Citation: Osoyoos Indian Band v. Town of Oliver 1999 BCCA 297
Date: 19990504
Docket: V03036
Registry: Victoria

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

OSOYOOS INDIAN BAND

APPELLANT

AND:

**THE TOWN OF OLIVER and
HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**

RESPONDENTS

Before: The Honourable Mr. Justice Lambert
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

J. Woodward	Counsel for the Appellant, Osoyoos Indian Band
W. Buholzer	Counsel for the Respondent, Town of Oliver
H. W. Gordon	Counsel for the Respondent, Her Majesty the Queen
Place and Date of Hearing	Vancouver, British Columbia 29 September, 1998
Place and Date of Judgment	Vancouver, British Columbia 4 May, 1999

Dissenting Reasons by:
The Honourable Mr. Justice Lambert

Majority Reasons by:
The Honourable Madam Justice Newbury (p.57, para.84)

Concurred in by:
The Honourable Madam Justice Prowse

Reasons for Judgment of the Honourable Mr. Justice Lambert:

I

INTRODUCTION AND SYNOPSIS

[1] The Osoyoos Indian Band has the power under s.83(1)(a) of the ***Indian Act*** to make by-laws for the purpose of taxing land or interests in land in its reserve, including rights to occupy, possess or use land in the reserve. It made such a by-law in 1995 and, for the 1996 assessment year it sought to include in the Assessment Roll, and to tax, the land or interest in land on which a concrete irrigation canal through the reserve had been constructed many years before, and the improvement represented by the canal.

[2] The proceedings arise from a Stated Case put to the Supreme Court of British Columbia by the Osoyoos Indian Band Board of Review. The Stated Case asks the opinion of the Court on two questions:

1. Are lands, taken pursuant to s.35 of the ***Indian Act***, "land or interests in land" in a reserve of a Band within the meaning of s.83(1)(a) of the ***Indian Act*** such that those lands are assessable and taxable pursuant to Band Assessment Bylaws and taxable pursuant to Band Taxation Bylaws?

2. If s.35 of the ***Indian Act*** authorizes the removal of lands from reserve status, does federal Order in Council 1957-577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band?

(my emphasis)

[3] The first question asks whether, after a taking of land in a reserve under s.35 of the ***Indian Act***, the aboriginal title of the Indians, at the very least, still remains in the hands of the Indians and whether, if so, the land taken is still land or an interest in land in the reserve so as to be amenable to taxation of land and improvements under s.83 of the ***Indian Act***. This first question is a question about the nature of aboriginal title.

[4] My answer to the first question, put shortly, is that s.35, which involves a compulsory taking of land or an interest in land in a reserve, is not sufficiently clear and plain to extinguish aboriginal title and was not clearly intended, when it and its predecessors were passed by Parliament, to extinguish aboriginal title, so that aboriginal title remains as a burden on any land, or interest in land, taken. If aboriginal title to the land remains, and the land is within the overall geographical boundaries of the reserve, then in my opinion the land is still land within the reserve, from the

aboriginal or any other proper perspective, and as such the land or interest in land held by someone other than the band is still within the reserve and amenable to real property taxation by the band of land and improvements under s.83.

[5] The second question assumes, for the purposes of the question, that s.35 of the ***Indian Act*** authorizes the removal of land from the reserve by compulsory taking, and asks whether the Order-in-Council in this case takes such an absolute interest in land out of the reserve that no interest in land remains within the reserve, with the result that the land is not subject to assessment or taxation under s.83 of the ***Indian Act***. This second question is a question about the interpretation of a statutory instrument that adversely affects Indian interests.

[6] The key opening words of the Description of the lands or interests in land taken under the Order-in-Council are these:

> The whole of those rights-of-way, in Osoyoos Indian Reserve number one, in the province of British Columbia, said rights-of-way containing together by admeasurement fifty-six acres and nine hundredths of an acre, more or less, as said rights-of-way are shown bordered red on a plan of record number Irr twenty-one hundred and thirty-four in the Indian Affairs survey records at Ottawa;

[7] My answer to the second question, put shortly, is that the Order-in-Council transfers the administration and control to

the Province of an interest in land like a statutory easement, and that it does not transfer the administration and control of an interest in land like a fee simple title, or, alternatively, that at the very least the Order-in-Council is ambiguous, and that by applying the principles of statutory interpretation applicable to instruments affecting the Indian interest in their reserve lands, and by examining the factual matrix in this case, and by looking at the internal evidence from the Order-in-Council, the proper conclusion is that the Order-in-Council transfers the administration and control to the Province of an interest like a statutory easement, sufficient to confer all the rights needed for the operation and maintenance and any necessary reconstruction of the irrigation canal, and yet leaves the Indians with their interests in their reserve land only minimally impaired and sufficient to support their land taxation powers over the land and the improvements on it.

[8] I have divided these reasons into Parts with headings.

II

THE STATED CASE

[9] These proceedings arise from a stated case put to the Supreme Court of British Columbia by the Osoyoos Indian Band Board of Review. The stated case is in these terms:

> This case is stated by the Osoyoos Indian Band Board of Review pursuant to section 80(1) of the Osoyoos Indian Band Property Assessment Bylaw PR 95-01, enacted pursuant to section 83(1)(a) of the ***Indian Act*** R.S.C. 1985 Ch. I-5, at the request of the parties to the appeal. The Board of Review seeks the opinion of the Supreme Court on the questions of law set out below. The material facts are:
>
> 1. The Governor in Council enacted Order in Council 1957-577 on April 25, 1957 ("Order in Council") pursuant to section 35 of the ***Indian Act*** in respect to certain lands in Osoyoos Indian

Reserve Number 1 ("Lands"). The Order in Council provided, in part:

> WHEREAS the Minister of Agriculture for the Province of British Columbia has applied for the lands hereinafter described, being a portion of Osoyoos Indian Reserve number one, in the said Province for irrigation canal purposes;
>
> AND WHEREAS the sum of $7,700 has been received from the Province of British Columbia in full payment for the land required in accordance with a valuation approved by the Band Council of the Osoyoos Band of Indians on the 30th day of March, 1955 and officials of the Indian Affairs Branch;
>
> THEREFORE His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the ***Indian Act***, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia:

2. The Lands were then, and continue to be, occupied by an irrigation canal.

3. The Federal Crown transferred the administration and control of the Lands to Her Majesty the Queen in right of the Province of British Columbia. The Lands were registered by way of Certificate of Indefeasible Title in the name of Her Majesty the Queen in right of the Province of British Columbia on September 12, 1961, in the Kamloops Registry of the British Columbia Land Title Office.

4. The Lands are occupied by the Town of Oliver.

5. The Osoyoos Indian Band Council ("Band Council") enacted property assessment and property taxation bylaws pursuant to section 83 of the ***Indian Act*** ("Assessment Bylaws") which are applicable to land in Osoyoos Reserve Number 1. The assessment Bylaws apply to assessments in 1996.

6. The Assessment Bylaws provide for the appointment of an assessor for carrying out the purposes of the Bylaw. Pursuant to that power, the Band Council appointed the B.C. Assessment Authority as an assessor.

7. On August 28, 1995 the Band Council passed a resolution (1995-65) which directed the B.C. Assessment Authority to assess the Lands and include them on the assessment roll of the Osoyoos Band and the Assessment Authority placed the Lands on the folios of the Osoyoos Indian Band.

8. The Lands have been assessed as follows:

	Land Value	Improvements	Total Assessed
Lot A	$ 37,100	$ 95,300	$132,400
Lot B	$ 36,200	$ 99,200	$135,400
Lot C	$ 63,800	$110,000	$173,800
Lot D	$ 26,400	$ 56,900	$ 83,300
	$163,500	$361,400	$524,900

THE QUESTIONS which the Board of Review asks the opinion of the Supreme Court are:

1. Are lands, taken pursuant to s.35 of the ***Indian Act***, "land or interests in land" in a reserve of a Band within the meaning of s.83(1)(a) of the ***Indian Act*** such that those lands are assessable and taxable pursuant to Band Assessment Bylaws and taxable pursuant to Band Taxation Bylaws?

2. If s.35 of the ***Indian Act*** authorizes the removal of lands from reserve status, does federal Order in Council 1957-577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band?

(my emphasis)

[10] For some reason the Stated Case does not contain the whole Order in Council. The description of the lands, a description

which is crucial to answering the questions in the Stated Case, has been omitted.

[11] The parties agreed that these additional documents should be before us as if they were part of the Stated Case, since they were all referred to in the Stated Case:

1. A copy of the whole of Order in Council PC 1957-577 including the part headed "Description" in which the land or interest in land is described.

2. A copy of Plan IRR 2134, referred to in the "Description" of the land or interest in land, but without any outlining in red.

3. A copy of the Certificate of Indefeasible Title referred to in para.3 of the Stated Case.

III

THE CHAMBERS JUDGMENT

[12] The chambers judge answered the first question "No" and the second question "Yes". In short, he decided that the 1957 Order-in-Council removed the "lands" from the reserve so that they were not assessable or taxable under the Osoyoos Indian Band Bylaw.

[13] The chambers judge's reasons are reported at (1997), 145 D.L.R. (4th) 552, and at [1998] 2 C.N.L.R. 66. Accordingly, it is unnecessary for me to summarize them.

[14] It is very important to note that nowhere in his reasons does the chambers judge set out the Description of the Lands, as contained in the Order in Council, nor has he referred to the highly significant fact that the Description of the Lands starts out with the words "The whole of the rights-of-way". Indeed, nowhere in his reasons does the chambers judge refer to the fact that the land or interest in land in question is comprised of "rights-of-way".

[15] It is also noteworthy that the chambers judge says in his reasons, in the concluding segment of para.4, that the Province's action in constructing and operating the irrigation works on the land was an effective acknowledgment of the Federal Order. Since the Federal Order was made in 1957, that assumes that the original works were constructed after that date. But an examination of Plan IRR 2134, which is incorporated in the Description of the Land in the Order in Council, indicates on its face that the concrete irrigation canal was completely constructed some time before that Plan was prepared in May, 1925 from a survey completed on 25 March, 1925.

[16] The chambers judge says he was "advised" that the Certificate of Title did not contain any reservation of the mines and minerals. Since the chambers judge used the word "advised" and since he did not indicate that the Certificate of Title was issued in September 1961, over four years after the Order in Council, it may be inferred that he did not see a copy of the Certificate of Title.

[17] The chambers judge did refer to the concluding words of the Description in the Order in Council which contain a reservation of mines and minerals. He may have been told that that was the concluding paragraph of the Description without seeing the Description as contained in the Order in Council.

