians, reserves set aside for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee.

But that case was concerned with the validity of a testamentary disposition made by an individual band member to a non-Indian. The statement cited does not seem to me helpful in the present case. While the policy of the Act is, of course, to preserve reserve land

against dispositions to third parties made by individual band members, it is equally the policy of the Act to permit the transfer of rights to third parties made by the Crown with the concurrence of the band itself--that is to say by vote of the members as a whole or by resolution of their council.

28 If in fact the grant in this case was not beneficial to the band--a matter yet to be decided, and on which other claims turn--that cannot influence us in interpreting the relevant provisions of the statute. These are provisions intended to enable the band, with the concurrence of the Crown, to get the best return from band property where it appears that this will be achieved by permitting third parties to use reserve lands on appropriate terms. The objectives of the statute would not, in my view, be served by placing a narrow interpretation on the scope of s. 28(2). That would impede band councils in doing what seems to them best in the management of reserve lands, and cast doubt on the security, and therefore the value, of licences issued with their approval under the section. The right of alienation being an important incident of the ownership of property, it is not in my view appropriate that a court cut down that right by placing a narrow construction on those powers of alienation granted by the statute which are to be exercised with consent of the band council.

29 I am for these reasons of the view also that the interpretation urged by the band is not one which can be said to favour those for whose benefit the statute is to be applied, the approach to construction adopted in ***Mitchell v. Peguis Indian Band***, [1990] 2 S.C.R. 85, and ***Nowegijick v. R.***, [1983] 1 S.C.R. 29.

30 I have concluded that the minister is authorized to grant rights of use and occupation under s. 28 which might as well have been granted under s. 35 or s. 37, so long as they involve no transfer of title to, or ownership of, the land. Had s. 37 said that notwithstanding any other provision of the Act lands in a reserve should not be "sold, alienated, leased or otherwise disposed of until they have been surrendered", definition of the rights which may be granted by s. 28(2) would, of course, pose some difficulty. But the words of s. 37 are:

> **37.** Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart. [Emphasis added]

Those words clearly acknowledge that sections of the Act other than the surrender provisions may authorize the granting of interests in land, and cannot be said to cut down the power granted by s. 28(2). Nor, in my view, can the words of s. 28(1):

> **28**(1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void. [Emphasis added]

The opening words of s-s. (1) make it clear that the words of s-s. (2) which follow operate free from those restrictions:

> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Subsection (2) should, in my view, be read as giving authority to the minister to accept approval of the band council as that of the band for the grant to third parties of rights of occupation or use of reserve land for more than a year. That is consistent with Parliament's intention by its 1956 amendments to broaden the operation of representative government in band affairs.

31 I have said that the 1956 amendment to s. 28(2), authorizing issuance of permits for occupation and use of reserve land for periods in excess of one year, with no restriction imposed on the extent of rights granted or length of the term, significantly changed the pre-existing regime.

32 The creation of a general and unlimited power to grant rights of occupation and use necessarily gave to the minister and the band council, acting in concert, the ability greatly to diminish the value and usefulness of the legal title thereafter remaining in the Crown for the use and benefit of the band. But s. 28(2) could be invoked only with consent of the council representing the band, to whom the framers of the 1956 amendments plainly intended that increased authority be given; by withholding its approval the council could in this case have required that the cabinet approve expropriation under s. 35 or invoke the surrender process and seek the approval of the band membership as a whole. The decision to invoke s. 28(2) lay as much in the discretion of the band council as it did in that of the minister.

33 I find nothing in s. 28(2), read alone or together with other provisions of the statute, including in particular s. 28(1) and s. 37, which requires that we apply a restrictive interpretation to the subsection, so as to limit its scope to grants of rights of occupation and use which would at common law be characterized as "licences", and to exclude those which would involve transfer of "interests in land". Introduction into the subsection of that highly technical and obscure common law distinction would in my view be inconsistent with the modern approach to statutory interpretation.

(f) The Meaning of 'Period'

34 No authority is needed for the proposition that a "period" can, in "normal" and "legal" usage alike, as readily be terminated by an event the timing of which cannot be predicted as by a date certain or "calendrical unit" of time.

35 Such expressions as "for life", "so long as he or she shall remain unmarried", "for the duration of the present emergency", "until municipal water supply becomes available", are, of course, used acceptably by lawyers to describe periods for which rights are granted, or obligations imposed. The question which we have to decide is whether in the present context the word "period" should be restrictively construed, so as to refer only to a period whose end is described by a date certain, or by words from which such a date can be ascertained at the time the grant is made, and to exclude a period the termination date of which cannot then be known but will become known later.

36 I am satisfied that none of the cases cited suggests that this restricted meaning ought to be given to the word "period" in the context of s. 28(2).

37 ***Ouimet v. The Queen***, *supra*, involved the establishment of a period of probation for a public servant under s. 28 of the ***Public***

Service Employment Act, R.S.C. 1970, c. P-32. The employee was advised when taken on that his period of probation would be six months. The question was whether this could later be extended for an additional six months under a regulation which authorizing deputy department heads to extend the probationary period of an employee. Mr. Justice Cattanach said (at p. 684):

> I do not think that the word "period" in this context can mean an indefinite portion of time in some continuous process. The word "period", without appropriate modification, must mean a fixed time and one that is not subject to prolongation. It is a term certain and not a term at will and an employee engaged is entitled to know the terms of his employment.