[18] On the basis of those observations about the chambers judge's reasons, I think that it may be inferred that the chambers judge did not see Plan IRR 2134 or the Certificate of Indefeasible Title. And from the fact that he never referred to the Description of the Land or interest in land taken, which forms a part of the Order in Council, I think the most likely conclusion is that the chambers judge never saw the whole of the Order in Council but only saw the portion of it included in the Stated Case.

[19] As I have said, on the basis of the limited information he was given, the chambers judge answered the first question "No"

and the second question "Yes". This appeal is brought by the Osoyoos Indian Band from that decision.

IV

THE STATUTORY PROVISIONS

[20] The power of the Council of the Band to tax land in the Band's reserve is contained in s. 83(1)(a) of the ***Indian Act***.

> **83.** (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
>
> (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;
>
> ...
>
> (my emphasis)

[21] The right to acquire, by compulsion, land or an interest in land in a reserve, and the right to obtain, by compulsion, possession, occupation or user rights over reserve land, are provided for in s. 35 of the ***Indian Act***.

> **LANDS TAKEN FOR PUBLIC PURPOSES**
>
> **Taking of lands by local authorities**

> **35.** (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> **Procedure**
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.
>
> **Grant in lieu of compulsory taking**
>
> (3) Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
>
> **Payment**
>
> (4) Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).
>
> (my emphasis)

[22] Section 21 of the ***Water Act*** of British Columbia, as it stood in 1957, reads, in its relevant part, in this way:

> **21.** (1) In this and the following three sections "land" includes any estate or interest in or easement over land.

> (2) Every licensee shall have the right to expropriate any land reasonably required for the construction, maintenance, improvement, or operation of any works authorized under his licence, ...
>
> (my emphasis)

[23] I make four observations about these provisions.

[24] The first observation is that the ***Indian Act*** sections, both s. 83 and s. 35, contemplate rights of possession, occupation and use of reserve land short of what is usually regarded outside the reserve as a registerable interest in land, as well as contemplating what would be regarded outside the reserve as registerable interests in land. Such user rights short of registerable interests would usually be conferred, as a matter of real property law, by a licence. (Since interests in reserve land are *sui generis* I have tried to describe these interests as being "like" or"similar to" or "equivalent to" fee simple interests or rights-of-way or easements in order to minimize the intrusion of common law concepts into the analysis of the status of reserve lands.)

[25] The second observation is that the use of the word "including" in s. 83(1)(a) suggests that simple user rights are treated for the purposes of the ***Indian Act*** as "interests in land". The same terminology seems to be adopted in s. 35 which relates only to "land or any interest therein" but which speaks of the power to "take" or to "use" land. I think that the

proper construction of s. 35 is to regard the word "take" as applying in relation to what would be regarded as an interest like a technical registerable interest in land, from an interest like a fee simple to an interest like an easement, and the word "use" as applying in relation to bare rights of occupancy or use.

[26] The third observation is that a condition of the invocation of s. 35 for a Provincial purpose is that there must be an enactment by the Provincial Legislature of a statute empowering the Province or a municipality or local authority to take or to use lands. Section 21 of the ***Water Act*** gave such a power to licensees to "expropriate" land including any estate or interest in or easement over land. But it is noteworthy that the power is restricted to land or an interest in land that is "reasonably required" for the works. I would think that such a restriction would be subject to objective determination on the basis of evidence. And I would think that if an interest in the nature of an easement would be sufficient for the constructions, maintenance and operation of the works then that would be the interest that was "reasonably required", and it could not be said in those circumstances, that an interest equivalent to a fee simple interest was "reasonably required". There are also questions about whether the Crown in right of the Province could be a licensee under the ***Water Act*** and about whether s. 21 of the ***Water Act*** confers a right to acquire simple use and occupation rights short of a technical

registerable interest in land. But I do not think that those questions have to be resolved in this case.

[27] Finally, I observe that s-s. 35(1) of the ***Indian Act*** refers to "lands or any interest therein" whereas s-s. 35(2) and s-s. 35(3) refer only to "land". It is clear that "land", after the first usage, has its ordinary meaning which includes any interest in land, registerable or not. Indeed it is essential for all purposes of this case to remember that whenever the word "land" is used in the ***Indian Act*** sections or in Order in Council 1957-577 or in the ***Water Act*** it means and includes not only an interest like an absolute ownership interest in real property, but also subordinate interests, registrable or not, including interests like an easement, a right-of-way, or a simple right of occupancy, and that no conclusion can be drawn to the effect that because the word "land" is sometimes used alone it does not in those instances include within its meaning: "or any interest in land".

V

THE FIRST QUESTION

[28] The first question is in these terms:

1. Are lands, taken pursuant to s.35 of the ***Indian Act***, "land or interests in land" in a reserve of a Band within the meaning of s.83(1)(a) of the ***Indian Act*** such that those lands are assessable and taxable pursuant to Band

Assessment Bylaws and taxable pursuant to Band Taxation Bylaws?

(my emphasis)

1. **The Scope of the Argument on the First Question**

[29] The first question was set out in the Stated Case and it was dealt with by the chambers judge. The appellant's factum does not deal separately with the two questions in the Stated Case, but it contains numerous points related to the first question, including specifically, in para. 9, the submission that no extinguishment of the Indian title in reserve land is authorized by s.35. The factum of the principal respondent, the Town of Oliver, also in para. 9, sets out the appellant's argument that s.35 of the Indian Act does not authorize any taking or transfer that would extinguish the Indian interest in reserve land. This argument is dealt with further in paras. 14 and 15. The factum of the Provincial Crown also deals with the first question separately from the second question. In oral argument all counsel addressed the question of whether the taking in this case, if it was considered to be a taking of the whole Indian interest in the reserve land in question, had the effect of extinguishing aboriginal title. Counsel for the Osoyoos Band argued that if the whole interest of the Indians in the land was taken, so that the Indian Band retained no interest in the reserve land, then aboriginal title would have been extinguished. He then argued that s.35 was not sufficiently clear and plain to bring about that extinguishment. And he argued that if aboriginal title was not

extinguished, then the Indian interests in the reserve land remained, with the consequence that the land continued to be in the reserve. In support of this argument counsel for the Osoyoos Band referred to ***C.P. v. Paul***, [1988] 2 S.C.R. 654, and particularly to pp. 678-679 and to ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, particularly at p.1116. Counsel for the Town of Oliver, and counsel for the Provincial Crown both argued that the aboriginal interest in the land in the reserve was not extinguished by the Order in Council and that the situation after the taking of the interest, which they said was an interest like fee simple, was the same as would exist outside a reserve where a private or public fee simple interest in land was one which was also burdened by aboriginal title. No counsel said that they were not prepared to deal with this argument. Indeed all counsel seemed to be prepared to deal with it and the Court heard all the submissions on the first question without any objection from the Court or from counsel. Counsel for the Osoyoos Band said that the point would have to be settled by the Supreme Court of Canada and that he hoped he would have an opportunity to argue it. He cannot have contemplated that the Supreme Court of Canada would wish to consider a point that had not been considered in the Court of Appeal.

[30] In my opinion no point is addressed in these reasons which was not argued at the hearing of the appeal. In those circumstances it is not open to this Court to decline to deal

with the question of whether s.35 is sufficiently clear and plain to permit the extinguishment of aboriginal title without the consent of the Indian Band, or with the question of whether, if aboriginal title remains after the taking of an interest in land like a fee simple interest, the land on which the aboriginal title persists remains land within the reserve.

2. **Does Compulsory Taking Extinguish Aboriginal Title?**

[31] The simple answer to the first question is that if, after the taking, the Indian interest in the land itself remains within the reserve, though an interest in that land may be held by persons other than the Indians for whose benefit the reserve has been set aside, whether those persons acquired their interest by a partial surrender by the Indians and a grant from the Crown or by a taking under s.35, then the interest of those persons in the lands is assessable under the ***Band Assessment Bylaws*** and taxable under the ***Band Taxation Bylaws***. In short, the key is whether the Indian interest in the land itself remains within the reserve. But that answer simply begs the question in this case.

[32] The first question really seeks a more fundamental answer. It is directed, I believe, towards the proposition that the powers conferred by s.35 in relation to a compulsory taking of land or an interest in land in the reserve, (powers which do

not contemplate the consent of the Indians for whose benefit the reserve has been set aside, and specifically do not contemplate the formalities and majority approval which must accompany an absolute surrender of the Indian interest in all or part of a reserve under ss. 37, 38, 39, and 40 of the ***Indian Act***), do not extend to the extinguishment of aboriginal title, and so do not take away the Indian interest in their reserve land, and thus can not take the land out of the reserve.

[33] The effect of an absolute surrender is that all the interests of the Indians in the reserve land that is surrendered are completely wiped out. The land is removed from the reserve and all interests of the Indians in the land, including interests which could be claimed as aboriginal title, are extinguished. That is what was decided by a unanimous Supreme Court of Canada in ***Smith v. The Queen***, [1983] 1 S.C.R. 554, particularly at 578, and given effect to in ***St. Mary's Indian Band v. Cranbrook***, [1997] 2 S.C.R. 657.

[34] We know that the nature of the Indian interest in reserve land is an interest that is now described as aboriginal title. It is the same interest as the Indians in question have to tracts of land outside the reserve over which they have aboriginal title through having occupied the land since the time of the assertion of sovereignty. The assertion of sovereignty brought with it the common law which, in turn, recognized the customary aboriginal title and absorbed it into

and gave it the protection of the common law. See ***Guerin v. The Queen***, [1984] 2 S.C.R. 335, particularly per Mr. Justice Dickson at p.379, for the nature of the Indian interest in reserve land, and see ***Delgamuukw v. The Queen***, [1997] 3 S.C.R. 1010 for the nature of aboriginal title generally.

[35] Of course, since this was a Stated Case, there is no finding of fact that the Osoyoos Indian Band have aboriginal title to the land in their reserve. But it would be perverse in this case not to take judicial notice of the fact that Indian reserves in British Columbia were assigned in relation to intensive occupancy areas such as village sites and fishing grounds that had been occupied since before the assertion of British sovereignty. And, as a matter of law, Chief Justice Dickson said in ***Guerin*** that the Indian interest in reserve land is the interest constituted by aboriginal title.

[36] (I add that I think that these reasons in this appeal are consistent with the reasons of the Supreme Court of Canada, both majority and minority, in ***Opetchesaht Indian Band v. Canada***, [1997] 2 S.C.R. 119, but add that the ***Opetchesaht*** case must now be examined through the lens created by the decision in ***Delgamuukw***.)

[37] We also know from the decision in ***Delgamuukw*** and from other cases that in order to extinguish aboriginal title the intention of the Sovereign to do so must be clear and plain. I

understand that to mean that the sovereign power, acting legislatively, must have enacted a clear and plain provision contemplating the extinguishment of aboriginal title. I do not believe that an executive act that is clear and plain is sufficient if the legislative authority that authorizes the executive act is not itself clear and plain. And I believe that the same is true for subordinate legislation such as an Order in Council. It is not enough that the Order in Council clearly and plainly intends to extinguish aboriginal title if the authorizing Parliamentary enactment is not itself clear and plain in conferring the power to extinguish the aboriginal title.

[38] In my opinion, s.35 of the ***Indian Act*** is not sufficiently clear and plain to warrant the conclusion that the person who takes an interest in lands under the section, even including an interest like or equivalent to a fee simple, can take the underlying aboriginal title of the Indians in their reserve at the same time. The aboriginal title, after all, is a burden on the radical title of the Crown, (the radical title having been gained through the assertion of sovereignty), and constitutes a more fundamental title than a title equivalent to fee simple or any other interest in land created by the Crown by derivation from its radical title.

3. **If Aboriginal Title to Land is Not Extinguished, Does the Land Remain Within the Reserve?**

[39] Suppose that the interest in land that is taken under s.35 is an interest like or equivalent to a fee simple, but that over the same tract of land the aboriginal title of the Indians remains, as would not be the case if the Indians had absolutely surrendered the land. Is that tract of land within the reserve? I think that it is. There will be unresolved questions about the relationship to each other of the holders of the aboriginal title and the holders of the title that is like or equivalent to a fee simple interest, and there will be questions about the relationship of each of them to the tract of land itself. But those issues are clearly similar to the issues that exist about the respective rights of the Indian holders of aboriginal title and the non-Indian holders of fee simple title over the same land outside a reserve. Those questions are not simple. But surely the answers are more complicated and more nicely balanced than simply saying that where a title like a fee simple title, or equivalent to a fee simple title, has been granted to a non-Indian, the underlying aboriginal title must be regarded as having been extinguished, even though no clear and plain enactment to that effect has been passed by a relevant legislative authority, specifically the Parliament of Canada.

[40] If, then, a taking under s.35, unlike a surrender under ss. 37, 38, 39 and 40, cannot result in the extinguishment of aboriginal title over the land that is taken, even where the interest that is taken is an interest like or equivalent to a

fee simple interest, then the next question is whether the taking of an interest like or equivalent to a fee simple interest, but with the retention by the Indians of aboriginal title over the same tract of land, results in the land ceasing to be "in the reserve". I cannot think that it does. The interest of the Indians in their reserve land has not been changed at all by the taking. And if they have aboriginal title which has not been extinguished, then the land taken is still land that is set apart for their use and benefit.

[41] The relevant part of the definition of "reserve" in the ***Indian Act*** reads:

> "reserve"
> (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, ...

[42] It is arguable that "Her Majesty" in that definition was intended, from the context, to mean The Queen in Right of Canada. But see the division of opinion in ***Mitchell v. Peguis Indian Band***, [1990] 2 S.C.R. 85 in relation to the meaning of "Her Majesty" in the ***Indian Act***, generally, and particularly as used in s.90. However, the ***Interpretation Act*** of Canada contains a definition that makes the phrase "Her Majesty" wide enough to include Her Majesty in Right of a Province as well as Her Majesty in Right of Canada:

> "Her Majesty", "His Majesty", "the Queen", "the King" or "the Crown" means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth;

[43] In s.35 of the ***Indian Act*** the words "Her Majesty" are clearly indicated to mean the Provincial Crown. I think that the context must govern the interpretation of the words "Her Majesty" in the definition of "reserve". Constitutionally, Her Majesty is one and indivisible and the fact that a legal title cannot be transferred from the federal Crown to the provincial Crown, because notionally they are one and the same, has been consistently adhered to in our Constitutional Law. That concept was applied in this very case where the administration and control of the interest in land that was taken under s.35 was transferred from Her Majesty in Right of Canada to Her Majesty in Right of British Columbia without any conveyance of any kind, simply under the Order in Council itself. Accordingly, when the definition of "reserve" in the ***Indian Act*** refers to "a tract of land, the legal title to which is vested in Her Majesty" there is no relevance to any issue about whether the administration and control of the land is in Her Majesty in Right of Canada or Her Majesty in Right of a province. In either case the legal title itself is vested in Her Majesty and that aspect of the definition of a reserve is met. This conclusion is supported by the fact that in the case of some reserves in Canada the underlying title is regarded as

held by the Provincial Crown whereas in others the underlying title is regarded as held by the Crown in right of Canada.

[44] In the same way the land within the overall geographical boundaries of the reserve must be regarded as having been set apart by Her Majesty for the use and benefit of a band for so long as the aboriginal title to the land in the reserve is not extinguished.

[45] In short, in my opinion it cannot be said that, after the taking of land or an interest in land for the irrigation canal, the land lying under the irrigation canal is no longer held by Her Majesty, or having regard to the fact that the Indians held aboriginal title to that land before the taking and still held aboriginal title to that land after the taking, that the land underlying the irrigation canal is no longer set apart by Her Majesty for the use and benefit of the Band, subject only to user rights to the irrigation canal. I do not think that the reference to "the legal title to which is vested in Her Majesty" necessarily means registered title in fee simple. The Crown holds title to land by virtue of its radical title when no fee simple title has been granted, and that may well be how title is held in land within any particular Indian reserve, though it is not the only way in which title may be held by Her Majesty. And if aboriginal title remains after the taking of the interest for the irrigation canal then surely that land

remains set apart by Her Majesty for the use and benefit of the Band.

[46] In the result, for the purposes of the first question, I consider that land that is taken under s.35 of the ***Indian Act***, unlike land that is absolutely surrendered under ss.37, 38, 39 and 40 of the Act, remains land "in the reserve" for the purposes of taxation under s.83(1)(a) of the ***Indian Act***. That is a conclusion of law supported by reasoning and not simply a bare assumption.

4. Support in the Wording of Section 83 of the *Indian Act*

[47] The conclusion I have reached is supported by the wording of s.83(1)(a) of the ***Indian Act***, the land taxation provision, which, for convenience, I will repeat:

> **83.** (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,
>
> > (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;
> >
> > ...
>
> (my emphasis)

The power to tax is given in relation to "land, or interests in land, in the reserve, including rights to occupy, possess and

use land in the reserve." In my opinion, when the word "land" is coupled with "or interests in land" then "land" must mean something other than an interest less than the equivalent of a fee simple title to the land itself. So the word "land" must mean some form of title to the land itself. It follows that s.83(1)(a) itself contemplates that a form of title to land can be held by someone other than the Band without taking the land out of the reserve and, by being taken out of the reserve, becoming exempt from taxation.

5. Support in the St. Mary's Case and the Parliamentary Intention

[48] I believe that my conclusion is also supported by the ***St. Mary's*** case and by the Parliamentary intention discussed in that case. In the ***St. Mary's*** case, which dealt with a surrender of reserve land for an airport, Chief Justice Lamer, for the Court, made this distinction at p.675:

> Why did Parliament use this broad "otherwise than absolutely" language? If its express intention was to keep surrenders for sale outside the reserve, why did Parliament not define "designated lands" in a more explicit manner? I offer one convincing response: Parliament must have selected the broad "otherwise than absolutely" phraseology in order to account for other contingencies - to allow, at one end, for other limited forms of surrender such as a right-of-way, to be considered designated land, and to ensure, at the other end, that other forms of permanent surrenders such as exchange or gift remain beyond our notions of reserve land.
>
> (my emphasis)

That passage contemplates that what Chief Justice Lamer calls "a right-of-way" would remain land in the reserve but that a permanent surrender by way of exchange or gift would remove that part of the land from the reserve. Chief Justice Lamer reaches his conclusion after quoting, at p.673 of his reasons, from the statement made by the Parliamentary Secretary to the Minister for Indian Affairs and Northern Development on the Bill which clarified the basis for property taxation of reserve lands (House of Commons Debate, vol. XIII, 2nd sess., 33rd Parl., June 2, 1988, at pp. 16046-47):

> There are two main purposes to this Bill: first, to clarify the legal status of Indian lands; second, to establish the legal foundation for property taxation by band councils....
>
> The Bill before us will establish that a surrender may take one of two forms - first, an absolute surrender for sale which would remove land completely of all Indian interests and take it out of reserve, which is extremely rare, and, second, a surrender for lease **or some other restricted purpose**, in which case the land remains part of the reserve. Setting aside part of a reserve for leasing is not a surrender, nor is it a release of the Indian interest in the land.
>
> (my emphasis)

[49] The statement by the Parliamentary Secretary continued by referring to the introduction, in the Bill, of the concept of "designated land". He said this:

> In order to facilitate and strengthen the distinction between these two types of surrender, land

> surrendered for lease would be termed "designated land" and the process of such non-absolute surrender would be termed "designation". This terminology is obviously far superior to the word "surrender", and the symbolic importance of this change is of great value.

[50] The definition of "designated land" which was added to the ***Indian Act*** in 1988 reads in this way:

> "designated lands" means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition.

[51] It can reasonably be said that the right of way in this case was taken for a "restricted purpose" and that the objects of the 1998 Amendment to the Indian Act are met if the right of way is treated as designated land and as fitting the definition of "designated land".

[52] Further insight into the Parliamentary intention with respect to the 1988 Amendment to the Indian Act is gained from this slightly later passage from the Parliamentary Secretary’s statement, also at page 16047 of Hansard:

> One of the most important by-law powers that bands need is their power to tax use of the land. <u>That brings me to the second purpose of these amendments, which is to establish clearly that band councils have the power to tax any interest or use of</u>

> reserve lands in order to defray their costs as the government of that land. Such taxation power is obviously indispensable to any form of modern government. Some bands may not wish to use this power, but it must be there for bands which wish to exercise it.
>
> In fact, Section 83 of the Indian Act has provided a taxation power for band councils since 1951. It is possible, however, that the power might apply only to Indians. It may not, as presently worded, apply to non-Indian leaseholders. The amendments will make certain that non-Indians are covered.
>
> (my emphasis)

[53] These passages are as revealing and helpful in this case as they were in St. Mary's case. In my opinion, they show that when land or an interest in land within the overall geographical boundaries of a reserve is transferred for a "restricted purpose" to a non-Indian interest, the Parliamentary intention was that the land or interest in land should remain amenable to taxation by the Indian band in order to defray the costs of administration of the reserve and the cost of providing essential services to the people who live on the reserve. The irrigation canal in this case was clearly required by the Provincial Crown for a "restricted purpose" and has been used for the last seventy-five years for only that "restricted purpose". I believe that the Parliamentary intention was that land or an interest in land in the category of the irrigation canal should be taxable by the Band for Band purposes.