The judge was not prepared to accept that a probationary period once set under the statute could thereafter be varied under a regulation. This was the context in which the judge held that the word "period", as used in the statute, should be taken to refer to a "fixed time" rather than a "term at will".

38 I find no similarity between the facts of that case and those of the case before us.

39 In ***Mackenzie v. Laird***, *supra*, the Court of Session had to decide whether a lease of agricultural land fell within a statutory exception covering leases entered into "in contemplation of the use of the land only for grazing or mowing during some specified period

of the year". It was in this context that Lord Mackintosh, in the passage to which we were referred, said (at p. 272) that a "specified period" need not be fixed by dates, but could include a season. The decision says no more for our purpose than that "period" *may* refer to a span the date of whose end cannot be precisely known in advance, and for this proposition, as I have said, we require no authority. Whether the same issue could arise under English law, which requires certainty in the term of leasehold interests, may be open to question.

40 In ***Re Motor Vehicle Act Re Bower*** (1967), 60 W.W.R. 445 (B.C.S.C.), the Superintendent of Motor Vehicles, acting under statutory authority empowering him to suspend a driving licence "for such period or during such period or periods as the Superintendent may see fit", purported to suspend the applicant's licence until such time as she was again fit to drive. In setting the suspension aside, the court held that the word "period" meant "a specified length of time". The section in question provided for licence suspensions or cancellations for statutory violation, bad driving, use of intoxicants or unfitness for any other reason to operate a motor vehicle, and that the superintendent might "at any time during the term of the suspension of a licence made under that section . . . reduce or cancel the remaining period of the suspension". It was in this context that the court found that rather than imposing a cancellation until such time as the

applicant could show that she was medically fit to drive, the superintendent should have cancelled the licence and intimated that he would issue a new one if and when she was able to furnish such evidence. I do not find that decision helpful in resolving the very different issue raised in this case.

41 In ***The King v. New England Co.*** (1922), 63 D.L.R. 537 (Ex. C.), a "licence of occupation" had been granted to the company in 1859 by the Governor General of the Province of Canada granting it possession of certain Indian land for so long as it operated a school there for the Six Nations. The grant was held void *ab initio* on the ground that only the Commissioner of Crown Lands had statutory authority to issue such a licence [although the reporter's note suggests that the grant could also have been issued by the Chief Superintendent of Indian Affairs]. Mr. Justice Audette asked rhetorically (at p. 539):

> Should a trustee be allowed to tie up lands for an indefinite period to the detriment of the *cestui que trust* when the law would afford a remedy to cure such detriment?

I do not understand the case to turn on the fact that the grant had been made for an indefinite period. The decision seems to say that since the grant had been made without statutory authority and was also detrimental it should be declared void.

42 It is, of course, generally true at common law that a lease must be granted for a term of certain duration, and cannot generally be granted for a period terminable on the happening of an event the date of which is not known at the commencement of the term. We were not referred to the cases in this area--such as ***Lace v. Chantler***, [1944] K.B. 368 (C.A.) and the decision of the House of Lords in ***Prudential Assurance Co. Ltd. v. London Residuary Body***, [1992] 2 A.C. 386, and Canadian authorities to like effect--but I am, in any event, of the view that whatever the rights granted here might amount to at common law, they could not amount to a leasehold interest. It is, perhaps, notable that a power line right-of-way was held to constitute an easement for the purposes of land title registration legislation in ***Card v. Transalta Utilities Corp.*** (1987), 57 Alta. L.R. 155 (Alta. Q.B.), a decision approved in ***Shelf Holdings Ltd. v. Husky Oil Operations Ltd. et al.*** (1989), 54 D.L.R. (4th) 193 (Alta. C.A.), despite the presence of poles and wires on the right-of-way, and the absence of the sort of dominant-servient tenament relationship normally required for the existence of an easement. Those cases, too, were not cited before us. But the restraint on assignment contained in the present permit seems, as I have said, inconsistent with creation of an easement and consistent rather with creation of a licence. I have found nothing to suggest that either a licence or an easement may not, at common law, be granted for a period to be determined by the happening of an event.

43 But whatever may be the position at common law, none of the authorities cited, or which I have been able to find, supports the contention that the word "period" as used in s. 28(2) of the ***Indian Act*** at the time with which we are concerned should be construed so as to refer only to a period ending on a specified or calculable date, and not to include a period terminating on the happening of an event the date of which cannot be determined when the permit is granted. Nothing said in argument persuades me that such a restriction should be placed on the broad authority granted by the words which Parliament has chosen, understood in their natural and ordinary sense, and for the reasons which I have stated I am satisfied that it would not be proper to apply to the section any narrow or restrictive construction.

44 I am of the view that s. 28(2) authorizes the grant of rights such as those created by the present permit, however they might be characterized at common law, either for a period having a predetermined termination date, no matter how long it may be, or until the happening of a future event the date of which cannot be known at the commencement of the term.

(g) Conclusion

45 It should be emphasized that the question whether, from a purely administrative point of view, s. 28(2) was the appropriate

provision to have been chosen in the present case is in no sense before us, nor are we required to pass judgment on the manner in which the consent of the band council was obtained, or on the sufficiency of the stated consideration for the permit, or the charges since imposed, or any other of the claims made by the band which have yet to be decided in the trial court.

46 For the reasons stated I am of the view that the present appeal must be allowed and the application for summary judgment on the only claim in issue before us must be dismissed.

"The Honourable Mr. Justice Taylor"

I AGREE: "The Honourable Mr. Justice Wood"

I AGREE: "The Honourable Madam Justice Rowles"