[54] Section 83 of the ***Indian Act*** was enacted specifically by Parliament in order to permit the assessment and taxation, for the benefit of Indian Bands, of non-Indian interests in reserve land. If all land that is absolutely surrendered is out of the reserve, as it is, and if any land in which an interest like a fee simple interest is compulsorily taken results in that land also being out of the reserve, then the tax base would be restricted to interests like easements and like leases, which would constitute a very limited tax base. I think s.83 was intended by Parliament to permit the taxation of interests like fee simple interests where they arise otherwise than from surrenders, just as the Town of Oliver itself may assess and tax fee simple interests within the Town for its own municipal purposes.

6. The Approach Suggested by Mr. Justice Décary in *Matsqui*

[55] I believe that the conclusion that I have reached provides an analytical underpinning for the approach suggested, in *obiter dicta*, by Mr. Justice Décary, in reasons concurred in by Mr. Justice Stone and Mr. Justice Dessault, in ***Matsqui Indian Band v. Canadian National Railway*** (1998), 162 D.L.R. (4th) 649; 228 N.R. 378 (Fed.C.A.) at paras. 10 and 11:

> These cases have been argued by all parties on the basis that the words "in the reserve", in paragraph 83(1) of the *Indian Act*, mean that only land that satisfied the requirements of the narrow definition of "reserve" in the *Indian Act* could be

> taxed by a band. It was not suggested that the words "in the reserve" ("les immeubles situés dans la réserve") might, for the limited purposes of paragraph 83(1)(a), be understood in a geographical rather than legal sense and include all lands that happen to be situated within the geographical boundaries of the reserve, whether or not they are legally "reserve lands". It could make sense, for taxation purposes, to look at the "reserve" as a physical, global entity — indeed, it is a "tract of land" — rather than as a legal puzzle missing a few pieces.
>
> Such a practical approach could suit situations where, as here, railway lands, should they be found not to be legally "in the reserve", would cut the reserve in two and transform to some extent "a tract of land" into two or more tracts of land. The argument, however, has not been made and it may well be, in view of the Kamloops Amendments in 1988, that it is too late in the day even to suggest it.

[56] The decision of the Federal Court of Appeal in the ***Matsqui*** case was not available in time to be incorporated in the factums of the parties to this appeal, but it was referred to by all counsel in the course of oral argument.

[57] Like Mr. Justice Décary, I think that the approach he presages and the approach which I have adopted in relation to the first question provide a much more practical resolution of the competing interests than the conclusion that a thin strip of land for an irrigation right-of-way, as in this case, or for any similar utility right-of-way in other cases, would be taken right out of the reserve with the result that the reserve would be left cut into pieces. The irrigation right-of-way in this case runs for several miles across the reserve and so cuts the reserve into two parts. But the irrigation right-of-way also

crosses the West Kootenay Power Company right-of-way for its transmission lines. The Kettle Valley Railway right-of-way also crosses the reserve. If all of those interests in land were to be considered as having taken the land over which they extend out of the reserve, then the reserve itself becomes divided into more than ten separate pieces, with the Indians having no access at all to some of these pieces, and no rights to cross from one piece to another.

[58] I do not think that it is too late to raise this argument, as Mr. Justice Décary wondered, since the analytical foundation for the argument rests on conclusions about the nature of aboriginal title on reserve land, and about the extinguishment of title on reserve land, which have come much more clearly into focus since the decision of the Supreme Court of Canada in the ***Delgamuukw*** case in December, 1997.

7. The Answer to the First Question

[59] It is not necessary in this appeal for me to address what would happen if the taking were done in favour of a municipal or local authority or a corporation with expropriation powers. I would hope that the Governor in Council would not permit the taking of an interest like or equivalent to a fee simple interest if it were thought to involve the extinguishment of aboriginal title. It is not necessary in this case for me to explore that question further.

[60] In the result, therefore, I would answer the first question "Yes". And I would add that my answer would be the same no matter the nature of the land or interest in land that is compulsorily taken under s.35, because the aboriginal title cannot be taken, and accordingly the land must continue to be held by Her Majesty for the use and benefit of the Indians on the reserve, and, as such, remains within the reserve.

VI

THE SECOND QUESTION

[61] It follows from my answer to the first question that I do not think that s.35 of the ***Indian Act*** authorizes the removal of lands from reserve status. But the second question requires that the Court must assume that s.35 does authorize removal of lands from reserve status, so I now move on, under that assumption, to address the second question, which is in these terms:

> If s.35 of the ***Indian Act*** authorizes the removal of lands from reserve status, does federal Order in Council 1957-577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band?
>
> (my emphasis)

[62] This question involves, first, an understanding of the principles governing the interpretation of an Order in Council which affects the interests of Indians who are under the

protection of the Crown; second, an examination of the factual matrix which is relevant to the interpretation of Order in Council 1957-577; and third, an examination of the text of the Order in Council itself. I propose to address each of those issues in that order and then to state my conclusion on the second question.

1. The Principles of Interpretation and Application for Statutory Instruments Relating to Indian Land Rights

[63] It is now a well established principle that in interpreting legislative enactments relating to Indians any ambiguity in the enactment or in its application should be resolved in a way that is favourable to the Indian interests affected, so long as the ambiguity is a genuine one, and the construction that is favourable to the Indian interests is one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment. See ***Nowegijick v. The Queen***, [1983] 1 S.C.R. 29 and ***Mitchell v. Peguis Indian Band***, [1990] 2 S.C.R. 85.

[64] In the context of this rule, one must be clear about the nature of the ambiguity which requires the invocation of the rule. At one end of the scale, it can not be a manufactured ambiguity resting on an implausible alternative construction of an otherwise clear provision. But, at the other end of the scale, it does not have to involve a presentation of two alternative constructions that can not be resolved by a

customary process of legal reasoning and analysis such as would be the case if the provision was void or unforceable on the ground of uncertainty. Between those two extremes lies the situation of two or more alternative plausible constructions with the choice between them resolvable by legal reasoning and analysis. The rule about preferring an interpretation favourable to the Indian interests does not represent the last residual tool in resolving an ambiguity after all other methods of legal reasoning have failed. Rather, it represents a primary, and perhaps even paramount, analytical tool for resolving the ambiguity if Indian interests are adversely affected, with practical consequences, by one plausible alternative construction and not by the other. (Though it must be noted that the ***Peguis*** case makes it clear that an alternative construction will not be a plausible one unless it is consistent with the perceived legislative purpose of the enactment.)

[65] It is an equally well established aspect of the same principle that if an enactment in its application detrimentally affects an Indian interest then the enactment should be interpreted or applied in a way that will adversely affect the Indian interest as little as possible. In ***Semiahmoo Indian Band v. Canada*** (1997), 148 D.L.R. (4th) 523; [1998] 1 C.N.L.R. 250 (F.C.A.), Chief Justice Isaac, for the Federal Court of Appeal, said this, at p.263:

> The bargain, in other words, was exploitative. For this reason, the respondent should not have consented to the absolute surrender, at least not without first ensuring that it contained appropriate safeguards, such as a reversionary clause, to ensure the least possible impairment of the Band's rights.
>
> (my emphasis)

And again, at p.264:

> While the Crown must be given some latitude in its land-use planning when it actively seeks the surrender of Indian land for a public purpose, the Crown must ensure that it impairs the rights of the affected Indian Band as little as possible, which includes ensuring that the surrender is for a timely public purpose.
>
> (my emphasis)

The point is not different from the point made by Chief Justice Dickson and Mr. Justice La Forest in ***R. v. Sparrow***, [1990] 1 S.C.R. 1075, in relation to legislative infringement and to justification for the infringement, at p.1119:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result;...
>
> (my emphasis)

In short, as a matter of principle, if two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law, then the interpretation or application should be preferred which impairs the Indian interests as little as possible. Like counsel for the

appellant in this case, I will call that principle the principle of "minimal impairment".

[66] The two leading cases on the effect of Indian surrender of reserve land illustrate, by the approach they take, the pervasiveness of the principles I have discussed, and their application to land documents involving Indian interests in their reserves, specifically in relation to an examination of the nature and scope of a surrender under ss.37, 38, 39 and 40 of the ***Indian Act***. The two cases are: ***Blueberry River Indian Band v. Canada***, [1995] 4 S.C.R. 344; and ***St. Mary's Indian Band v. Cranbrook***, [1997] 2 S.C.R. 657. In both of those cases the "*sui generis*" nature of aboriginal title was discussed and the principle was emphasized that questions involving Indian land should not be resolved in the straightjacket of strict common law conveyancing principles which may well not be applicable to the unique nature of Indian lands. Since the two cases involved questions arising from the surrender of reserve land by the Indian bands, the Supreme Court emphasized the importance of trying to search out the intention of the Indian bands and of the Crown at the relevant time, and to interpret and apply the conveyancing documents in a way which would promote the common intention. Since this is a case of compulsory taking there is no issue about whether an intention to surrender on the part of the Osoyoos Indian Band was involved. But the two cases exemplify the approach that strict conveyancing principles should not be applied technically to

the disadvantage of the Indians if the land documents in question, when considered in relation to the "*sui generis*" nature of aboriginal title, are susceptible of a meaning that is more consistent with the Indian interest.

[67] So I approach an examination of the factual matrix in this case, and an examination of the terms of the Order in Council in the light of the principles I have discussed, namely: first, that ambiguities in an enactment affecting Indian lands should be given the interpretation most favourable to the Indian interests if such an interpretation is one which the enactment will reasonably bear; second, that an enactment and its application should be given an interpretation and application that results in a minimal impairment of the Indian interests if that interpretation and application are in accordance with the enactment, reasonably construed; and third, that technical conveyancing principles should not guide the resolution of questions involving the "*sui generis*" nature of Indian land if the interests of the Crown and the Indians in question can be reconciled and harmonized in a way consistent with the purposes of the legislation and the purposes of the transaction itself, if that reconciliation and harmonization would be prevented by an adherence to strict conveyancing principles.

2. **The Factual Matrix Underlying the Interpretation and Application of Order in Council 1957-577**

[68] There are a number of important aspects of the factual matrix against which Order in Council 1957-577 must be interpreted and applied. I propose to set them out in lettered paragraphs:

A. The first relevant aspect of the factual matrix is that we know from Plan IRR 2134 referred to in the Description of the Land in the Order in Council, and which the parties agreed was properly before us, that the concrete lined irrigation canal was built in 1925 or earlier. We know that is so because it was shown and described as a concrete irrigation canal on the survey completed on 25 March, 1925 and recorded on the Plan that was itself completed in May 1925. So the actual concrete irrigation canal had been built and was in use for more than thirty years before Order in Council 1957-577 was made in 1957 to authorize the taking of the right-of-way.

B. The second relevant aspect of the factual matrix is that we know nothing at all about the legal authority under which the concrete irrigation canal was built, or under which it was operated from 1925 to 1957. It is, of course, possible that there was no legal authority whatsoever for the building and operation of the irrigation canal. But great pains were taken to prepare a careful and accurate survey. So it is much more likely

that there was some form of authority granted by the federal Crown to the Indian Affairs Department, possibly, but not necessarily, after consultation with the Osoyoos Band. The reason that we do not know anything about the 1925 authority to build the irrigation canal and to operate it is that this case was framed as a Stated Case in land assessment proceedings where a question of law alone is to be stated to obtain the opinion of the Supreme Court of British Columbia, and, if necessary, this Court, on the basis of the facts stated, which are supposed to be all the facts necessary to resolve the question of law. But, in my opinion, the interpretation and application of Order in Council 1957-577 must rest on an understanding of what it was designed to achieve. Was it to formalize what went before? Was it to change what went before? Was it to be a correction to what went before? Had a problem arisen in relation to the previous arrangements? If so, an understanding of the nature of that problem would help in the understanding and resolution of the question of what the Order in Council in 1957 was expected to achieve. I would not give a decision depriving the Osoyoos Indian Band of their rights over a part of their reserve on the basis of a set of facts which excludes relevant material and which is demonstrably incomplete.

C. Plan IRR 2134, prepared in 1925, shows the full length of the concrete irrigation canal within the boundaries of the

reserve. The canal extends for several miles, though since the Plan has two conflicting scales, one cannot be sure which scale is applicable. Effectively the irrigation canal cuts the reserve into two parts. But the irrigation canal follows the contours of the hillside. In doing so it crosses the right-of-way of the West Kootenay Power Company, which is not required to follow contours, and the cutting occurs in three places. The result is to produce six separate parcels of land bounded in whole or in part by the irrigation canal right-of-way or the power line right-of-way. I understand that a similar argument to the argument in this case is being made in a different case in relation to the West Kootenay Power Company right-of-way. But whether the Indian reserve is to be regarded as divided into two separate parts or six separate parts by the rights-of-way, the fact remains that if the effect of the taking of a right-of-way is to take the land over which the right-of-way passes out of the reserve, then the Indians on the reserve would have no right of access from one part of their reserve to another part of their reserve without going off the reserve and travelling round the end of the works and then on to the other part of their land from outside of the reserve; and for the two parts of this reserve that are entirely bounded by the irrigation canal and the power line right-of-way, the Indians would have no access to those parts of their reserve at all. If the Indians have no right to cross the canal, or to build a

bridge over the canal, or a passage for cattle over the canal, then they cannot change the grazing of cattle from one part of their reserve to another. In circumstances where there is nothing to indicate that a standard form of utility right-of-way giving only rights like those given under a statutory easement would not be sufficient for the purposes of the building, maintenance and operation of the canal, I would be loathe to see the Indians deprived of their right to travel from one part of the reserve to another over their reserve land.

D. The 1925 plan refers to the area of the irrigation project as 57.20 acres; then it shows 1.00 acres as also being within the power line right-of-way and 0.11 acres as also being within the Kettle Valley railway right-of-way, leaving a total of 56.09 acres, which it describes as "Area Taken". The plan is headed "Plan showing Right-of-Way" and I do not think any conclusion can be drawn from the words "Area Taken" about the nature of the interest in land which was being shown by the Surveyor on the plan in 1925. The reason why the 1.00 acres are excluded from the area taken is because the area taken does not include any area which is within the power line right-of-way which came into existence before the canal was built in 1925. And that is also the reason, and the only reason, why the Description of the Land or interest in land taken describes the interest as "rights-of-way" in the plural.

E. The Crown in right of British Columbia arranged to issue to itself a Certificate of Indefeasible Title in 1961. We do not know whether the Osoyoos Indian Band was aware that the Crown had done so. There is no accompanying grant. The Certificate of Indefeasible Title does not contain a reservation of the mines and minerals. We had no other evidence about the Certificate and I do not think the unilateral issuance of a Certificate of Indefeasible Title four years after the 1957 Order in Council and at least 35 years after the construction of the irrigation works can support any conclusion about the nature of the interest in land taken from the reserve. It may well have been done at the wish of a government conveyancer in order to make the grant from the Crown to the Town of Oliver fit a standard government lease form. It certainly can not reveal anything at all about the intention of the Governor in Council at the time Order in Council 1957-577 was made in 1957, four years earlier. Nor can the fact that the provincial Crown called its transfer of rights of occupancy of the canal and powers to maintain the canal to the Town of Oliver a "lease".

F. The factual matrix must include an understanding of the restricted nature of the expropriation power under the ***Water Act*** where, if only a limited interest in the nature of a statutory easement is reasonably required for the

works, then the ***Water Act*** does not authorize the taking of a more ample interest equivalent to a fee simple.

[69] From those six points, which I have described as forming part of the relevant factual matrix in this case, it can be concluded, certainly, that many important relevant facts that would guide an understanding leading to a proper interpretation and application of Order in Council 1957-577 are not before us, not because of the parties, but because of the nature of the proceedings, which are brought by way of Stated Case. Among the missing facts are all facts relating to the 1925 rights to construct and operate the irrigation canal and all facts which might indicate why a simple right-of-way like a statutory easement would not have been sufficient for the purposes of the construction and operation of the canal, while still retaining for the Indians a total single reserve with rights of passage for Band members to any part of the reserve from any other part of the reserve.

3. **Interpretation of Order in Council 1957-577 Itself**

[70] It is my opinion that whether the Order in Council is taken in isolation and interpreted in accordance with its wording, or whether it is interpreted in relation to the factual matrix which brought it into being, its meaning is that it covers the taking of what it says it covers, namely "rights-of-way" and not the land itself; but even if the meaning were

not thought to be clear from its terms, nonetheless the Order in Council, including the Description of the "Land" taken, certainly can not be said to be free from ambiguity. That ambiguity cannot be resolved against the interests of the Indians. To do so would be to flout the principles of interpretation with respect to Indian land as I have described them at the beginning of this Part.

[71] I propose now to set out the terms of the Order in Council and the Description of the Lands which forms a part of it. I will then set down, in lettered paragraphs, the specific wording in the Order in Council which demonstrates that the Order in Council does not accomplish the taking of the land itself in the form of a title like a fee simple or other absolute title, but only a lesser interest in the land; or, alternatively, that it is, at least, ambiguous.

[72] These are the terms of the Order in Council:

AT THE GOVERNMENT HOUSE AT OTTAWA
THURSDAY, the 25th day of APRIL, 1957.
PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS the Minister of Agriculture for the Province of British Columbia has applied for the lands hereinafter described, being a portion of Osoyoos Indian Reserve number one, in the said Province for irrigation canal purposes;

AND WHEREAS the sum of $7,700 has been received from the Province of British Columbia in full payment for the land required in accordance with a valuation approved by the Band Council of the Osoyoos Band of Indians on the 30th of March, 1955 and officials of the Indian Affairs Branch;

THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, pursuant to the provisions of Section 35 of the Indian Act, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and to transfer the administration and control thereof to Her Majesty the Queen in right of the Province of British Columbia:

DESCRIPTION

The whole of those rights-of-way, in Osoyoos Indian Reserve number one, in the province of British Columbia, said rights-of-way containing together by admeasurement fifty-six acres and nine hundredths of an acre, more or less, as said rights-of-way are shown bordered red on a plan of record number Irr twenty-one hundred and thirty-four in the Indian Affairs survey records at Ottawa; saving and excepting thereout and therefrom all that portion lying within a right-of-way for a road, as the last aforesaid right-of-way is shown bordered red on a plan of record number Rd thirty-six hundred and eighty in said records, a copy of which is deposited in the Land Registry Office for the district of Kamloops at Kamloops under number A thirteen hundred and seventy-seven; also saving and excepting thereout and therefrom all roads reserved by the Province of British Columbia by provincial order-in-council number one thousand and thirty-six, also subject to a prior Grant of Easement for a Power Transmission Line granted to West Kootenay Power and Light Company Ltd. by Order-in-Council P.C. 143 dated January 25, 1937, for a term of thirty years, this right-of-way containing by admeasurement 22 acres and two-tenths of an acre, more or less, and is shown on a plan of survey by R.P. Brown, B.C.L.S. dated November 16, 1936 and which is of record in the Indian Affairs Branch as Plan No. M. 2691.

Reserving thereout and therefrom all mines and minerals and the right to work the same.

(my emphasis)

[73] It should be noted that there is nothing in the Order in Council which grants "exclusive rights of enjoyment and possession" to the Provincial Crown or to anyone else.

[74] I will now set out my lettered paragraphs in relation to the wording of the Order in Council.

A. The Order in Council talks about "the lands hereinafter described", "the said lands" and "the lands". In doing so I am sure that it is using "lands" in the usual sense of an interest in real property and not in the restricted sense of real property held under an indefeasible title in fee simple.

B. The order talks of "taking" in contrast to "using" whereas s. 35 talks of both. But, as I said in Part IV of these reasons, I think that the context indicates that "take" is the appropriate word when a true registerable interest in land is being acquired, and that "use" is the appropriate word when only a right to possession, occupation or use is being acquired, upon terms which would usually be incorporated in a licence.

C. The description of the lands starts off with the words "The whole of those rights-of-way". The usual meaning of "right-of-way" in describing land or an interest in land

is that a right-of-way is either an easement, created by the parties, containing a right to pass over land without the acquisition of title to the land, or a statutory right in equivalent terms but without a contiguous dominant tenement. There is a secondary use of the phrase "right-of-way" in relation to railways, where legislation grants a railway company the right to acquire land along the route of the railway and the legislation contemplates that the railway company will hold the title to the land over which the railway passes. But, of course, where people and equipment are passing along the strip of land, as is the case for a railway, the word "right-of-way" is closer to the literal conception of a right of passing along the strip of land. The common usage of "right-of-way" to describe a type of easement is well settled: a right-of-way is a class of easement, the purpose to which it is put varying with the circumstances particular to the easement: see Paul Jackson in The Law of Easements and Profits, (London: Butterworths, 1978), at pp.139-48, 189-94 and Gale on Easements, 16th ed. Jonathan Gaunt Q.C. and Paul Morgan, Eds. (London: Sweet & Maxwell, 1997) at pp.317-44. However, as I have said, the grant of the fee simple to a strip of land to a railway is also often referred to as a "right-of-way", though not in the sense of a being a class of easement. In ***C.P. v. Paul***, [1988] 2 S.C.R. 654, the Supreme Court of Canada considered the issue of whether the right-of-way granted to a railway company was

in fact a class of easement or whether it was a grant of indefeasible title in fee simple, and concluded on the facts that it was a grant of an easement. At p.672 the reasons of the Court said:

> The jurisprudence makes it clear that resort must be had to the relevant statutes and documents in order to determine the nature and extent of a railway company's interest in land. We are in full agreement with that approach.

And at p.671:

> The nature and extent of a right-of-way depends on the proper construction of the language of the instrument creating it: ***United Land Co. v. Great Eastern Railway Co.*** (1875), L.R. 10 Ch. App. 586; ***Cannon v. Villars*** (1878), 8 Ch. D. 415.

The proper construction of the instrument in this case is required to be a construction that resolves ambiguities in favour of the Indian interests. That construction would regard the Order in Council as taking an interest in the nature of a statutory easement containing sufficient power to build, maintain and operate the irrigation canal. What more could be necessary?

D. The description of the land includes an acreage. If the right-of-way was for a long railway then it would be unusual to include an acreage. But the right-of-way is

entirely within the boundaries of the Indian reserve so the acreage within the right-of-way is only 57.20 acres. I do not think that the inclusion of an acreage gives any guidance to the nature of the interest in land. It is noteworthy that the "right-of-way" and the acreage do not include the areas where the irrigation works cross over the power transmission line right-of-way and that, and that alone, is why the Order in Council refers to "rights-of-way" and not simply to a single right-of-way. What are the nature of the rights of the Provincial Crown or the Town of Oliver to build and operate this concrete irrigation canal over the land covered by the easement in favour of the West Kootenay Power Company for its power line? We do not know. If we did, we might have more insight into what interest in land was being taken under Order in Council 1957-577.

E. Perhaps the most revealing indication of all in the Order in Council itself is the reference to the right-of-way being subject to the power transmission line right-of-way which is referred to as "a prior Grant of Easement" which created a "right-of-way containing by admeasurement 22 acres and two-tenths of an acre, more or less". That reference indicates that in this very Order in Council itself an interest in land called a "right-of-way" and containing an acreage is described as having been created by a "Grant of Easement". It would be a clear misuse of

words to describe a transfer of the fee simple in the power line right-of-way as a "Grant of Easement". This usage indicates that within the very Order in Council itself a "right-of-way" is equated with an easement.

F. Finally, the Order in Council finished up with a reservation of the mines and minerals. It does not seem to me that the inclusion of this reservation supports any real conclusion. By 1957 it had become boiler plate in all Orders in Council made under what is now s. 35 of the ***Indian Act***, as a result of the troubles created by the failure to make such a reservation as later demonstrated in ***Apsassin v. Canada***, [1984] 4 C.N.L.R. 14 (Fed. C.A.).

[75] I rely particularly on points C. and E. in the preceding paragraph in support of my opinion that this Order in Council creates a right-of-way in the nature of a statutory easement or, in the alternative, that it is not clear and plain that the Order in Council creates any different interest and, at the very least, the Order in Council is ambiguous. How could it be said that an Order in Council which describes the West Kootenay Power right-of-way for its transmission line as being a right-of-way obtained by a Grant of Easement, and which describes the interest taken by the Order in Council for the irrigation canal also as "rights-of-way", is not, at the very least, ambiguous in relation to whether it constitutes a taking of an interest like absolute title to the land itself or an interest like a

simple easement or a statutory right-of-way sufficient to build, maintain and operate an irrigation canal?

4. **The Answer to the Second Question**

[76] By applying the three principles that I have discussed, (namely: that an ambiguity in a legislative enactment affecting Indians in particular should be resolved in favour of the Indian interest; that an enactment which impairs an Indian interest should be interpreted in such a way as to cause only the least or most minimal impairment to which a reasonable interpretation will lend itself; and that technical conveyancing principles should not govern the interpretation of documents relating to the Indian interest in reserve land, or land subject to aboriginal title) to Order in Council 1957-577, either exclusively in relation to its own terms, or when viewed in the context of the factual matrix which brought it into being and surrounds it, including the restricted terms of the ***Water Act***, I conclude that the Order in Council must be interpreted as taking from the Indian interest in the reserve lands only a right-of-way in the nature of a limited interest like a statutory easement sufficient for the purposes of maintenance and operation of the irrigation canal, leaving the Indians' fundamental interest in the strip of land unimpaired, and continuing that strip of land as a part of the reserve. Such an interest was sufficient to carry out the public purpose

in ***C.P. v. Paul*** in relation to a railway, and in ***Opetchesaht*** in relation to hydro lines. Surely it is sufficient in this case.

[77] It follows that I would answer the second question: "No".

VII

PARLIAMENT AND THE PUBLIC INTEREST

[78] We must decide this case according to law. But in doing so we must place the case in the contemporary life of our entire Canadian society.

[79] We are dealing with a concrete irrigation canal built through the Osoyoos Indian Band Reserve in 1925 or earlier. We have no evidence about the nature of the powers that were exercised at that time. We are also dealing with an Order-in-Council made in 1957 with respect to the Osoyoos Indian Band Reserve land. And, finally, we are trying to apply the Parliamentary intention incorporated in the Indian Act amendments of 1988 in relation to taxation by the Band of non-Indian interests in land within the overall geographic boundaries of an Indian reserve.

[80] But we are able to bring to those problems a knowledge of the law and the public policy reflected in s.35 of the ***Constitution Act***, 1982. And we have the benefit of the decisions since 1982 of the Supreme Court of Canada in relation

to aboriginal title and to the constitutional position of the Indian peoples and their reserves. We also have the Report of the Royal Commission on Aboriginal Peoples (Ottawa: The Commission, 1996) which carefully explains the necessity of permitting Indian bands to exercise sufficient independent self-regulation powers to allow them to create an infrastructure, facilities and services for their people so that they may live with health, education and self-respect on their own reserves and in their own way.

[81] It would be a mistake, in my opinion, to apply the social conditions and social attitudes of 1925 or of 1957 to this case. I believe that my reasons and conclusions are correct in law. But I wish to add that, in my opinion, they carry out rather than frustrate the Parliamentary intention embodied in the current ***Indian Act*** and they serve to promote the public interest involved in nurturing a life of independent dignity for aboriginal peoples on their reserve lands.

VIII

DISPOSITION

[82] I have answered the first question "Yes" and the second question "No", in each case reaching a different conclusion than the chambers judge, who, as I have said, does not seem to have been given, from the Order in Council, the description of the land or interest in land taken.

[83] I would allow the appeal and answer the two questions in the Stated Case respectively "Yes" and "No".

"The Honourable Mr. Justice Lambert"

Reasons for Judgment of the Honourable Madam Justice Newbury:

[84] The questions of law stated in this case for the opinion of the Court were the following:

> 1. Are lands, taken pursuant to s. 35 of the ***Indian Act***, "land or interests in land" in a reserve of a Band within the meaning of s. 83(1)(a) of the ***Indian Act*** such that those lands are assessable and taxable pursuant to Band Assessment Bylaws and taxable pursuant to Band Taxation Bylaws?
>
> 2. If s. 35 of the ***Indian Act*** authorizes the removal of lands from reserve status, does federal Order in Council 1957-577, by which the Lands were transferred, remove the Lands from reserve status so that they are not assessable and taxable by the Osoyoos Indian Band?

In this court and in the court below, counsel argued these as questions of statutory and documentary construction; and in my view, in the absence of submissions on the nature of aboriginal title and its relationship to fee simple ownership, and in the absence of relevant evidence as to the existence of aboriginal title in this case, that is how we must approach them. The Osoyoos Indian Band, for example, adduced no evidence of the kind that would have been required to amplify the question of aboriginal title to the particular reserve land in question. Was the Band in occupation at the time sovereignty was asserted by the Crown? The Band made no attempt to prove that it was — Mr. Woodward noted that he preferred to leave that issue "for another court" — and counsel for the respondents declined even to take a position, in response to questioning from the Court,

as to whether the Band has, or would continue to have, subsisting rights (i.e. aboriginal rights subsisting notwithstanding what the respondents say was a "taking") in respect of the subject lands. They relied instead on the more concrete proposition that having been "taken" and used for purposes of irrigation, the subject lands are not at present "in the reserve" and are therefore not subject to taxation by the Band on the wording of s. 83(1)(a) of the ***Act***.

[85] In these circumstances, I do not think it appropriate to enter into an analysis of aboriginal title in connection with the stated questions and it seems to me unnecessary to do so. (As to the restrictions on a court in a stated case, see ***Re Caldwell and Stuart*** [1984] 2 S.C.R. 603, at 613-16 *per* McIntyre J.) I say only that I do not make the assumption that for land to cease to be in the reserve, the underlying aboriginal title must be extinguished; nor that as long as aboriginal title to the land is not extinguished, the land must be regarded as being set apart for the use and benefit of the Band. If in fact and in law the land is not land the legal title to which is vested in Her Majesty, or if the land is not set apart "for the use and benefit of [the] Band", it cannot in my view be said to be land in the "reserve" within the meaning of the ***Indian Act***.

[86] Instead of basing his argument on the nature and existence of aboriginal title, counsel for the Band in this case began

his oral submissions by emphasizing the distinction between "ownership" and "jurisdiction", citing Chief Justice Lamer's comments in ***Delgamuukw v. Her Majesty The Queen in Right of the Province of British Columbia*** [1997] 3 S.C.R. 1010, at para. 175. For this part of his argument at least, Mr. Woodward seemed to concede that the Band had, in his words, "parted with ownership" of an interest in land. He drew an analogy between a sale in fee simple of land by the Band and the sale of land in fee simple by a municipality to a private person. Obviously, Mr. Woodward said, the municipality would still retain the power to tax that land; similarly, the Band would retain the right or jurisdiction to tax the land despite parting with ownership thereof. In his view, then, the conclusion of the Chambers judge, at para. 4 of his Reasons, that the Order in Council had effected a "transfer of jurisdiction . . . from the Federal Government to the Province" was erroneous.

[87] But the analogy to a sale of municipal lands does not in my view hold true: land that is subject to taxation by a municipality under the ***Municipal Act*** is land that comes within the physical geographical boundaries specified by statute regardless of its ownership or use. (See s. 22 and Part 11 of the ***Municipal Act***, R.S.B.C. 1996, c. 323.) The term "reserve" is defined in the ***Indian Act***, however, as follows:

> "reserve"
> (a) means a tract of land, the legal title to which is vested in Her Majesty, that has

> been set apart by Her Majesty for the use and benefit of a band . . . .

Thus where land has ceased to be set apart by Her Majesty for the use and benefit of a band, or where legal title has ceased to be vested in Her Majesty (counsel did not suggest this referred to anything other than the Crown in right of Canada, but on this point see ***Mitchell v. Peguis Indian Band*** [1990] 2 S.C.R. 85, at 123 *per* La Forest J. and 102-110 *per* Lamer C.J.C.), the land can no longer be said to be "in" or part of the reserve. More importantly, reserve land that is expropriated and used for a public purpose is no longer land held for the benefit of a band but is land held for other purposes. I view this as a matter of logic rather than one involving the larger, and largely unresolved, questions of aboriginal title or aboriginal land rights generally. Those rights, of course, arise independently of any statute and apply to reserve and non-reserve lands alike, provided occupation at the time of the Crown's assertion of sovereignty is shown (***Delgamuukw***, *supra*, para. 145).

[88] The real question advanced by counsel for the opinion of the Court in this case, then, is not whether the Band retains aboriginal title to the land, but whether the "taking" effected by the Order in Council was such that the land no longer qualifies as land in the "reserve".

[89] I note now, and will emphasize later in these Reasons, that in the case at bar, no breach of duty is alleged, and no attack is made on the validity of the Order in Council. Indeed, Her Majesty in right of Canada is not a party to this proceeding. More importantly, we are concerned with s. 35 of the ***Indian Act***, not with s. 37 or 38, which deal with surrenders of land. Sub-section 35(1) essentially confirms statutory powers of expropriation of land (in particular, reserve land) or any interest therein given to the provincial or federal Crown or a municipal or local authority — powers which may obviously be exercised without the consent of the owner of the land and indeed contrary to the owner's wishes or intentions. In this case, the power of expropriation originated in s. 21 of the ***Water Act***, R.S.B.C. 1948, c. 361. Sub-section (2) thereof provided at the relevant time:

> (2) Every licensee shall have the right to expropriate any land reasonably required for the construction, maintenance, improvement, or operation of any works authorized under his licence, and the holder of any licence that authorizes the diversion of water for domestic purpose or waterworks purpose shall have the right to expropriate, in addition, any land the control of which by the licensee would help to prevent pollution of the water authorized to be diverted, and, with the consent of the Lieutenant-Governor in Council, the holder of any licence that authorizes the construction of a dam shall have the right to expropriate, in addition, any land that would be flooded if the dam were constructed and utilized to the maximum height authorized. The owner of land so expropriated shall be compensated therefor by the licensee, and the procedure to be followed in expropriating land and the method of determining the compensation shall be as prescribed in the regulations.

[90] Sub-section 35(3) of the ***Indian Act*** allows formal expropriation procedures to be short-cut by Order in Council of the federal government authorizing a "transfer or grant" of the lands to the relevant authority. Native intentions, like the intentions of any owner whose land is expropriated, will usually be irrelevant in these circumstances, where the larger public good prevails over the interests and wishes of the owner. This was recognized by McLachlin J. in ***Opetchesaht Indian Band v. Canada*** [1997] 2 S.C.R. 119, where her Ladyship reviewed the surrender provisions of the ***Indian Act*** and stated:

> The only other way Indian interests in reserve land can be permanently disposed of under the ***Indian Act*** is by expropriation. Where the greater public good so requires, interests in reserve land may be expropriated: s. 35. The procedure is strictly regulated and subject to consent of the Governor in Counsel, exercised by Cabinet, which owes the Indians a fiduciary duty to act in their best interests. The process is politically sensitive and open to public scrutiny. [at 157]

[91] McLachlin J. also noted a departmental manual entitled ***Land Management and Procedures Manual*** (1998), which stated that expropriation under s. 35 was the appropriate means for achieving such things as "major highways, railways, and long distance fuel and energy transmission systems" because "[s]uch uses require that the expropriating body gain exclusive right to use and occupy reserve lands". The manual continued:

> In the past, reliance was placed on the use of subsection 28(2) [which allows short-term permits of occupation] for the provision of rights of way for various utilities crossing <u>through</u> reserves to non-

> Indian lands. Since permanent installations or improvements such as roads, pipelines, electric and telephone cables and surface support structures are attached to the reserve land, it is inappropriate to grant a permit except in those circumstances where the sole purpose of the utility is to service reserve lands and the exclusive use of those lands is not required by the subject utility; [Emphasis in original.] [quoted at 159 of ***Opetchesaht***]

[92] How does one, then, approach the question before the Court in this case) whether the Order in Council consenting to the "taking of the said lands by the Province of British Columbia" and to the "transfer [of] the administration and control thereof" to the Province, gave it only a right-of-way or greater rights) in common law parlance, a fee simple interest) inconsistent with those lands remaining "in the reserve"? There is no doubt that because Indian reserve lands are involved, special considerations apply. The fiduciary duty of the Crown requires that Indian rights and benefits be interpreted so as to impair such rights to the least extent possible: see ***Opetchesaht***, *supra*, at 143; ***R. v. Sparrow*** [1990] 1 S.C.R. 1075, at 1119; and ***Mitchell v. Peguis***, *supra*. This principle of "minimal impairment", really a principle of Crown obligation, translates into a rule of construction for the courts: where ambiguous or unclear words are used in an instrument or enactment, the matter must be resolved in favour of the Indians as it is assumed the Crown would not breach its fiduciary duty. This approach is consistent with and supplements the rule of construction in expropriation law that ambiguities are decided in favour of the owner whose land has

been taken. (See ***Simpson v. South Staffordshire Water Works Co.*** (1869) 34 L.J.Ch. 380 and ***Thomson v. Halifax Power Co.*** (1914) 16 D.L.R. 424 (N.S.S.Ct.), both cited by Professor Todd, *infra*, at 26-31.)

[93] As well, as Mr. Justice Lambert notes in his Reasons, a technical or formalistic approach is not to be taken in "adjudicating disputes relating to native land rights". Indeed, the Supreme Court of Canada has stated that "common law real property concepts do not apply to native lands". (*per* Lamer C.J.C. in ***St. Mary's Indian Band v. Cranbrook*** [1997] 2 S.C.R. 657, at 668.) The Chief Justice gave as the reason for this approach the need to ensure that "native intentions" are not frustrated by the application of "formalistic and arguably alien rules"; but even in the context of expropriation, where such intentions are much less relevant, a non-technical approach may be justified by the unique history and constitutional position of Indians in Canada. Form should generally not be permitted to "trump substance" wherever Indian interests may be affected, in my respectful view.

[94] At the same time, in the case of an expropriation under s. 35, where the primary parties are the federal and provincial governments by whom common law concepts of real property are well understood, "formalistic" words of limitation will, as in cases involving railway companies, be the focus of the inquiry. As stated by the Court in ***Canadian Pacific Ltd. v. Paul*** [1988]

2 S.C.R. 654, in the course of a highly technical discussion of interests in land, "[t]he jurisprudence makes it clear that resort must be had to the relevant statutes and documents in order to determine the nature and extent of a railway company's interest in land." (at 672)

[95] In this case, there is remarkably little to go on aside from the Order in Council of April 25, 1957. Counsel agreed that the Chambers judge was mistaken in his apparent assumption (at para. 4 of his Reasons) that the irrigation works comprising the Osoyoos Canal constituted "an effective acknowledgement of the Federal Order". In fact, counsel on appeal advised that the Canal had been built in the 1920s, permitting the agricultural development of the South Okanagan. This is confirmed by a survey plan prepared around that time, although that plan was apparently not in evidence. Nor was there any evidence as to the activities carried on on the subject lands in fact: are Band members permitted to pass over the Canal at certain points, or is the land fenced off or occupied by the Town of Oliver exclusively? There was no evidence on these matters.

[96] We do know that in 1961, the Province took the steps necessary to register indefeasible title to the subject lands in its own name. I do not agree that this fact should be essentially disregarded in the attempt to determine the effect of the Order in Council of 1957. There is no reason to assume

the Province would have taken this step had it understood the Order gave it only a right of way, and again, an improper intention should not be imputed to the Crown. (The issuance of the certificate also brings into focus the provisions of the ***Land Title Act*** dealing with indefeasibility, but these were not argued before us or the court below.) Further, the lease in favour of the Town of Oliver — also not before us, but referred to in Mr. Woodward's factum - is presumably a lease, i.e., a document that purports to give exclusive possession and occupation of the subject lands to the Town for a stated term. In my view, both of these considerations may be evidence, albeit not strong evidence, supporting the conclusion that something more than the taking of a right of way was intended in 1957, at least by the provincial Crown.

[97] I return, then, to the Order in Council. It will be recalled that the Order refers to the "taking of the said lands by the Province", to the Province's payment to the Band of $7,700 "for the land required"; and to the "transfer of administration and control" thereof to the Province. Viewing the matter in non-technical terms, it seems to me that if a right of way were intended, a right of way or right to "use" of the land would have been taken, rather than "the land" without more. Under the heading "Description", however, the Order in Council refers to "the whole of those rights-of-way, in Osoyoos Indian Reserve number one, in the province of British Columbia, said rights-of-way containing together by admeasurement fifty-

six acres and nine hundredths of an acre, more or less, as said rights-of-way are shown bordered red on a plan of record . . . ." (Emphasis added.) Does the reference to "rights-of-way" alter the tenor of the document or create an ambiguity?

[98] In ***The Law of Expropriation and Compensation in Canada*** (2nd ed., 1992), Professor Todd notes that:

> In strictly legal terms a right of way is a type of easement. It enables a person, corporate entity, or government authority, to use part of the land of another person in a particular way and for a limited purpose or purposes. At common law the acquisition of an easement or right of way does not give the holder a fee simple interest. Moreover, it does not confer the right to exclusive possession such as arises under a lease. [at 426]

He adds, however, that in modern usage, the term "right of way . . . does not always correspond to the common law concept." Where a highway is being established or widened, for example, the "taking" of the required strip of land usually involves a transfer of the fee simple, whereas when "utility easements" (e.g., power lines) are taken it is usual for the original owner to retain some rights with respect to the land.

[99] This bifurcation was noted recently by the Federal Court of Appeal in ***Matsqui Indian Band v. Canadian National Railway (1998) 162 D.L.R. (4th) 649,*** **which in turn referred to the ruling of the Supreme Court of Canada in *Opetchesaht***, *supra*. In the latter case, the grant of an interest to B.C. Hydro for

the installation of power lines was found not to give the utility any exclusive rights. It restricted the band's ability to use the land only insofar as the band could not erect buildings on it or interfere with B.C. Hydro's improvements. Thus, said Décary J.A. for the Court in ***Matsqui***:

> The ruling in ***Opetchesaht Indian Band*** is a clear illustration, in my view, of the different status that must be recognized in law to "rights of way" which require the exclusive right to use and occupy reserve lands, such as railways, and to "rights of way" where the exclusive use of the lands is not required, such as utilities. In the instant case, the right of way is clearly of the first category. [para. 51]

The Court found that although the expression "right of way" had been used in the description of the land through the reserve surrendered to C.N.R., taken in context the phrase:

> . . . merely described the land taken and did not qualify the interest on the land that was surrendered. The expression was used, in other words, to define precisely what land was taken; it was not used to describe what right in that land was meant to be given up by the Band. Finally, the expression was used in all the documents in the context of an outright sale of land. [para. 46]

[100] The Town of Oliver argues that "right of way" was used in a similar way in this case, i.e., as a geographical description of a tract or tracts of land shown on the surveyor's map, and not as words of limitation delineating the nature of the interest being "taken". Mr. Buholzer noted that the Order in Council refers to "right<u>s</u>-of-way" as opposed to

one right-of-way and is therefore more likely to be intended as referring to particular tracts of land rather than to one type of restrictive interest. More to the point, he submits that the absence of restrictions on the Province's ability to use the subject lands and the absence of any provisions specifying whether and how Band members may pass over the lands in common with the Crown and its licensees, denote an intention that the Province was to have exclusive use thereof, not just the right to enter on and pass over the lands for a specified purpose or a specified time. In short, he says, the Order in Council does not transfer a right to "use part of the land of another person in a particular way and for a limited purpose". Indeed, only the mines and mineral rights were reserved from the Order, a step that would be unnecessary, or at least improbable, if only the right to enter the lands in order to operate the Canal had been intended to be taken and transferred. In this regard, Mr. Buholzer again cites ***Matsqui***, where a reservation of mines and minerals was regarded as additional evidence that the C.N.R. had been granted "absolute ownership of the surface rights and . . . there is nothing left on the land for the Band to use and occupy". (para. 55)

[101] These arguments are consistent with the authorities that have established the nature of rights of way outside of the aboriginal context. (Unfortunately, counsel did not refer us to these authorities other than dictionary definitions.) Many of the cases deal with statutory rights of way, usually

granted to railways. However, considerable assistance is provided by a decision of the Alberta Court of Appeal in ***Shelf Holdings Ltd. v. Husky Oil Operations Ltd.*** (1989) 56 D.L.R. (4th) 193 (leave to appeal to S.C.C. denied), which contains a review of many of the older English decisions concerning rights of way or easements. In ***Shelf***, the question was whether what appeared to be the grant of an easement had in fact conveyed "a grant of an interest in land" within the meaning of the Alberta ***Land Titles Act***. The Court, *per* Haddad J.A., began its analysis by noting the definition of "right of way" found in Halsbury's ***Laws of England*** (4th ed., vol. 14) at para. 144:

> . . . a right to utilise the servient tenement as a means of access to or egress from the dominant tenement for some purpose connected with the enjoyment of the dominant tenement, according to the nature of that tenement.

The leading English case of ***Re Ellenborough Park***; ***Re Davies***; ***Powell v. Maddison*** [1956] 1 Ch. 131 was cited, where four characteristics of an easement, as formulated in Cheshire's ***Modern Real Property*** (7th ed., 1954) at 456, were listed:

> . . . (1) there must be a dominant and servient tenement: (2) an easement must "accommodate" the dominant tenement: (3) dominant and servient owners must be different persons, (4) the easement must be capable of forming the subject-matter of a grant.

The fourth characteristic was in turn dissected by Evershed M.R. in ***Re Ellenborough Park*** into three additional questions, the second of which was whether the grant was inconsistent with

the "proprietorship or possession of the alleged servient owner".

[102] The Court in ***Shelf*** also noted the statement by Lopes L.J. in ***Reilly v. Booth*** (1890) 44 Ch. D. 12 at 26, that "there is no easement known to law which gives exclusive and unrestricted use of a piece of land." This principle was adopted in ***Metropolitan Railway Co. v. Fowler*** [1893] A.C. 416 (H.L.), which Haddad J.A. distinguished at 199-200. He went on to cite some older Ontario cases, namely ***Consumer Gas Co. of Toronto v. Toronto*** (1897) 27 S.C.R. 453 and ***Jarvis v. City of Toronto*** (1894) 21 O.A.R. 395, and two articles relating to easements, one by Dr. A.J. McClean, "The Nature of an Easement" (1966) 5 Western L. Rev. 32. His Lordship then continued:

> The key to resolving the issue at hand is to look at the grant of easement to assess the extent of the rights relinquished by Peregrym as opposed to the rights it reserved. . . .
>
> In his article "The Nature of an Easement", Mr. McClean, at p. 51, puts into perspective the quality and extent of the limitations a grant will impose upon the servient tenement and balancing process to be engaged to ascertain whether the grant is an easement or something more. I adopt these general observations:
>
> > As was pointed out earlier, it follows from the general nature of the recognized interests in property that an <u>easement cannot amount to a claim quite at variance with the proprietary rights of the servient owner. On the other hand, it is also quite obvious that an easement does to some extent detract from those rights</u>. A right of way cuts down the servient owner's right to exclude people from his property or to develop it as he pleases; and a negative easement such as light also hinders development. The issue in fact is the perennial one of

> drawing the line, of deciding when the point has been reached that the right in question detracts so substantially from the rights of the servient owner that it must be something other than an easement. . . .
>
> The degree of occupation or possession will be governed by the document conceding the grant. . . .
>
> By the very nature of an easement it is inevitable that some measure of occupation by the easement taker is present in all cases) and that the dominant tenement will to some extent, at least, interfere with the servient tenement. Moreover, because of the rights it carries an easement, for its limited purpose, is an interest in land. . . .
>
> Examination of the grant in this case discloses, in my view, that the privileges granted to Husky do not detract from the servient owner's rights of ownership.
>
> The tenor of the grant is such that it reflects the intention of the parties that the grantee Husky acquire a benefit subject to its compliance with certain terms and conditions. The right of Shelf as a servient owner to use the land free of interference has been curtailed to the extent only of prohibiting it from interfering with the subsoil or to erect works on the strip comprising the right of way "but otherwise the Grantor shall have the right fully to use and enjoy the said right-of-way except as the same be necessary for the purposes herein granted to the Grantor".
>
> I infer from the material filed and the comments of counsel that the lands are farm lands. It is apparent from the literal construction of the second term that curtailment of the appellant's use of its land does not deprive it completely of use of the surface of the right of way. All conventional rights of way will, to some degree, impair the use of the land. [at 202-3; emphasis added]

[103] These considerations, together with the fact that the Grantee Husky was subject to various prohibitions that might interfere with the ordinary cultivation of the lands and that the land would revert to the Grantor after it had served the

Grantee's purposes, supported the conclusion in ***Shelf*** that "the parties intended the grant to create nothing more than an easement". Further, the grant was free of the words "appropriate" and "exclusive" or other terms that would have negatived any continuing proprietary rights in the servient owner.

[104] In my view, ***Shelf Holdings*** helps to distill the basic question before us: does the Order in Council of April 25, 1957 grant rights that are consistent with exclusive use by the Province or does it simply grant some rights or benefits that "to some extent detract" from continuing rights of the Band?

[105] I believe the answer to this question is clear: the Order in Council did not grant only a right of way to the Province; it granted exclusive rights of enjoyment and possession that are inconsistent with the lands continuing to be held by Her Majesty in right of Canada "for the use and benefit of [the] Band". The Order referred to "the taking of the said lands", not simply the right to use or pass over the said lands; there was no indication the Province was acquiring anything other than exclusive rights (whether in fee simple or until the lands ceases to be used for irrigation purposes need not be decided); and the Order transferred "administration and control" of the lands to the Province) wording that is surely inconsistent with the lands continuing to be held "for the benefit of" the Band. As the Chambers judge noted, the

phraseology of "administration and control" is customarily used in place of a conveyance of title between the Crown Provincial and the Crown Federal, because of the indivisibility of the Crown. He cites Paul Lordon, who in ***Crown Law*** (1991) states:

> A transfer of property between the federal government and a province is not done by ordinary conveyance, because of the principle of indivisibility of the Crown. Her Majesty is the owner of the property whether in right of Canada or the province and cannot grant to Herself. Only administrative control of the property passes. The transfer is, therefore, made by reciprocal Orders in Council and is confirmed by statute where third party rights are involved. [at 283, para. 4.6.1, cited by the Chambers judge at para. 4 of his Reasons].

[106] Mr. Woodward pointed out that Lordon goes on to make a different point that must now be incorrect on the authority of ***Delgamuukw***, *supra*. Specifically, Professor Lordon suggests that "with the `proprietorship' of the land also comes legislative jurisdiction over those lands") but as noted by Chief Justice Lamer in ***Delgamuukw***, provincial ownership of lands that are subject to aboriginal title does not limit federal jurisdiction over those lands. This does not detract from Lordon's other point, which Mr. Woodward did not challenge directly.

[107] In summary, I agree with the Chambers judge that the Order in Council of 1957 did not contemplate the expropriation of a mere right of way, but of "the lands" themselves, which were thereby removed from the reserve. I say this on a non-technical view of the wording used, although the same

conclusion is supported by the ordinary common law rules, reviewed above, applicable to rights of way and easements. In this case, there is no dichotomy, and the Order in Council is not ambiguous or ultimately unclear.

[108] It is perhaps unnecessary to add, as have the courts in many of the cases to which we were referred, that the foregoing conclusion does not affect the question of whether in consenting to the taking of the subject land by the Province, the Crown in right of Canada was in breach of its fiduciary duty to the Band. This question is not before us, but would obviously require a great deal more evidence as to the basis on which the valuation of the lands at $7,700 was carried out and other circumstances surrounding both the original *de facto* use of the land for the construction of the Canal, and the 1957 Order in Council. On the face of it, there is no reason to conclude that a breach of fiduciary duty took place, and we would be wrong to assume it.

[109] I would therefore dismiss the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Prowse"